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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of SCOTT and KAREN BLAZER.	H031574 (Monterey County Super. Ct. No. DR38292)
SCOTT BLAZER, Appellant, v. KAREN BLAZER, Appellant.	

In this marital dissolution case, both parties challenge a spousal support order. In her appeal, the wife asserts that the trial court abused its discretion in reducing temporary spousal support and in setting permanent support. She contends that the court failed to account for all of the husband's income and that it erred in imputing investment income to her. In his cross-appeal, the husband contends that the permanent spousal support order unfairly charges him a second time for earnings from the business that he operates. In his view, since the wife received half of the business's going-concern value in the property division, the court should not consider the entire stream of business income in

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of (1) all but the first two and the last two paragraphs of the section entitled "BACKGROUND," and (2) parts II.A, II.C, and III of the section entitled "DISCUSSION."

assessing his ability to pay support. The husband asks us to announce a new rule in California prohibiting such "double dipping."

Rejecting both parties' contentions, we affirm the challenged order. In the published part of the opinion, we conclude that the trial court acted within its discretion in determining the husband's income for purposes of spousal support.

BACKGROUND

The parties to this appeal are Scott Blazer (husband) and Karen Nickles Blazer (wife). Husband and wife married in November 1982 and separated in January 2002. There are two children of the marriage, both now adults.

The principal marital asset was a company created in 1996 by husband and a business partner, called Blazer-Wilkinson LLC (BW). BW is a brokerage company that buys and sells produce, principally strawberries and bush berries. In 2004, the court valued the community interest in BW at $5.6 million.

2002 – Dissolution; Temporary Support

On January 31, 2002, husband petitioned for dissolution of the marriage in Monterey County Superior Court. In October 2002, the marriage was dissolved.

At a hearing in July 2002, husband was ordered to pay wife "guideline temporary spousal support in the amount of $57,224 per month, plus $6,500 a month for child support, effective June 1st." The child support award was for the parties' younger child, a son, who was still a minor when these proceedings were instituted. The following month, child support was increased to $8,000 per month.

2004 – Decision after Trial

In December 2003, Judge John Phillips conducted a trial that addressed several issues, including spousal support and valuation of the community interest in BW.

In a decision issued in February 2004, Judge Phillips valued the community's interest in BW at $5.6 million. Concerning spousal support, Judge Phillips determined that this was "a marriage of long duration with a substantial standard of living." The judge found it "premature to now make a permanent spousal support order." He anticipated that another "five to six months should be enough time to provide the necessary answers" for that determination. In the meantime, the judge reduced temporary support to $52,000 per month, effective February 1, 2004.

The parties thereafter stipulated to a reservation of jurisdiction to modify support retroactive to August 15, 2004.

2005 – Property Settlement

Following a mediation held in October 2004, the parties "reached a settlement of the property aspects of their case," which was "memorialized and confirmed" in a stipulation and order filed in June 2005. Husband received the community interest in BW. Wife received all of the remaining property, plus an equalizing payment of approximately $1.34 million.

2006 – Decision after Trial

In December 2005 and January 2006, Judge Adrienne Grover conducted a trial on the remaining issues, principally permanent spousal support. At the conclusion of the trial, the judge rendered a decision from the bench.

More than six months later, in August 2006, a statement of decision was filed. Consistent with the judge's oral pronouncement, the written statement of decision made several determinations relevant to this appeal. First, it rejected husband's "double-dipping" argument against awarding spousal support on BW's excess earnings. In addition, the decision confirmed Judge Phillips's earlier determination that the parties enjoyed a "substantial" marital living standard, declining to describe it with any greater specificity. The statement of decision also addressed each party's earning capacity and

included a finding that wife "has the potential to earn $35,000 per year in accounting or retail positions, assuming that her health permits her to work full time." It further concluded that wife would "receive significant investible assets" and that "distribution" of the property was "commencing" with each party apparently "operating in good faith to achieve that distribution." The statement of decision characterized as "reasonable" the "projections of [wife's] future income after the asset distribution is complete." In addition, it treated husband's investments in BW to capitalize and vertically integrate the business as "reasonable expenses that should not be charged against [his] income but rather should be taken out of the company before assessing what his reasonable income is for purposes of support." With respect to wife's needs, the court noted that her September 2005 income and expense statement showed living expenses – as distinguished from savings and investment – of $20,000 per month, which the court found "reasonable and generally consistent with the lifestyle the parties enjoyed during the last five years of the marriage . . . ."

