6-2010

Pro Se Trends and Divorce in Wisconsin

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Publication Information

Repository Citation
McMullen, Judith G., "Pro Se Trends and Divorce in Wisconsin" (2010). Faculty Publications. 500. https://scholarship.law.marquette.edu/facpub/500

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The face of divorce practice has changed considerably in the last few decades. Once the province of experienced family law attorneys (with the occasional non-family law attorney pressed into service by a needy friend or relative), divorce courts have been increasingly flooded with pro se litigants. The reasons for this trend are not entirely clear but may have to do with economic considerations, distrust of lawyers, and a do-it-yourself mentality that is prevalent in modern American society. There have been other changes in divorce practice as well: more frequent awards of joint legal custody along with more frequent awards of equal physical placement of children between the parties, uniform application of child support formulas, and fewer and shorter-term awards of maintenance.

How do these trends affect Wisconsin lawyers as they practice family law in the 21st century? Despite the many anecdotes about the pro se explosion in family court, there have been few studies of the phenomenon. A 1994 ABA report addressed the issues facing pro se divorce litigants, but there have been few studies since then, despite the perception that pro se litigants are present in family court in ever increasing numbers.

Psychologist Debra Oswald and the author recently conducted an empirical study of divorce cases in one Wisconsin county to try to learn why divorce litigants choose to represent themselves and to examine whether pro se divorce litigants had worse outcomes than those represented by counsel. The findings have been published in an article entitled "Why Do We Need A Lawyer?: An Empirical Study of Divorce Cases." The study reviewed 567 divorce cases filed in 2005 in Waukesha County. Waukesha was the target county because its residents have a median income well above the national average, making it possible to study whether factors other than economic ones influence the decision to self-represent. Although the study collected data about the pro se phenomenon in divorce court, it yielded some interesting data about maintenance awards as well. This article briefly summarizes the study findings and speculates on the effect of current trends on the practice of divorce law in Wisconsin in the next decade.
Divorce

Trends in Pro Se Divorce Litigation

In the 2005 study, the majority of divorce cases involved at least one pro se litigant: both spouses had counsel in only 46.4 percent of the cases. Neither spouse had counsel in a significant minority (27.7 percent) of cases. Men were somewhat more likely to self-represent, with 43.9 percent of the husbands compared to 37.7 percent of the wives proceeding pro se. In 9.7 percent of the cases, only the husband had counsel, and in 15.9 percent of the cases, only the wife had counsel.

The examination of the characteristics associated with having counsel or not having counsel yielded some interesting findings. The data showed that women with counsel, compared to women without counsel, were older, more likely to have children, had been married longer, and had husbands who earned significantly more money. A woman’s own income was not significantly related to her decision to have or forgo counsel. While having minor children was statistically associated with women having counsel, the number of children did not seem to matter. Similarly, men who had counsel, compared to men who proceeded pro se, were older, had longer marriages, had higher gross income, and were more likely to have minor children. Neither the wives’ incomes nor the number of minor children were statistically associated with men having counsel.

One obvious conclusion that can be drawn from the data is that, as expected, the decision whether to hire divorce counsel often is based partly or wholly on economic factors. This is consistent with anecdotal reports that the rates of pro se litigants are much higher in counties with lower median incomes; for example, it has been estimated that between 50 percent and 80 percent of divorce litigants in Milwaukee County represent themselves. Other conclusions include the following:

- Since the amount of the women’s incomes was not significantly correlated with the decision to have or forgo a lawyer, it is reasonable to conclude that noneconomic factors also influence the decision to self-represent, at least in some cases.
- Since higher age and longer marriages were associated with hiring a lawyer for both men and women, it is possible that people hire counsel because they feel more invested in the relationship and may have more to lose, both emotionally and financially. Older people who have been in longer marriages may be more aware of possible complications in a divorce and more receptive to a lawyer’s professional advice.
- The fact that both men and women were more likely to hire counsel when there were minor children in the marriage suggests that people turn to lawyers both to help protect the important interests at stake with children (such as placement time or decision-making authority) and to protect the children themselves by ensuring a smoother divorce process.
- Perhaps most important, divorcing parties were more likely to hire legal counsel when their divorces involved factors that complicate the resolution of legal issues. This suggests that many litigants are realistic about whether or not they can competently proceed pro se.

There have been anecdotal reports that the severe economic downturn since 2007 has resulted in higher numbers of pro se divorce litigants. Indeed, a random sample of 103 divorce cases filed in 2008 confirms that these reports are accurate, at least in Waukesha County. In the sample, both the husband and the wife were represented in 44.7 percent of the 2008 cases (compared to 46.4 percent of the 2005 cases). There was a significant increase in the percentage of cases in which neither spouse had counsel: in 2008, neither spouse had counsel in 37.9 percent of the cases (compared to 27.7 percent of the 2005 cases). In 14.6 percent of the 2008 cases, only the wife had counsel, which is a slight drop from the 15.9 percent of the 2005 cases in which only the wife had counsel. The drop was more dramatic in cases in which only the husband had counsel, which were 2.9 percent of the sample in 2008 compared to 9.7 percent of the cases in 2005.

