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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of LINDA SIVYER-FOLEY and MARTIN J. FOLEY.	B214462 (Los Angeles County Super. Ct. No. GD035308)
LINDA SIVYER-FOLEY, Appellant, v. MARTIN J. FOLEY, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Nori Anne Walla, Commissioner. Affirmed in part and reversed in part with directions.

Law Officers of Gary W. Kearney and Gary W. Kearney for Appellant Linda Sivyer-Foley.

Law Office of Mary-Lynne Fisher, Marilyn M. Smith and Mary-Lynne Fisher for Appellant Martin J. Foley.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for partial publication with the exception of the Discussion sections II through VIII.

Linda Sivyer-Foley appeals the judgment in this marital dissolution action awarding respondent Martin J. Foley partnership distributions from his law practice and allocating property and debts among the parties. The principal issue on appeal is whether the court erred in awarding Martin[1] as his separate property his share of partnership profits for the year in which the parties separated because the profits were not distributed until the following calendar year, after the parties' separation. Martin protectively cross-appeals, asking us to review the court's findings on support, reimbursement and taxes in the event we reverse the characterization of such law firm profits. We find the trial court erred in finding that all of Martin's partnership profits were his separate property, and reverse for a redetermination of the trial court's findings and orders that were based upon this conclusion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

Martin and Linda were married March 21, 1986. At the time, Martin was employed at the law firm of Bryan, Cave & McRoberts as a senior partner. Linda worked at TWA, and after retiring from TWA, became a housewife. On January 1, 1990, Martin joined Sonnenschein, Nath & Rosenthal (Sonnenschein) as an equity partner. Martin and Linda had a daughter, Michelle, born February 8, 1988. Child support for Michelle terminated in June 2006.

The parties separated on November 7, 2003, and Linda filed a petition for legal separation on January 20, 2004. On March 9, 2004, the parties entered into a stipulation and settlement providing for, among other things, spousal and child support. Trial commenced January 8, 2007 and concluded October 19, 2007. During trial, both the parties testified. Martin called as witnesses Edwin B. Reeser, the managing partner of Sonnenschein's Los Angeles office, and Thomas Pastore, a business evaluation analyst. Linda called as a witness

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[1] To avoid confusion and not out of disrespect, we refer to the parties by their first names.

[2] Pursuant to a stipulation, the parties have agreed that a small portion of the record concerning Martin's firm partnership agreement and his compensation is confidential. Although we have reviewed this portion of the record, to protect the parties' privacy, we have not cited it in this opinion.

Jack Zuckerman, who testified solely on the issue of the value of Martin's interest in Sonnenschein. The trial court issued its memorandum of decision on April 18, 2008, and entered judgment on December 23, 2008.

DISCUSSION

I. COMMUNITY'S RIGHT TO RECEIVE PROFITS FROM MARTIN'S LAW FIRM

Linda argues that the trial court's conclusion is contrary to *In re Marriage of Brown* (1976) 15 Cal.3d 838 (*Brown*), which held that nonvested pension rights represent a property interest that is subject to division during dissolution proceedings. (*Id.* at pp. 841–842.) Thus, part of Martin's post-separation partnership distribution was a right to receive a benefit that was earned during the existence of the community and belonged to the community even though he received it after the date of separation. Martin contends that the pension cases and their progeny are distinguishable because here, pursuant to the partnership agreement, he did not have a vested right to his partnership distribution until calculated and confirmed by the partnership, an event which occurred after his separation from Linda.

A. Factual Background

1. Trial Testimony

Martin was employed as an equity partner at Sonnenschein, an Illinois limited liability company. As an equity partner, Martin was allocated an ownership share in the partnership, which was adjusted every two years. Sonnenschein partners receive a percentage of the firm's profits as compensation, using a formula based on technical skills, hours billed, clients that the partner originated, quality of the partner's accounts receivable, and contribution to the firm's community through recruiting, pro bono work, and firm administration. Typically, the firm receives 40 percent of its income in the last three months of the year. During the year, Martin received semi-monthly draws against his share of the firm's future profits, calculated as 55 percent of his income for the year based on budget projections. The remainder of a partner's distribution is received in three installments: the first in December, the second around the 10th of January, and the third during the last week of January.

The firm's policy and planning committee determines partnership compensation at the end of the calendar year. If a partner leaves before the determination of the prior year's compensation, pursuant to the firm's partnership agreement, the partner forfeits the right to receive any amounts in excess of the bimonthly draws that the partner has already received.