Temporary spousal support was reduced to $30,000 per month, retroactive to August 15, 2004. Permanent spousal support was set at $20,000 per month, starting January 1, 2006.

2007 – Order; Appeals

In March 2007, the court entered a formal order that was consistent with its August 2006 statement of decision, entered after the trial held in December 2005 and January 2006. The order reduces temporary spousal support from $52,000 per month to $30,000 per month, effective August 15, 2004 (consistent with the parties' prior stipulation permitting modification retroactive to that date); it sets permanent spousal support at $20,000 per month, effective January 1, 2006.

In May 2007, wife filed a notice of appeal and husband filed a notice of cross-appeal. The following month, husband asked this court to dismiss wife's appeal as

untimely on the ground that the March 2007 order merely formalized the court's earlier ruling. We denied husband's dismissal motion.

CONTENTIONS

In her appeal from the May 2007 spousal support order, wife argues that the trial court abused its discretion (1) in excluding part of husband's income when considering his ability to pay support and (2) in imputing investment income to her.

In response to wife's appeal, husband defends the order against the two arguments that she offers. He also asserts that wife has forfeited her claims by failing to comply with appellate rules. In his cross-appeal, husband challenges the order on the same ground offered below – that it permits wife to unfairly "double dip" into the income stream from his business. He posits this challenge as an issue of first impression in California and a question of law.

DISCUSSION

To establish the proper framework for our analysis, we begin by summarizing the applicable legal principles before turning first to wife's appeal and then to husband's cross-appeal.

I. Legal Principles

A. Spousal Support

The trial court is authorized to order and to modify temporary and permanent spousal support, as provided in the Family Code.[1]

1. Temporary Support

The trial court has statutory authority to order temporary spousal support while a marital action is pending. (§ 3600.) "Temporary support . . . usually is higher than

[1] Unspecified statutory citations in this opinion are to the Family Code.

permanent support because it is intended to maintain the status quo *prior* to the divorce." (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 522.) The trial court has broad discretion to determine the amount of temporary spousal support, considering both the supported spouse's need for support and the supporting spouse's ability to pay. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 165.)

2. Permanent Support

Permanent spousal support "is governed by the statutory scheme set forth in sections 4300 through 4360. Section 4330 authorizes the trial court to order a party to pay spousal support in an amount, and for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances set forth in section 4320." (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1559; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302.) The statutory factors include the supporting spouse's ability to pay; the needs of each spouse based on the marital standard of living; the obligations and assets of each spouse, including separate property; and any other factors pertinent to a just and equitable award. (§ 4320, subds. (c)-(e), (n).) "The trial court has broad discretion in balancing the applicable statutory factors and determining the appropriate weight to accord to each, but it may not be arbitrary and must both recognize and apply each applicable factor." (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 207.)

B. Appellate Review

As a general rule, we review spousal support orders under the deferential abuse of discretion standard. (*In re Marriage of Nelson, supra,* 139 Cal.App.4th at p. 1559.) We examine the challenged order for legal and factual support. "As long as the court exercised its discretion along legal lines, its decision will be affirmed on appeal if there is substantial evidence to support it." (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 625; *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1286.) "To the extent

that a trial court's exercise of discretion is based on the facts of the case, it will be upheld 'as long as its determination is within the range of the evidence presented.' " (*In re Marriage of Ackerman, supra,* 146 Cal.App.4th at p. 197.)

Where a question of law is presented on undisputed facts, appellate review is de novo. (See, e.g., *Elsenheimer v. Elsenheimer* (2004) 124 Cal.App.4th 1532, 1536 [interpretation of child support statute presents question of law]; *In re Marriage of Von der Nuell* (1994) 23 Cal.App.4th 730, 736 [on undisputed facts, date of separation is a question of law]; cf. *In re Marriage of Duncan, supra,* 90 Cal.App.4th at p. 625, fn. 5 [rejecting wife's bid for de novo review where the evidence was in conflict].)

With those principles in mind, we consider the issues raised here. We begin with wife's appeal.

