# The Misuse of Supreme Court Rule 215(a) for Vocational Evaluations in Maintenance Cases

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## 1. Introduction

Divorce practitioners often attempt to impute future income to a party seeking maintenance who the attorney alleges is voluntarily unemployed or under-employed. As a result, attorneys often hire vocational experts to opine on a spouse's realistic range of current and future ability to earn income. The goal of retaining such an expert is to eliminate or minimize the amount or duration of the maintenance claim advanced by the spouse seeking maintenance.

The vocational evaluator is supposed to provide an objective measure of the potential income of the spouse seeking maintenance. The vocational evaluator's process in formulating an opinion usually involves an interview with that party regarding his or her education, employment history, medical and psychological history, and any other impairments that may exist and serve as impediments to the party's day-to-day functioning. Some evaluators administer written tests designed to measure intelligence, employment interests and skill sets.

The vocational evaluation, when utilized appropriately, can be an effective means for reducing or eliminating a maintenance claim, whether through trial or settlement. The most common use of these experts involves the situation where a court in a maintenance review hearing assesses a party's efforts to obtain financial independence, an obligation imposed by law on a spouse seeking to extend maintenance.

However, while divorce practitioners should continue to rely on vocational evaluators in connection with appropriate maintenance cases, the question arises whether the court, at the request of the defending spouse, has the authority to order the other party to meet and interview with the retained expert and to submit to whatever testing regarding that party's employability the vocational expert deems appropriate.

Most practitioners rely upon Illinois Supreme Court Rule 215(a) for court authorization to have their vocational evaluator conduct an interview with and test the opposing party. Further, many practitioners also cite Section 504 of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), the statute dealing with maintenance determinations, when seeking the authority to compel these evaluations. This author is of the opinion that reliance upon Supreme Court Rule 215(a) for this purpose results in an abuse and misuse of the statute.

## 2. Supreme Court Rule 215(a)

Illinois Supreme Court Rule 215(a) provides that where a person's physical or mental condition is in controversy, the court may order that party to submit to a physical or mental examination by a

licensed professional in a discipline related to the physical and mental condition involved. The committee comments to the Rule indicate that it is intended to provide an orderly procedure for the examination of civil litigants whose physical or mental condition is in controversy.

Originally, Supreme Court Rule 215(a) authorized examinations only by physicians. However, the Rule has since been amended to include professionals in other health related disciplines, as stated in the committee comments. The revisions to Supreme Court Rule 215(a), which was amended in 1995, substituted the words "licensed professional" for "physician."

The committee comments go on to explain that the scope of the rule was expanded to include "sociologists, psychologists, or other licensed professionals in juvenile, domestic relations and child custody cases" in order to assist smaller, more rural jurisdictions that did not have the resources of the larger counties. Although the scope of the rule was broadened to allow professionals other than physicians to opine as to one's physical or mental condition, the rule never eliminated the requirement that one's physical and/or mental condition be at issue before the discovery-ordered examination could proceed.

### 3. Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act

Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act outlines the factors a Court should consider in making a determination regarding maintenance. Included among those factors are the following:

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> 3. The present and future earning capacity of each party;
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> 4. Any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having foregone or delayed education, training, employment, or career opportunities due to the marriage;
>
> 5. Time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment;
>
> 6. The age and physical and emotional condition of both parties.

These factors provide objective criteria against which a court is supposed to measure the facts of a current case in making a maintenance determination. While the individual facts of each case vary, the criteria are intended to provide guidance to the court in assessing the appropriateness of the amount and duration of maintenance.

Although these factors are identified in Section 504(a), the statute does not provide guidance as to how to go about establishing these facts or proving the necessary elements of a maintenance claim. That is obviously left to the individual lawyer to determine in his or her own judgment and depends upon the complexities of the case. A maintenance claim involves lay testimony from the parties in all cases. Sometimes it requires other fact witness testimony. On rarer occasions, proving these claims requires the use of expert witnesses such as the vocational counselor to prove earning capacity, an accountant to prove income or cash flow, or a lifestyle expert to prove standard of living or a party's needs. Nothing in the statute, however, identifies how those experts may gather or obtain the information about which they will opine.