2. Trial Court's Ruling

The trial court found that there was no community interest in Sonnenschein's January 2004 partnership distributions (2004 Partnership Distribution) to Martin. Relying on *In re Marriage of Iredale & Cates* (2004) 121 Cal.App.4th 321 (*Iredale*), the court reasoned that compensation was governed by the partnership agreement, which provided that partners have no vested interest in year-end distributions until such time as the distributions are approved by the partnership. Furthermore, the partnership agreement had been consistently applied to deny compensation to any partner who leaves the firm prior to year end. Finally, partners have no share in any of the firm's accounts receivable or work in progress, and thus have no income until the firm's profits are determined at the end of the year. The court concluded because Martin had no interest in the 2004 Partnership Distribution until January 2004, which was after the date of the parties' separation, the community had no interest in these partnership distributions.

B. Discussion

We hold that part of the 2004 Partnership Distribution is community property. Absent an agreement by the parties, Family Code section 2550[3] imposes on the trial court in marital dissolution proceedings a duty to value and divide equally the parties' community property estate. (§ 2550; *In re Marriage of Walrath* (1998) 17 Cal.4th 907, 924.) A spouse's time, skill, and labor are community assets and his or her earnings during marriage are community property, but after separation, earnings and accumulations of a spouse are separate property. (§§ 760, 771, subd. (a).) The trial court must characterize the property for purposes of this division as separate, community, or quasi-community. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291.) The characterization of property as community or

[3] All statutory references herein are to the Family Code unless otherwise noted.

separate can be determined by the date of acquisition, the application and operations of presumptions, or whether the spouses have transmuted the property. (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 732.) In characterizing a benefit, courts consider all relevant circumstances. (*In re Marriage of Horn* (1986) 181 Cal.App.3d 540, 544–548.) The party claiming that property acquired during the marriage, which is presumed to be community property, is actually separate property has the burden of overcoming this presumption by a preponderance of the evidence. (*In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1586, 1591.)

The trial court has broad discretion to determine the manner in which community property is divided, although absent an agreement, it must be divided equally. (§ 2550; *Brown, supra*, 15 Cal.3d at p. 848, fn. 10.) Accordingly, we review the trial court's judgment dividing marital property for an abuse of discretion. (*In re Marriage of Dellaria & Blickman-Dellaria* (2009) 172 Cal.App.4th 196, 201; *In re Marriage of Quay* (1993) 18 Cal.App.4th 961, 966.) In addition, we review the trial court's factual findings regarding the character and value of the parties' property under the substantial evidence standard. (*Dellaria*, at p. 201; *In re Marriage of Ettefagh*, *supra*, 150 Cal.App.4th at p. 1584.) Ultimately we review characterization issues independently because they are a mixed question of fact and law involving application of the law to facts. (*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 184; *In re Marriage of Davis* (2004) 120 Cal.App.4th 1007, 1015.)

Linda analogizes Martin's right to his compensation from Sonnenschein to the pension benefits at issue in *In re Marriage of Brown, supra,* 15 Cal.3d 838, where the court determined that because pension benefits represented a form of deferred compensation for services rendered, the employee's right to such benefits was a matter of contractual right derived from the terms of the employment contract. (*Id.* at p. 845.) Therefore, to the extent that pension rights, whether vested or not, derived from employment during the marriage, *Brown* held they constituted a community asset subject to division in a dissolution proceeding. (*Id.* at p. 842.)

Other cases have applied similar principles to difficult-to-characterize assets. Time of acquisition is the key factor considered. (*In re Marriage of Lehman*, *supra*, 18 Cal.4th at p. 177.) "Perhaps the most basic characterization factor is the time when property is acquired in relation to the parties' marital status." (*In re Marriage of Haines*, *supra*, 33 Cal.App.4th at p. 291.) Therefore, to apply the proper analytic focus, we must first look to see if the right to the payment accrued during the marriage. (*In re Marriage of Rossin*, *supra*, 172 Cal.App.4th at p. 736.)

In *In re Marriage of Rossin*, *supra*, 172 Cal.App.4th 725, the parties disputed the characterization of a disability policy paid for solely by the wife prior to marriage from her separate funds. The wife received benefits under the policy while married. (*Id.* at p. 730.) *Rossin* reasoned that disability was a right to draw from an income stream that accured prior to marriage and the timing of the receipt of benefits was irrelevant. (*Id.* at p. 737–738.) Furthermore, *Rossin* found the fact that the benefits were a substitute for wages was irrelevant. (*Id.* at p. 738.)