II. Wife's Appeal

A. Forfeiture

Before addressing the substance of wife's challenges to the spousal support order, we first consider husband's claim that she has forfeited them by failing to comply with appellate rules requiring her (1) to discuss evidence supporting the court's factual findings, and (2) to present the issues using separate, appropriate headings. (Cal. Rules of Court, rule 8.204 (a)(1)(B), (2)(C).)

1. Discussion of Material Evidence

The appellant has the burden of showing that a challenged order lacks sufficient evidentiary support. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368.) "The appellant's brief must set forth all of the material evidence bearing on the issue, not merely the evidence favorable to the appellant, and it also must show how the evidence does not sustain the challenged finding." (*Ibid.*) "If the appellant fails to set forth all of the material evidence, its claim of insufficiency of the evidence is waived." (*Ibid.*; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

We agree that wife's brief could have been more thorough in discussing some of the evidence. For example, in support of her claim that the court erred in treating husband's investments as business expenses reducing his income available for support, wife cites only her own expert's testimony and her objections to the proposed statement of decision, without discussing testimony on that point offered by husband and by his expert witness. That said, we do not consider wife's brief so defective as to warrant a finding of forfeiture. (Cf. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 237 [rule violations did not warrant "drastic sanction" of dismissal].) Moreover, husband's brief cites "considerable evidence supporting the order" – a circumstance that eases our task on appeal. (*Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832; cf. *Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 685 [court's review "would have been simplified had plaintiffs fulfilled their duty, as respondents, to point out the evidence they deem is sufficient to support the judgment"].)

Under these circumstances, we decline to find forfeiture on this ground.

2. Use of Proper Headings

The governing rules require appellate briefs to set forth "each point under a separate heading or subheading summarizing the point . . . ." (Cal. Rules of Court, rule 8.204 (a)(1)(B).) "This is not a mere technical requirement; it is 'designed to lighten the labors of the appellate tribunals . . . .' " (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) The reviewing court is not "obliged to speculate about which issues counsel intend to raise." (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4.) "The failure to head an argument as required" thus may result in forfeiture of the contention. (*Ibid.*; see also, e.g., *In re Mark B.* (2007) 149 Cal.App.4th 61, 67, fn. 2.)

As husband correctly observes, wife "has presented the entirety of her discussion of both issues on appeal under just one heading" in her brief. That shortcoming in wife's brief does not render our task on appeal substantially more difficult, however, since wife presents her two claims in a logical, sequential order. (Compare, *In re S.C., supra,* 138

Cal.App.4th at p. 408 [one heading subsumed "what appear to be five separate complaints that, because of the manner in which they are presented, are painful to read and difficult to understand"].)

We therefore overlook this flaw and proceed to the merits of wife's appeal.

B. Exclusions from Husband's Income

1. Pertinent Facts

In assessing husband's income for spousal support purposes, the court excluded funds used to capitalize BW and to vertically integrate the business. In the court's words: "The need to maintain higher capitalization in the company and the need to diversify the company's work are reasonable expenses that should not be charged against [husband's] income but rather should be taken out of the company before assessing what his reasonable income is for purposes of support." Wife assigns this determination as error.

On the question of capitalization, the court heard testimony from two experts.

Husband's expert witness was certified public accountant Richard Wilkolaski. Wilkolaski described BW as "very thinly capitalized for a business" with such high gross revenue. Husband had drawn down his capital account at BW by more than $1 million in the three years from January 2002 to December 2004. Wilkolaski opined that the company was "endangered" by the level of capital, which instead "should be building back up again." Based on some 30 years of forensic accounting, Wilkolaski understood that capital account withdrawals are not income available for spousal support.

Wife called certified public accountant Jeffrey Wriedt as her expert witness. Wriedt agreed that husband's BW capital account had declined. He characterized BW as "probably slightly undercapitalized." And Wriedt agreed with Wilkolaski that "probably more money should have been left in the business." Since he is not "a legal expert," Wriedt could not say whether spousal support should be based on money withdrawn from

husband's BW capital account. But Wriedt did state: "Withdrawals from the partnership capital account are not taxable income."

Concerning vertical integration, the court heard testimony from the same two expert witnesses, and from husband.