**4. Misapplication of Section 215(a) and 504(a) to Vocational Evaluations**

The recurring argument in these cases is that a party seeking maintenance should be forced to submit to a vocational evaluation because such an evaluation is necessary to assess his or her present and future earning capacity in connection with a claim for maintenance. Most lawyers rely upon Supreme Court Rule 215(a) and IMDMA Section 504 in seeking a vocational evaluation. Typically, the request is made through what is commonly titled a Motion for Vocational Assessment.

A Motion for Vocational Assessment must allege a few basic elements: first, that the opposing spouse is seeking maintenance; second, that said spouse is un- or under-employed and is not pursuing any or more appropriate employment; third, that earning capacity is a requirement for determining maintenance; and fourth, that determining earning capacity requires an assessment of one's ability to be employed and the reasonable income appropriate employment will produce. The motion, as mandated by Supreme Court Rule 215(a), proposes a vocational counselor by name to conduct the vocational evaluation and typically attaches that person's *curriculum vitae*.

Most lawyers argue that the substitution of the words "licensed professionals" in the amendment to Supreme Court Rule 215(a) resulted in a broadening of the examinations permitted by the rule. However, nothing in the Rule provides any authority for a court to explore vocational employment capacity under the guise of a physical or mental examination. In fact, the Rule is very clear that it is limited to situations where the examinee's mental and or physical condition is at issue.

For courts to use Supreme Court Rule 215(a) in order to authorize vocational evaluations necessarily implies that a person who is seeking maintenance has automatically placed his or her physical or mental condition at issue. However, the facts of a case may or may not support such an implication. A party may be in perfect health, both physically and mentally, but still be unemployed for a myriad of reasons, the most obvious of which is the years of performing her role in the marriage as a homemaker spouse and/or caretaker for minor children. In so performing this role, the party's absence from the workforce is for reasons other than a mental or physical condition.

Further, although Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act requires an examination of earning capacity, it provides no specific authority for a court to order vocational testing of a litigant seeking maintenance. In fact, neither Section 504(a) nor Supreme Court Rule 215(a) requires a compulsory evaluation of one party's earning capacity or employability, nor does either provision mandate educating an opposing party's expert for purposes of assisting in the completion of their report.

Comparing a vocational assessment with a business valuation illustrates the problem. In many instances, business valuators are retained to value a business. Because a management interview is typically an integral part of the appraisal process, the expert always requests a meeting with the business owner. However, the management interview in a business valuation setting is not mandatory, and the business owner/spouse may decline such a request. The situation with the vocational evaluator is no different. Essentially, allowing Supreme Court Rule 215(a) to authorize a court to order an opposing party to meet with the other party's expert is akin to a forced *ex parte* communication since the vocational expert is really an agent of the requesting attorney.

The existing case of *Roberts v. Norfolk and Western Ry. Co*., 229 Ill.App.3d 706 (4th Dist. 1992), is clear on the issue:

> "The purpose of the rule permitting the Court to order the party to submit to a physical or mental examination by a physician suggested by the party requesting examination is not to provide an expert witness for the litigant, but to permit discovery."

There are other means by which a vocational expert can obtain the necessary information for purposes of completing the report, such as the use of interrogatories, document requests, and depositions. Until a statute is passed authorizing a party's expert to meet with an opposing party, when neither physical or mental condition is at issue or Supreme Court Rule 215(a) is clarified to allow vocational evaluations in appropriate cases, such as dissolution of marriage, the practice of allowing a vocational assessment to be conducted under the guise of Supreme Court Rule 215(a) simply because a person is seeking maintenance should be stopped. This is particularly true when neither physical nor mental condition is at issue, since Supreme Court Rule 215 (a) requires clarification as to whether it allows vocational evaluations in cases such as those dealing with dissolution of marriage. Only when the person seeking maintenance objects to being required to make ongoing progress toward financial independence should he or she be deemed to have placed his or her physical or mental condition into issue, thereby triggering a Rule 215(a) examination.

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