In *In re Marriage of Frahm* (1996) 45 Cal.App.4th 536, upon dissolution the spouses split the husband's pension. Many years later, the husband took early retirement and received a one-time lump sum incentive payment from his employer for doing so. (*Id.* at p. 538.) *Frahm* noted that under previous authorities, such benefits were evaluated under a test that considered whether they were based upon past compensation or were meant to replace future earnings, but it found the test insufficient. (*Id.* at p. 543.) However, relying on *Brown*, *supra*, 15 Cal.3d 838, where the court stated that "'[t]he joint effort that composes the community and the respective contributions of the spouses that make up its assets, are the meaningful criteria,'" *Frahm* found the one-time payment to be separate property. (*Frahm* at p. 544, italics omitted.) *Frahm* reasoned that the husband's right to receive the lump sum incentive payment was not based on the efforts of the community, but resulted solely from his employer's beneficence after the parties' dissolution. (*Id.* at pp. 543–544.)

Under these principles, the community's right to part of the 2004 Partnership Distribution accrued prior to separation. Martin's efforts on behalf of the community during

the year garnered him the right to receive his share of the partnership profits at the time the firm chose to calculate them. His right to receive partnership profits was not based on the firm's beneficence at the time of their distribution postseparation, but rather his performance on behalf of the firm during the entire previous year. The firm did not reward him for his time spent during December 2003 and January 2004; rather, it rewarded him for his efforts all year long. This view is consistent with *Brown*, *supra*, 15 Cal.3d 838, where the court found that the right to retirement benefits represented a property interest, and to the extent that such a right derived from employment during marriage before separation, it was community asset. (*Id.* at p. 842.) "Throughout our decisions we have always recognized that the community owns all pension rights attributable to employment during the marriage." (*Id.* at p. 844.)

The fact that Martin's right to receive the firm's profits could be defeated if Martin withdrew from the partnership before the time the firm actually calculated and distributed them does not affect our analysis. The vesting of the community property interest is distinct from whether Martin's contractual right to receive his partnership distribution had ripened. Thus, although Martin's right to receive 2003 profits in January 2004 was contingent upon his continued employment with the firm, the community property interest in part of them vested during the period before the parties' separation in November 2003.

In any event, as a factual matter, because Martin did not withdraw from the partnership, his right to receive the 2004 Partnership Distribution was not defeated, and his argument based upon a contingency that did not occur cannot affect the present characterization of the property.[4]

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[4] Linda has argued that there was no evidence before the trial court of an apportionment of Martin's efforts for the period 2002 to 2004 which would provide the basis of his share of firm distributions for 2005 and 2006. She suggests a "proportional approach" that would result in a finding that 70 percent of the distributions for 2005 and 2006 are community because they are based upon facts occurring during the existence of the community (2002 to 2004). We reject Linda's argument because the firm's allocation of ownership share, made every two years based on factors reflecting the partner's contributions to the firm, was nothing more than a formula for computing the actual

Here, the trial court relied on *In re Marriage of Iredale & Cates* (2004) 121 Cal.App.4th 321, where the court divided the wife's law partnership capital account. As part of the division, the court considered whether a $220,000 distribution debited to her account prior to the date of property valuation should be included for purposes of valuing it as a community asset. The court found that the distribution to her was made on account of her postseparation work for the law partnership, and therefore was separate property. (*Id.* at pp. 330–331.) *Iredale* factually is distinguishable on that basis. The wife's labors that produced the right to the distribution were made postseparation. Here, Martin's labor that produced the right to distribution that Linda claims as community property was made preseparation and is subject to apportionment and division on remand pursuant to the method of apportionment chosen in the trial court's discretion. "Whatever the method it may use, however, the superior court must arrive at a result that is 'reasonable and fairly representative of the relative contributions of the community and separate estates.'" (*In re Marriage of Lehman*, *supra*, 18 Cal.4th at p. 187 [discussing different methods of apportionment].)