Husband testified about his post-separation actions to expand and vertically integrate BW. Explaining the need for these actions, husband said "we had to change the way we did business because the retail side was looking to cut out the middle man . . . to lower their costs. . . . So we have had to change and accept the fact that the buying broker entity is no longer a viable business plan." Explaining the nature of the change, husband testified that the company expanded in two directions, transforming from a middle-man to include both distribution and growing operations. BW thus expanded by getting "into the warehouse side, which is a distribution arm," and by getting into the berry-growing business. The warehouse is an east-coast facility operated by Blazer-Wilkinson-Salins, with BW in partnership with a third person; it had been profitable. The berry-growing operation, Camarillo Berry Farms, had not yet been profitable. Husband testified that he was willing to use his BW capital account to continue with the "Camarillo investment" since "the only way" to "keep Blazer-Wilkinson in existence, is to maintain some type of ground up relationships."

Husband's expert witness, Wilkolaski, testified about husband's investments in Blazer-Wilkinson-Salins and in Camarillo Berry Farms, based on information gleaned from husband's tax returns. Both businesses were started in 2003. For Camarillo Berry Farms, husband contributed capital totaling about $342,000 in 2003 and about $1,086,000 in 2004. Those sums, which came to husband from BW cash flow, were "monies that were disposable to him to invest" in Camarillo Berry Farms.

Wife's expert, Wriedt, testified that BW generated cash flow for 2002, 2003, and 2004 in the millions of dollars. Wriedt stated that it was husband's choice to "spend the money on his vertical integration."

On appeal, wife argues that by excluding "income that was used by [husband] to diversify into other areas of his business to establish a more vertically integrated business," the court "failed to use the total of [husband's] income in setting support which is an abuse of . . . discretion." Wife challenges only the nature of these expenditures, not the amount.

2. Legal Authority

Under the spousal support statute that governs here, the trial court is required to assess the "ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living." (§ 4320, subd. (c).)

The spousal support statute does not define income. "There are no statutes that address the computation of income for the purpose of determining spousal support." (2 Kirkland et al., Cal. Family Law: Practice and Procedure (2009), Spousal Support Orders, § 51.33, p. 51.31.)

This is in contrast to the statutory provisions governing child support.[2] As one commentator notes, "there is not yet any authority" applying the child support definition to spousal support. (Kirkland, *supra*, Cal. Family Law: Practice and Procedure, § 51.33, p. 51.31.) Despite that dearth of authority, and without discussing the point, the parties offer argument based on section 4058, which defines income for child support purposes. As a general proposition, we question how well child support concepts translate to

[2] The child support statute defines income broadly. (§ 4058; *In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at pp. 285-286.) With stated exceptions, the statutory definition covers "income from whatever source derived," including: "Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business." (§ 4058, subd. (a)(2).)

spousal support.[3] Nevertheless, to the extent that the child support provision defining income may have some relevance to the issue before us, we address it below.

So far as we are aware, there is no case law directly addressing the question before us here. While acknowledging that there are no reported cases "analogous" to the situation presented here, wife nevertheless cites two appellate decisions in support of her argument. The first case proffered by wife is *In re Marriage of Ostler and Smith* (1990) 223 Cal.App.3d 33. In that case, the husband was required to pay spousal support based on a percentage of future bonuses. (*Id.* at pp. 41-42; see also, e.g., *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1387 ["any bonus actually received must be counted as part of [obligor's] annual gross income for the purposes of spousal and child support"].) The second case cited by wife is *In re Marriage of Kerr* (1999) 77

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[3] Child support and spousal support serve different purposes, implicate different policies, and are governed by different rules. (Compare § 4053, subd. (e) [concerning child support, the legislative policy is to treat "the children's interests as the state's top priority"] with § 4320, subd. (*l*) [concerning spousal support, the legislative policy is for the supported spouse to become "self-supporting within a reasonable period of time"]; compare § 4052 [for child support, "court shall adhere to the statewide uniform guideline"] with § 4320, subd. (n) [for spousal support, court shall consider enumerated circumstances including "other factors the court determines are just and equitable"]; see also, e.g., *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 49 [public policy prohibits waiver of child support but not spousal support]; *In re Marriage of Lynn* (2002) 101 Cal.App.4th 120, 130, fn. 7 [same]; *In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 308 [when imputing income to the payee spouse, child support order must "consider the children's best interests" but no such requirement applies to spousal support order]; *In re Marriage of Kerr*, *supra*, 77 Cal.App.4th at pp. 95-96 ["child support awards must reflect a minor child's right to be maintained in a lifestyle and condition consonant with his or her parents' position in society after dissolution of the marriage" while spousal support orders require "consideration of the parties' standard of living during marriage" only]; *In re Marriage of Schulze*, *supra*, 60 Cal.App.4th at pp. 528, 527 [guideline child support is highly regulated and "relatively fixed" whereas permanent spousal support orders must be "the product of a truly independent exercise of judicial discretion"]; but see Kirkland, *supra*, Cal. Family Law: Practice and Procedure, § 51.33, p. 51.31 [considering it "reasonable that the same rules" defining income for child support purposes "would apply to spousal support"].)

