

The “Double-Dipping” Debate

BY ROBERT O. BARTON and
LAWRENCE M. MARKEY JR.

In family law, some legal issues are breathtakingly simple, while others are incredibly complicated and emotional. The simple: Most property acquired during a marriage is community property. (Cal. Fam. Code §760.) The complex: When awarding support to a spouse who has been bought out of an income-generating community property business or asset—and in the process has received compensation for the transfer of its anticipated future income stream—the court may consider the future income stream earned by the “supporting” spouse. To some observers, this amounts to a form of “double-dipping” that is unfair to the spouse who has paid to acquire 100 percent of the business or asset, and then must pay support based, in part, on the income stream.

But is it really unfair? Opinions differ. Before analyzing them, it is helpful to review the fundamentals of property division and support calculations—two of the most important aspects of any dissolution case.

BASIC RULES

Though by law community property must be divided equally, an award of spousal support is within the broad discretion of the court. The amount of support is based upon a number of factors specified in the California Family Code, which generally include:

- the extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account the marketable skills of the supported party and the job market for those skills;
- the extent to which the supported party’s earning capacity is impaired by periods of unemployment so the supported party could devote time to domestic duties;
- the extent to which the supported party contributed to the education, training, or licensing of the supporting party;
- the ability of the supporting party to pay spousal support, taking into account the supporting party’s income, assets, and standard of living;
- the ability of the supported party to engage in gainful employment without unduly compro-

ming the interests of dependent children;

- the age and health of the parties;
- any documented evidence of domestic violence;
- the immediate and specific tax consequences to each party;
- the balance of hardships to each party; and
- any other factors the court determines are just and equitable. (Cal. Fam. Code §4320(a)(1)–(k); see also *In re Marriage of White*, 192 Cal. App. 3d 1022, 1026 (1987).)

The goal is for the supported spouse to be self-supporting within a reasonable period of time. With the exception of marriages of long duration (that is, more than ten years, as set forth in section 4336), a reasonable period of time is generally one-half the length of the marriage. (Cal. Fam. Code §4320(l).) However, if there has been a criminal conviction for an act of domestic violence, a court may reduce or eliminate any award of temporary or permanent spousal support to the abusive spouse. (Cal. Fam. Code §§ 4320, 4325.)

In addition to the factors as set forth above, a cardinal rule is that in a judgment of dissolution, the court may order support payments from one party to the other only in an amount, and for a duration, that the court determines is “just and reasonable, based on the standard of living established during the marriage.” (See Cal. Fam. Code §4330.)

A judgment dividing community

CLE CENTER

You can now earn MCLE credit without leaving your computer. Go to www.callawyer.com and click on CLE Center for access to dozens of articles and tests on a range of topics.

GENERAL CREDIT

MCLE CREDIT

Earn one hour of MCLE credit by reading the article and answering the questions that follow. Mail your answers with a check for \$35 to the address on the answer form. You will receive the correct answers with explanations and a certificate within six weeks. Price subject to change without notice.

CERTIFICATION

The Daily Journal Corp., publisher of *California Lawyer*, has been approved by the State Bar of California as a continuing legal education provider. This self-study activity qualifies for Minimum Continuing Legal Education credit in the amount of one hour of **general credit**.

property between the parties enjoys the benefit of finality, but there is no such requirement with respect to spousal support. Rather, because spousal support is based on equitable considerations and is not an absolute right, courts usually retain jurisdiction so the order can be modified later, as may be necessary and appropriate. This is especially true after a long marriage. (See *In re Marriage of Morrison*, 20 Cal. 3d 437, 453 (1978).)

In enforcing an order for spousal support, the court must resort to the following property in the order indicated: a) the earnings, income, or accumulations of a spouse while living separate and apart that would have been community property if the spouses had been living together, b) the community property, c) the quasi-community property; and d) the other separate property of the spouse making the support payments. (Cal. Fam. Code §4338.)

“DOUBLE-DIPPING”

Under current law, when a community property or family business is awarded to one spouse, an equalizing payment to the other spouse is often necessary. This is because commonly the business is the most valuable asset, and it is typically awarded 100 percent to the spouse who ran it during the marriage. In order to equalize the community property division then, the spouse awarded the business will have to buy out the other spouse’s interest.

The most common method of valuing a community property business is by assessing the present value of the future cash flow. (For example, assume a family taco stand generates \$50,000 free and clear each year, and that the income stream will remain constant for ten years, for total net income of \$500,000; at a 4 percent interest rate, the present value of that future income stream is \$337,782.) Once a value is determined using this or any other method, the total is then split between the spouses: The

owner spouse buys out the nonowner spouse’s one-half interest. But future support obligations to the spouse who relinquished his or her interest will be determined based upon the entire income stream produced by the business, and critics of the current law complain that this is double-dipping (or “double-counting”). That is, it is unfair to the spouse paying support because the business was awarded solely to him or her in the property division after a sizable equalizing payment, yet he or she is being hit again by having to pay support based on the income stream “purchased” from the spouse receiving support. The same can be said of any income-producing asset such as a pension or annuity when it is valued based upon its projected, future income stream and assigned to the earner spouse after an equalizing payment to the nonearner spouse.