Nonetheless, Martin relies on *Garfein v. Garfein* (1971) 16 Cal.App.3d 155 (*Garfein*), where one spouse was a movie actress who had a contract with Paramount Pictures to make six movies, one per year over a six-year period. The studio agreed to pay her, whether or not it used her services. The parties separated after the second year of the contract, and the husband contended the payments under the third through sixth years of the "'play or pay'" clause were community property. *Garfein* concluded these payments were the wife's separate property because she earned them after separation. (*Id.* at pp. 158–159.) *Garfein* found that under the contract, the wife earned her payments by refraining from working for other studios, even if she did not perform for Paramount Pictures. Thus, the payments were not earned until the time the wife performed under the contract, either by making a movie or

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compensation to be received when the right to receive such compensation accrued. Although this formula was based upon historic facts (accounts receivable, recruiting efforts, technical skill, hours billed) occurring during the existence of the community, the facts underlying the genesis of Martin's percentage share was merely foundation of the compensation formula going forward.

refraining from working for anyone else. Payments made in the third through sixth years of the contract were therefore separate property because they were not earned until that time. (*Id.* at p. 159.)

In that respect, although *Garfein, supra,* 16 Cal.App.3d 155 involved the right to receive payments under a contract such as the Sonnenschein partnership agreement at issue here, *Garfein* is not inconsistent with *Brown, supra,* 15 Cal.3d 838 or other cases which look to the time when the compensation is earned, rather than when it is received. As the wife in *Garfein* did not earn her payments under the contract until after separation, Martin earned his right to payment under the contract when he peformed legal services for the firm during the calendar year, not when the right to receive such payments ripened as a result of the firm's calculations. Although the contractual right to receive the actual payment could be defeated by his withdrawal from the partnership, the community's right to the underlying compensation accrued during the entire year prior to the date of separation. On remand, the trial court is directed to determine the community share of Martin's 2004 Partnership Distribution.

II. MARTIN'S RETIREMENT PLAN FOR 2003

Linda argues that under the logic of *Brown, supra*, 15 Cal.3d 838, Martin's contributions to fund a defined contribution retirement plan at Sonnenschein using his 2003 to 2004 year-end distributions were entirely community property. We conclude that because this contribution was made partially from community funds, a portion of it is community property.

At trial, the parties stipulated that the community interest in this plan and two other plans could be divided equally through a domestic relations order. The parties do not dispute that the two partnership profit distributions Martin received in January 2004 were used to fund his defined contribution plan. Based upon the fact it determined these two distributions were Martin's separate property, the trial court determined that $106,000 in retirement contributions Martin made in January 2004 to his defined contribution plan were also his separate property. We conclude that because this contribution was partially made from

community funds, the community portion is subject to division pursuant to the domestic relations order. On remand, the trial court is directed to recalculate the community share of Martin's retirement plan.

III. MARTIN'S REIMBURSEMENT FOR PAYMENT OF 2003 INCOME TAXES

Linda similarly argues that if we conclude that part of the 2004 Partnership Distribution is community property, then Martin should not have been given credit for paying a certain amount of community taxes with separate funds. Martin concedes this issue if we determine, as we have done, that part of the 2004 Partnership Distribution constitutes community property. Therefore, the trial court must recalculate the community's share of 2003 taxes. In addition, to the extent other tax years are implicated because of our recharacterization of the 2004 Partnership Distribution, the trial court may be required to reallocate responsibility for such taxes also.

IV. THE AMOUNT OF MARTIN'S REIMBURSEMENT FOR COMMUNITY DEBTS MUST BE RECONSIDERED BY THE TRIAL COURT

Exhibit 117 consists of invoices and copies of checks written from Martin's separate account. Exhibit 117 was admitted into evidence without objection. Exhibit 156 contained an itemized listing of community debts paid from Martin's separate property after the date of separation. Mr. Pastore testified that Martin gave him a list of items that he considered to be preseparation debts. Mr. Pastore confirmed that the debts had been paid from Martin's account opened postseparation. However, Martin testified at trial that he deposited his firm profits into that account. At trial, the court relied on Exhibit 117 to find that Martin was entitled to reimbursement from Linda in the sum of $74,543.

Linda contends Exhibit 117 lacks foundation because it was admitted into evidence without any testimony to authenticate it, and that Martin's firm profits for 2003, which were community property, were used to pay preseparation obligations, and thus the court erred in ordering her to reimburse Martin.

Based upon Linda's failure to object to Exhibit 117, the evidence supports the conclusion that the trial court's finding of the amount of community debts was proper. However, Martin's firm profits for 2003, which we have determined were in part community

property, were used to pay all or part of the community's debts. Accordingly, because we have ordered the 2004 Partnership Distribution must be recharacterized, the trial court must recalculate any credits due Martin for payment of community debts.