Cal.App.4th 87. There, the husband was required to pay spousal support based on income that could include a percentage of future stock options. (*Id.* at p. 95 [on remand, "a percentage support award based on [the husband's] exercised option income would be permissible as long as the court sets a maximum amount proportionate to its findings of the marital standard of living"].) But as husband correctly observes, in both cases, the supporting spouse was an employee, not a business owner. (*In re Marriage of Ostler and Smith, supra,* 223 Cal.App.3d at p. 37; *In re Marriage of Kerr, supra,* 77 Cal.App.4th at p. 91.) We agree with husband that the two cases proffered by wife are in apposite.

The question before us thus is one of first impression.

3. Analysis

Applying the governing statute to the case at hand, our analysis turns on the trial court's assessment of "the ability of the supporting party to pay spousal support, taking into account the supporting party's . . . income . . . ." (§ 4320, subd. (c).) As explained above, we affirm the trial court's decision if it is supported in fact and law. (*In re Marriage of Duncan, supra,* 90 Cal.App.4th at p. 625.)

a. The court's determination is supported by substantial evidence.

As pertinent to wife's appellate claim, the trial court determined that there was a "need to diversify the company's work" and that funds spent for that purpose were "reasonable expenses" properly chargeable to the business, not to husband.

The court's factual finding is supported by substantial testimonial evidence.[4] Husband testified that unless the company diversified, BW "will not exist, it will be gone." The testimony of husband's expert supported the need for diversification, given

[4] The evidence cited by husband concerning "the reasonable business expenditures of BW" includes a number of trial exhibits. But no exhibits were transmitted to this court. (See Cal. Rules of Court, rule 8.224.) For that reason, the trial exhibits are not part of the appellate record, and we do not consider them here. (*Dominguez v. American Suzuki Motor Corp.* (2008) 160 Cal.App.4th 53, 55, fn. 2.)

the changing business environment and the risk inherent in BW's dependence on two major clients.

Since the court's determination on this point enjoys substantial evidentiary support, there is no abuse of discretion. (*In re Marriage of Ackerman*, *supra*, 146 Cal.App.4th at p. 197.)

b. The court's determination is legally proper.

The trial court's determination also comports with applicable law.

Under the spousal support statute that governs here, it was within the court's discretion to calculate husband's income without regard to funds derived from BW that were used to diversify the business. The court must consider the "earned and unearned income" and the "assets" of the supporting *party*. (§ 4320, subd. (c).) Here, the trial court acted within its discretion in attributing the reinvested funds to the business instead of husband. The court may "look past the apparent form of ownership in which husband's assets were held to determine the extent of husband's true interest in them and the availability of those assets in assessing husband's ability to pay." (*In re Marriage of Dick, supra,* 15 Cal.App.4th at p. 162; cf. *In re Marriage of Imperato* (1975) 45 Cal.App.3d 432, 438; *id.* at p. 440 [in property division, court could disregard corporate entity when divorcing parties had "not treated the corporation as a separate entity"].)

More broadly, in the face of an ambiguity as to whether disputed sums represent income available for support, that determination is committed to the court's discretion. For example, "the trial court possesses broad discretion to determine whether to consider as income available for spousal support purposes contributions made by a participant to his or her retirement plan, as well as accruals or accrued earnings of that plan which are not withdrawn." (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 13.)