FAMILY LAW POLITICS

There have been recent attempts by “fathers’ rights” groups and the Family Law Section of the California State Bar, among others, to get the law changed with respect to this issue. But critics argue that such income streams are properly considered income for support, and hence there is no such thing as double-dipping or double-counting.

Although the issue is contentious, case law supports the current practice. In the *White* case, cited above, the court labeled double-dipping a fallacy, and quoted a major treatise for the proposition that “[i]t is possible, without committing the error of ‘double counting’ to treat a pension as marital property, award it entirely to the earner spouse (with off-setting award of marital property to the non-earner spouse) and then to take the earner spouse’s receipt of pension benefits into account in determining whether there should be any alimony award to either spouse.” (*Marriage of White*, 192 Cal. App. 3d at 1027 (quoting Blumberg, *Intangible Assets: Recognition and Valuation*, at pp. 23–15, 23–16).)

The *White* court also found its own compelling reason to include the previously capitalized income stream in the support equation, opining that the unknown actual value of the asset warrants against its exclusion. Because a pension (or annuity) pays out a gross amount which is currently unascertainable, although constant, it is unlike payments that would be made in liquidation of a fixed asset owned by the community, such as the payments created by the sale of stock or real estate. That is because the present value of a pension (or annuity) can only be quantified by reference to life expectancy charts, but the actual value cannot be known until all payments have been made. As this potential variation in actual value was a risk assumed by the supporting spouse when she/he chose to keep the pension rather than share it with the spouse receiving support, the court held that it is not unfair to treat the previously capitalized income stream as income for the purpose of the spousal support calculation. (192 Cal. App. 3d at 1030.) At least three other courts have reached the same conclusion.

In *Verner v. Verner* (77 Cal. App. 3d 718 (1978)), the trial court had divided the husband’s retirement account evenly, awarding \$8,906 to each spouse. The judgment of dissolution stated that “[t]his fund shall be used toward satisfaction of [husband’s] obligation to support the [wife].” (77 Cal. App. 3d at 722.) Although the husband argued that his ongoing monthly support payment of \$250 somehow liquidated his \$8,906 debt to his wife, the appellate court held that the language used in the judgment “merely sought to identify the probable source of [husband’s] support payments at some future time, and nothing more.” (77 Cal. App. 3d at 725.) By so holding, the appellate court acknowledged that a former community property retirement account is a proper source for the payment of future spousal support. (See also *In re Marriage of Olivarez*, 188 Cal. App. 3d

336, 343–44 (1986).)

In *Epstein v. Epstein* (24 Cal.3d 76 (1979)), the California Supreme Court approved the consideration of former community property as a source for the payment of spousal support, stating that “there is no requirement excluding such property as a source of that support. As the court of appeal noted, ‘in every case where one spouse receives permanent spousal support from the other spouse, the source is from the separate property of the paying spouse, including ... earnings or property which were once the community property of both spouses.’” (24 Cal. 3d 76, 91 & n. 14 (superseded by statute on other grounds).)

Thus, absent intervention from the Legislature, courts today must consider the income streams generated by an entire pension, annuity or a community property business, even though when it was awarded to the supporting spouse in the property division, an offsetting award of marital property was made to the spouse who will be also receiving the payments of support.

IS CURRENT PRACTICE FAIR?

These are complex policy issues, and many experts have differing opinions as to whether and how they should be addressed, if at all. There are sound arguments on both sides.

On the one hand, including income from community property could be considered unfair because it may result in the loss of a family business or keep a retired person from relying on the pension he or she thought was owned free-and-clear of any claim by the other spouse. In recent years many states, such as New York, have acted to prohibit “double-dipping.” (See *In re Marriage of Grunfeld*, 731 N.E. 2d 142, 148 (2000).)

On the other hand, some commentators view California’s current law as fair because shared income-producing assets are generally the result of a joint marital effort. Thus, a spouse whose work or support dur-

ing marriage enabled the creation or acquisition of an income-producing asset should be entitled to a full share in the value of that asset. If it were not for the joint effort of the community, the asset would not exist. Moreover, the fact that the supporting spouse bought out an income-producing asset at current market value does not alter the fact that the asset will produce income in the future.