Trends in Maintenance

Next, the study turned to the characteristics of parties who received spousal support awards. The data revealed that one party was awarded either family support or spousal maintenance in 11.3 percent of the cases, with maintenance being awarded in 8.6 percent of cases. Maintenance was left open in 12.5 percent of the cases, and maintenance was not awarded in 78.1 percent of the cases. The husband was the party ordered to pay maintenance or family support in all but two of the cases. There was a lot of variation in the terms of the support awards. Only 17 percent of the support awards were permanent, and 8 percent were payable until the fulfillment of conditions such as finishing a degree, retiring, selling the family home, or obtaining full-time employment. Fifty-eight percent of the support awards were for both men and women, and 42 percent were awarded to the wife only. The mean length of the awards being 60.69 months and the mean monthly payment being $1,767.80.

Awards of maintenance were
associated with older spouses, longer marriages, and husbands with higher incomes. Maintenance awards were not significantly associated with variations in the wives' incomes. Income disparity between spouses, however, was significantly greater in cases in which maintenance was awarded than in cases where maintenance was not awarded. Cases in which maintenance was awarded or left open took significantly longer to reach final judgment than cases in which maintenance was not awarded. Maintenance was not awarded more often in cases involving minor children, although the presence of minor children made it more likely that the maintenance decision would be left open.

**Lawyer Effect on Divorce Process**

The data showed that the divorce process was longest when both parties were represented by lawyers and shortest when both parties were self-represented. It is likely the longer time reflects the fact that the complicated issues making lawyer representation more likely simply take a longer time to resolve.

The study also considered the relationship between lawyer representation and awards of spousal maintenance. The data showed that there was a statistically significant association between lawyer-representation status and maintenance-award outcomes. Maintenance was most likely to be awarded when both spouses were represented by counsel: both spouses were represented by counsel in 77.6 percent of the cases in which maintenance was awarded. Maintenance also was awarded in 12.2 percent of the cases in which only the wife had a lawyer and in 10.2 percent of cases in which both spouses were pro se, but never in cases in which only the husband was represented by counsel.

It is impossible to tell from the data whether the lawyers were responsible for the maintenance awards, or whether parties whose cases fit the profile of couples who might expect a maintenance order are more likely to hire lawyers. LaRocque v. LaRocque, a 1987 case, established that in cases involving long-term marriages in which one party needs financial help to continue at the marital standard of living and the other party has the resources to provide that help, maintenance should be awarded. The study looked closely at couples in the sample that fit these criteria since the LaRocque rule could be expected to result in a large percentage of maintenance awards in these cases. The study showed that 55.1 percent of the cases in which maintenance was awarded involved couples who had been married for at least 15 years. The study also showed that there was significant income disparity in cases in which maintenance was awarded (as mentioned above). This is consistent with the LaRocque ruling, which required a spouse earning significantly more income to help the other spouse maintain something at or approaching the marital standard of living.

As described earlier in this article, however, lawyer representation was much more likely for older parties and husbands with high incomes. Since older parties are more likely to have been married a long time, and since income disparity most frequently means the husband earned significantly more than the wife, the study results do not conclusively establish whether lawyer representation made a maintenance award more likely. It is also possible that the parties who have characteristics likely to result in maintenance orders are the parties who hire lawyers to protect their interests.

Ultimately, the data yielded tantalizing information, but could not answer the question whether pro se divorce (continued on page 53)

**Research Methodology Highlights**

Here is an explanation of the methodology used by Debra Oswald and Judith McMullen in their study of pro se divorce litigants.

- Waukesha County was selected because the county's relatively high median income and the range of incomes made it possible to examine noneconomic factors that could influence a party's decision to self-represent in a divorce.

- The researchers wanted a fairly large sample size so that when subgroups (such as husbands, wives, cases with maintenance, and so on) were studied and compared, the population subgroup sizes would be large enough for reliable statistical tests to be run. The researchers aimed for a sample of at least 500 cases and began with a larger random sample (700 plus) to produce at least 500 cases after nondivorce family actions were eliminated from the pool.

- The researchers selected 2005 as the study year, because it was the most recent year for which the vast majority of cases would have been concluded when data collection began in 2007. Cases in progress would not have yielded meaningful data.

- Either McMullen or a research assistant pulled and examined each paper or microfiche file and coded and recorded data on paper forms. Oswald, a statistics expert, entered the data and ran the statistical tests.