V. MARTIN'S REIMBURSEMENT REQUEST FOR UNREIMBURSED MEDICAL EXPENSE FOR THE PARTIES' MINOR CHILD

Linda contends that Martin's request for reimbursement of overpayments for Michelle's medical expenses is not supported by the record. We disagree.

A. Factual Background

At trial, Mr. Pastore calculated on Exhibit 156 that Martin was entitled to reimbursement of $45,861.81 for one-half of the unreimbursed medical expenses in 2004 and 2005 for counselors, educational consultants, physicians, and residential programs for their daughter Michelle. The trial court found that after application of a credit of $24,050 to Martin on account of child support reductions, Martin was entitled to reimbursement of $33,837 on account for Michelle's expenses paid from his separate funds.

However, Linda argues that the parties' March 9, 2004 stipulation provided that Michelle's Mayfield school tuition would be paid from a Wells Fargo line of credit that would be paid off when the parties sold their residence on South Hudson Street in Pasadena. In October 2004, the parties agreed to a disposition of the proceeds from the sale of that property. However, she claims that Exhibit 156 demonstrates that of the $91,723.62 Martin paid for child expenses, $5,927.50 was paid to Mayfield although such payment was to have come from the Wells Fargo line of credit.[5] Linda reasons therefore that because Exhibit 157 (consisting of copies of Martin's separate account checks) does not show any payments to Mayfield, it must be presumed that such payments were made from the line of credit. Martin contends that the payments to Mayfield on Exhibit 156 were made before the stipulation regarding the sale of the Hudson property, and that he presented proof of such payment on

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[5] Exhibit 156 shows a total of six checks Martin wrote to Mayfield School during the period February to May 2004 for a total amount of $5,927.50.

Exhibit 119. Exhibit 119 shows that Martin paid $5,927.50 to Mayfield School in February through May of 2004 with six checks drawn on his separate account.

B. Discussion

In applying the substantial evidence standard of review, we resolve all conflicts in the evidence in favor of the prevailing party, and we draw all reasonable inferences in a manner that upholds the judgment. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) "'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) It is not our task to weigh conflicts and disputes in the evidence. Our authority begins and ends with a determination of whether, on the entire record, there is any "substantial" evidence, contradicted or uncontradicted, that will support the judgment. (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 506–507.) Further, we will not find the trial court's findings unsupported merely because they rely on inferences which may reasonably be drawn from the evidence. (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1229.) Whether a certain inference can be drawn from particular evidence is a question of law, but whether the inference should be drawn is a question of fact for the fact finder. (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 44.)

Here, nothing in the record supports the conclusion that because Exhibit 157 did not contain Mayfield checks, they "must have" been made from the Wells Fargo Line of Credit. On the contrary, Exhibits 119 and 156 show that Martin made these payments from his separate funds, and absent any evidence to the contrary, the trial court was justified in concluding Martin was entitled to reimbursement to these checks.

VI. MARTIN'S REIMBURSEMENT FOR OVERPAYMENT OF SPOUSAL SUPPORT[6]

Linda contends that insufficient evidence supports Martin's overpayment of spousal support and that the evidence establishes he actually underpaid support. Martin contends that Linda failed to raise the issue in the trial court, and in any event, she has not demonstrated any error with respect to the overpayment.

A. Factual Background

The March 9, 2004 stipulation provided that Martin would pay $2,700 a month in child support, plus $8,076 per month spousal support commencing January 22, 2004. At trial, Exhibit 156.2 demonstrated that Martin had overpaid child support in the amount of $14,101.36 for the period January 22, 2004 to March 1, 2004. Mr. Pastore testified at trial that he made this calculation by taking into account the preorder support payments of $1,475 and one-half of the living expenses. The trial court ordered reimbursement to Martin in the sum of $14,101.36 based upon Exhibit 156.2.

B. Discussion

Linda contends that because the March 9, 2004 stipulation provided Martin would pay child and spousal support from January 22, 2004, he in fact owed her $10,776 on account of the time period between January 22, 2004 and March 1, 2004. She argues, that applying the orders from the parties' stipulation, a review of Exhibit 156.2 would lead to the conclusion that the evidence does not support Mr. Pastore's conclusion, and in fact Martin underpaid support.

