DETERMINING PERMANENT SPOUSAL SUPPORT IN THEORY AND PRACTICE

By Franklin R. Garfield

In the immortal words of Yogi Berra: "In theory, there is no difference between theory and practice. In practice, there is." The truth of this timeless maxim is illustrated by the disconnect between the theory for determining the amount of permanent spousal support mandated by section 4320 of the *California Family Code* and the practice on the ground.

A dichotomy arises because temporary spousal support is routinely determined by using the Dissomaster and other computer programs that incorporate the guidelines adopted by local court rules and permanent spousal support must be determined solely by analyzing the factors listed in section 4320. Those factors include the duration of the marriage, the age and health of the parties, the parties' earning capacities, the supporting spouse's ability to pay, the supported spouse's marketable skills, the needs of both parties, and "any other factors the court determines are just and equitable."

The first inconsistency: The appellate courts repeat with some frequency that the purpose of temporary spousal support is to preserve the *status quo*, which is defined as the marital standard of living. *See Marriage of Winter*, 7 Cal.App.4th 1926, 1932 (1992); *Marriage of Gruen*, 191 Cal.App.4th 627, 637 (2011). In the vast majority of cases, the parties have altered the *status quo* in various ways; most notably by living separate and apart. If the income available for support does not go up – more often, it goes down – it is insufficient to enable either party to maintain the marital standard of living. In short, the *status quo* has almost always changed before the parties address the issue of temporary spousal support – either between themselves, or through counsel, or in court.

The second inconsistency is the notion that using a computer program to determine the amount of temporary spousal support enables the parties to preserve the *status quo* pending settlement or trial. There is no evidence that guideline spousal support orders accomplish that purpose. Indeed, it is difficult to imagine any procedure, including a detailed analysis of the section 4320 factors, that would achieve the stated goal.

To the contrary, the parties must usually supplement the income available for support by dipping into their savings, or running up credit card balances, or falling behind in paying their taxes, or borrowing money from friends or relatives, or any number of other work arounds. Although the stated policy of the law is to preserve the parties' community estate until the time of settlement or trial, and the automatic temporary restraining orders prohibit either party from transferring, encumbering, hypothecating, or otherwise disposing of community property, there is an exception to the prohibition for transactions "in the ordinary course of business or for the necessities of life." This is at least a tacit acknowledgment that in many cases the parties must use community property to supplement current income.

Another inconsistency is the suggestion that when it comes to permanent spousal support, the Dissomaster computer program is irrelevant. Appellate opinions consistently hold that trial judges are required to analyze the factors set forth in section 4320 and base permanent spousal support awards on the exercise of sound discretion. *See Marriage of Burlini*, 143 Cal.App. 65, 69 (1983); *Marriage of Zywiciel*, 83 Cal.App.4th 1078, 1081-82 (2000). The guideline amount that is used to make a temporary spousal support order cannot even be used as a starting point.

At the same time, the appellate courts acknowledge that the amount of a permanent spousal support award will generally be less than the amount of a temporary spousal support order. *See Marriage of Schulze*, 60 Cal.App.4th 519, 525 (1997). There is thus a relationship between the amount of temporary spousal support (as determined by the Dissomaster computer program) and the amount of permanent spousal support (as determined by a bench officer's sound discretion). As a practical matter, the amount of guideline spousal support constitutes a *de facto* cap on the amount of permanent spousal support.

The problem with following the repeated admonitions of the appellate courts: Analyzing the statutory factors takes time. The process is entirely subjective. It does not produce a better result than discounting the guideline amount by 10 or 20% (depending on the judge's evaluation of other factors that may be involved in the case). Under these circumstances, it is unrealistic to suppose that the guideline amount does not affect a trial judge's analysis.

There is another reason the theory of permanent spousal support enshrined in section 4320 is overwhelmed by the practice on the ground: Fewer than 10% of all family law cases go to trial. The parties, mediators and lawyers who resolve over 90% of those cases without getting the court involved routinely discount the guideline amount to determine the amount of permanent spousal support. This avoids the inevitable differences of opinion with respect to how the statutory factors should be weighed.

Using the guideline amount as a cap promotes the consistency and predictability that would otherwise be absent if trial judges followed the law as mandated by the appellate courts. Under these circumstances, it should surprise no one that trial judges use the Dissomaster computer program as a tool to determine the amount of permanent spousal support instead of starting from scratch.

However, trial judges should be circumspect. A trial judge who even mentions the Dissomaster computer program on the record may find that the spousal support award is reversed and remanded for the required analysis. Section 4320 does not require a trial court to state how each of the listed factors was weighed, and the exercise of discretion that takes place in the privacy of a judge's chambers is not subject to appellate review.

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