- A party was considered to be represented by counsel if the party had an attorney of record at the time of the final hearing.
litigants are less successful than their attorney-represented counterparts. The study looked only at objective measures of success and did not include surveys of subjective satisfaction. In the past, merely obtaining a divorce decree was considered a form of success, because complex claims of fault and defenses thereto could result in a court refusing to grant a divorce. Since the advent of no-fault divorce in the 1970s and 1980s, grants of divorce are virtually automatic when any eligible party requests one. Comparisons of divorce decrees in cases in which the parties had lawyers and the cases in which one or both parties were pro se demonstrate the reality that divorce settlements are infinitely idiosyncratic. Decisions about property division or child custody depend largely on the preferences of the litigants, each of whom defines the ideal outcome differently.

There is food for thought in the study data detailing the effect of representation status on the length of the divorce process and on awards of maintenance. Most clients want both speed and thoroughness from their lawyers, and divorce clients may be especially intent on getting through the emotional tumult of a divorce as quickly as possible. Cases in which parties are represented by lawyers may last longer because the cases are more complex, but there is clearly a tipping point where lawyer thoroughness will be perceived negatively by clients who just want to get the divorce over with so they can get on with their lives. At times, delays caused by lawyer representation will be experienced as negatives by clients.

Similarly, although lawyer representation is positively associated with maintenance awards, hiring a lawyer is no guarantee that a lower-earning spouse in a long marriage will get maintenance, or that a higher-earning spouse will not have to pay maintenance. It is likely that social forces (such as more two-income couples) are making maintenance awards less common, and that a lawyer's expertise may increase a chance that a fair spousal-support outcome for both parties can be negotiated.

Repercussions for Lawyers

What does all this mean for lawyers? The study findings support the conclusion that many divorcing parties have a sensible and realistic idea of when a divorce is simple enough for self representation and when the issues are complex enough to merit hiring a
lawyer. Economic considerations and reluctance to pay a professional to handle a “simple” divorce mean that the pro se phenomenon is probably here to stay, and this may not be a bad thing for many litigants. In an emotional sense, there is no such thing as a simple divorce from a client’s perspective, because it is well known that stress, depression, anger, and conflict accompany most divorces.

On the other hand, the legal system is best equipped to resolve disputes over child custody or property, and cases with no children or property to fight over are relatively simple in the legal sense. In cases involving shorter-term marriages, childless marriages, or little property, many divorce litigants have opted for the quicker, cheaper option of self-representation. Although this study did not measure litigant satisfaction with the process, a 1994 report by the American Bar Association revealed that pro se divorce litigants were as satisfied or more satisfied than were attorney-represented divorce litigants.13

To the extent that lawyers are still hired in “simple” divorce situations, it is likely that they are sought for their ability to explain the process or for unbundled services, to serve as shields between their clients and the stress of the nitty-gritty negotiations and court procedures, and to offer sound advice and reassurance.

Conclusion

For the most part, the study data suggest that divorcing couples reserve hiring lawyers for more complex cases involving significant amounts of property, custody disputes, and higher family income. The divorce lawyer of the future, then, will have to be ever more adept at client counseling (and comforting), and increasingly knowledgeable about financial and psychological issues likely to arise in complex custody, property, and support cases.

Endnotes

1Andrew Schepard, Law Schools and Family Court Reform, 40 Fam. Ct. Rev. 460, 461-62 (2002) (noting that majority of pro se family court litigants cannot afford counsel, but “[s]mall but increasing segment of the middle and upper classes” could afford lawyers but reject them “because of distrust of the profession,” and citing studies showing that divorce litigants sometimes avoid lawyers because of fears that lawyers will increase length and hostility of conflict); see also Drew A. Swank, The Pro Se Phenomenon, 19 BYU J. Pub. L. 373, 378 (2005) (listing reasons for growth of pro se litigation, including economics, antilawyer sentiment, mistrust of legal system, and belief that cases are simple enough to be handled without a lawyer).

2ABA Standing Committee on Delivery of Legal Services, Responding to the Needs of the Self-represented Divorce Litigant (1994).


6This follow-up is not part of the original study.

7Data on file with the author. It is not possible to obtain reliable data from 2009 and 2010 at this time, because parties can hire lawyers at any time before the final hearing and judgment, and many divorce cases filed in 2009 and 2010 are still open.

8McMullen & Oswald, supra note 3, at 75.

9In cases in which maintenance was awarded, the mean income disparity was $4,035.81, compared to a mean income disparity of $1,250.55 in cases in which maintenance was not awarded. Id. at 79.

10Id. at 74.

11Some people have suggested that lawyers have an incentive to prolong litigation because they are paid per hour, but the study data could neither prove nor disprove this theory. See, e.g., Lynn A. Baker, Facts About Fees: Lessons for Legal Ethics, 80 Tex. L. Rev. 1985, 1988-89 (2002).

12LaRocque v. LaRocque, 139 Wis. 2d 23, 406 N.W.2d 736 (1987).

13ABA Standing Committee, supra note 2, at 10-11.