We find Linda has waived any claim of error. We are not required to scrutinize the Exhibit to ascertain whether it contains support for Linda's contention that it does not support Mr. Pastore's conclusion. We do not make the parties' arguments for them. As a result, the issue, to the extent it has been raised, is waived. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546.)

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[6] Although the trial court labeled the reimbursement request as one for "'child support,'" the parties concede it is for spousal support.

VII. MARTIN'S CLAIM FOR OVERPAYMENT OF SPOUSAL SUPPORT

Linda contends the trial court erred in calculating Martin's overpayment of spousal support. Mr. Pastore took Martin's total draw and added his year end distributions and deducted Martin's payments to the firm's Mandatory Keough/Profit Sharing and Mandatory Pension Plan. She contends nothing in the parties' stipulation permitted the deduction for Martin's contribution to the two retirement plans. Martin contends Linda waived the issue by failing to object in the trial court and the error is not mathematical because such contributions are required by section 4059, subdivision (c). In response, Linda contends she is simply doing the math on the figures Martin provided to the trial court.

On March 9, 2004, the parties stipulated that Martin would pay Linda $8,076 per month in spousal support, commencing as of January 22, 2004, plus an additional percentage of any profit distributions paid to Martin. At trial, Mr. Pastore's calculations showed that Martin was entitled to credits for overpayment of support for the years 2004, 2005, and 2006. His calculation included a deduction for Martin's contribution to the firm's retirement plans. These contributions were required by Martin's Partnership Agreement. Apparently, at some point during the dissolution proceedings, the trial court also ordered that "Pursuant to the stipulation of the parties at the time of the hearing, the *Smith-Ostler*[7] order remains in full force and effect with regard to spousal support. Included with Attachment 1B and 2B are Annual Bonus Tables for Father which shall be used in calculating the *Smith-Ostler* order."[8] (Second fn. omitted.) The trial court ordered Martin to pay $9,000 a month in spousal support based upon his base income of $28,000 per month. For additional spousal support, the trial court ordered 33.6 percent of Martin's annual distribution to be paid to Linda. The court found that Martin had overpaid Linda $32,486.46.

Generally, consistent with section 4320, subdivision (c) (ability to pay in light of "earned and unearned income"), the trial court has broad discretion to include, exclude or partially include contributions to individual retirement plans or earnings and accruals of such

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[7] *In re Marriage of Ostler & Smith* [(1990) 223 Cal.App.3d 33].

[8] Linda's brief contains no reference to the record for this citation.

plans not actually withdrawn as income available to pay "permanent" spousal support. (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 3.) However, section 4059 provides, "The annual net disposable income of each parent shall be computed by deducting from his or her annual gross income the actual amounts attributable to the following items or other items permitted under this article: [¶] . . . [¶] (c) Deductions for mandatory union dues and retirement benefits, provided that they are required as a condition of employment."

Putting aside the waiver issue (which Linda impliedly concedes with her statement that she is doing the math; such factual objection should have been made below), we find no error. Martin was required pursuant to his Partnership Agreement to contribute to the Mandatory Keough/Profit Sharing and Mandatory Pension Plan. Linda's reliance on the prior court order does not change this result because the statutory mandate of section 4509, subdivision (c) is implied in the court's order absent an agreement of the parties to the contrary. (See *City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 378.) Therefore, the trial court did not err in finding that Mr. Pastore's calculations were correct because they deducted such contributions from spousal support.

Furthermore, we reject any assertion that Martin's contributions to his retirement funds should be included in the 2003 partnership income, paid in January 2004, which we are characterizing as community property. Martin was required to make these contributions; to the extent any of the retirement funds themselves are community because they were funded during the community, they are subject to division as discussed above.

VIII. MARTIN'S CROSS-APPEAL

Martin filed a protective cross-appeal, requesting that if we find that part of the 2004 Partnership Distribution constitutes community property, we must necessarily remand for a recalculation of the support and reimbursement orders. We agree. Consistent with the views expressed in this opinion, the trial court's rulings on Martin's retirement plan, reimbursement for payment of 2003 income taxes, child and spousal support (as affected by the recharacterization of the 2004 Partnership Distribution) and reimbursement for community debts paid with firm profits must be recalculated on remand. In addition, of course, in

calculating support the trial court must consider the tax implications of the changed allocation of income. Finally, the trial court must reconsider any other financial issues which are affected by the recharacterization of the 2004 Partnership Distribution.

DISPOSITION

The judgment of dissolution is affirmed in part and reversed in part. The parties are to bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.