Finally, some might argue that the court system already has mechanisms for dealing with such circumstances equitably. Consider the possibility that the equalization payment awarded as the buy-out value of the community property asset could have been, and arguably should have been, invested to earn future income that would be counted as the recipient’s income in a support calculation at some later date. Indeed, the returns on that investment, if any, will also be used by the court at that later date in assessing the supported spouse’s need for spousal sup-

port. Such “bilateral double-dipping” would eliminate any perceived unfairness in considering the previously capitalized income stream earned by the supporting spouse.

stream produced by the shared asset would be going to both spouses in proportion to their respective ownership interests in it.

Indeed, the same could be true with respect to a simple community property or family-owned business if joint management will not be a problem. In such cases, splitting the income stream and retaining joint ownership of the business might well be the better approach. If the business is more complex, however, or if the parties are unable or unwilling to share ownership cooperatively, that is unlikely to be a viable option. Then the parties might consider selling the business to a third party and splitting the proceeds. If a sale of the business is unwise for economic reasons, as it frequently is, clients must be clearly apprised of the issues discussed herein before a settlement is reached.

Attorneys representing the payee spouse whose interest will be bought out might better advise their client to

Permanent support comes “from the separate property of the paying spouse, including ... earnings or property which were once community property of both spouses.”

port. Such “bilateral double-dipping” would eliminate any perceived unfairness in considering the previously capitalized income stream earned by the supporting spouse.

ADVICE TO CLIENTS

If your client is the payor spouse and is considering buying out the other spouse’s interest in an income-producing asset, it might be wise to consider an equitable division instead. This is especially true if the income-producing asset is one that can be easily divided, such as a pension or annuity. With such an arrangement, neither spouse would suffer the consequences of double-dipping because the income

sell and take the payment now—especially if the client urgently needs the funds. Because current law requires the court to also consider the capitalized income stream of the payor spouse in any future support calculation, the client could spend the buy-out funds now on non-income producing assets or for the costs of living and still benefit from future support based on the income stream produced by the entire asset. Regardless of the path chosen, all counsel should ensure that divorcing clients are aware of the complexities of these vexing support issues. ☞

Robert O. Barton and Lawrence M. Markey Jr. are solo practitioners in Torrance, where each concentrates on civil litigation and family law.

The “Double-Dipping” Debate

- 1 In family law, the term “double-dipping” refers to a spouse who collects two pensions and refuses to declare them community property.

True False
- 2 Only certain types of property acquired during a marriage—such as earned income—are community property in California.

True False
- 3 The court has broad discretion in dividing community property.

True False
- 4 Permanent spousal support is based on a computer calculation, giving the court little discretion in making its award.

True False
- 5 In awarding spousal support, the court will take into consideration the extent to which the supported spouse’s earning capacity is impaired by periods of unemployment that she/he devoted to domestic duties.

True False
- 6 The extent to which the supported spouse contributed to the education, training, or licensing of the other spouse is irrelevant to an award of spousal support.

True False
- 7 A family court is a court of equity. Hence, the balance of hardships is a factor for the court to consider when awarding spousal support.

True False
- 8 The age and health of the parties is a factor the court considers in making a spousal support award.

True False
- 9 If the supported party is able to engage in gainful employment, the court considers it irrelevant whether such employment will substantially interfere with the interests of dependent children.

True False
- 10 The court expects the supported spouse to become self-supporting within a reasonable period of time.

True False
- 11 Except for marriages of long duration, a reasonable period of time is generally equal to the length of the marriage.

True False
- 12 A court may reduce or eliminate an award of support to a spouse who has been convicted for an act of domestic violence.

True False
- 13 Just as a judgment dividing community property enjoys the benefit of finality, so does a judgment awarding spousal support.

True False
- 14 When a community property or family business is awarded to one spouse, an “equalizing payment” to the other spouse is generally required.

True False
- 15 All amounts paid by the acquiring spouse to the selling spouse for an interest in a community property business will be excluded from a support calculation.

True False
- 16 The present value of the future cash flow cannot be used to value a community property business.

True False
- 17 Unlike a family business, a pension or annuity cannot be bought out by one spouse in the division of community property.

True False
- 18 Under current law it is appropriate to include a previously capitalized income stream in support calculations because its actual value is unknown until all payments have been made.

True False
- 19 “Double-dipping” as described in this article is currently allowed in all 50 states.

True False
- 20 A colorable argument can be made that “double-dipping” in spousal support cases is a legal fiction.

True False

HOW TO RECEIVE ONE HOUR OF MCLE CREDIT

Answer the test questions above, choosing the one best answer to each question. For timely processing, print the requested information below. Mail this page and a check for \$35 made payable to *California Lawyer* to:

California Lawyer/MCLE
P.O. Box 54026, Los Angeles, CA 90054-0026

name (required)

date (required)

law firm, company, or organization

practice area

address (required)

please check here if this is a new address

city, state, zip (required)

phone

state bar number (required)

email