To the extent that the child support statute may offer guidance, it likewise sustains the trial court's decision here. That statute excludes from income "expenditures required for the operation of the business." (§ 4058, subd. (a)(2); but see *Afsaw v. Woldberhan*

(2007) 147 Cal.App.4th 1407, 1425-1426 [based on statutory interpretation, child support obligor could not deduct rental property depreciation from income]; *In re Marriage of Calcaterra and Badakhsh* (2005) 132 Cal.App.4th 28, 36 [trial court did not err in using child support obligor's "gross rental income without deducting expenses" where ruling was "occasioned by [obligor's] perjury"]; *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 109 [trial court properly rejected business owner's "structuring of income and expenses" as "an attempt to minimize child support obligations"].)

Under the circumstances presented here, the court "exercised its discretion along legal lines" in making the challenged determination. (*In re Marriage of Duncan, supra,* 90 Cal.App.4th at p. 625.) We therefore reject wife's claim concerning husband's income.

C. Imputation of Investment Income to Wife

1. Pertinent Facts

Regarding wife's ability to generate income, the court found it "foreseeable that much of her earnings will be derived from investment income . . . ." The court determined that wife ultimately would "receive significant investable assets" from the community property division and that the necessary transfers were underway. The statement of decision characterized as "reasonable" the "projections of [wife's] future income after the asset distribution is complete."

Testimony concerning wife's post-dissolution assets and projected investment income was provided by the two certified public accountants retained by the parties, Wilkolaski for husband and Wriedt for wife.

Wilkolaski calculated wife's "investable asset base" at approximately $4.4 million. He applied different rates of return, ranging from four percent to eight percent. Applying a straight interest rate without compounding, the estimated return was $217,000 per year at four percent, $306,000 per year at six percent, and $394,000 per year at eight

percent. Wilkolaski stated that "six percent is probably realistic as a very conservative approach."

Wriedt assumed different rates of return depending on the type of investment and the degree of risk. For interest-bearing checking accounts, he said: "If you get much more than one percent, you are extremely fortunate." For savings accounts, the rate was about two percent. For the investment account at Linsco, Wriedt applied a rate of 4.3 percent, which was "the interest rate on federal three maturities" with "zero risk." He applied the same rate of return to a residential real property. Wriedt assumed no return on the Smith Barney joint brokerage account or on husband's Smith Barney retirement account or on an expected inheritance from wife's mother, based on his understanding that wife had not yet received those funds. Though the parties were still negotiating the details of the equalizing payment in another forum, Wriedt assumed an interest rate of 9.3 percent based on his assessment of risk. At that rate, wife "might be able to generate" about $124,000 per year from the promissory note for the equalizing payment.

On appeal, wife contends that "there was no basis" for the court's determination that she "would be receiving sufficient income after the asset distribution" to provide for her needs as measured against the marital standard of living. Wife does not dispute the court's imputation of employment income of $35,000 per year.

2. Legal Authority

There is an express legislative "goal that the supported party shall be self-supporting within a reasonable period of time." (§ 4320, subd. (*l*); see, e.g., *In re Marriage of Mosley, supra,* 165 Cal.App.4th at p. 1388; *In re Marriage of Cheriton, supra,* 92 Cal.App.4th at p. 310.) This "has long been the policy of the law." (*In re Marriage of Rosan* (1972) 24 Cal.App.3d 885, 896.) The supported spouse's "separate assets and the manner in which they are utilized" are proper considerations "in determining spousal support." (*In re Marriage of Kennedy* (1987) 193 Cal.App.3d 1633, 1640-1641; see also, e.g., §§ 4321-4322; see generally, Hogoboom & King, Cal. Practice

Guide: Family Law (The Rutter Group 2009) ¶¶ 17:191-17:192, pp. 17-49 to 17-51; Kirkland, *supra*, Cal. Family Law: Practice and Procedure, § 51.16, p. 51-18; *id.*, § 51.36, pp. 51-40 to 51-42.)

3. Analysis

As wife acknowledges, investment income may be imputed to a supported spouse. (*In re Marriage of Ackerman*, *supra*, 146 Cal.App.4th at pp. 210-212.) Wife nevertheless contends that the record does not support the underlying assumptions about her investment income. She maintains that Wilkolaski's projections relied on asset "values that did not exist at the time of trial" and that his conclusions failed to "take into account either the tax ramifications or requirements in order to liquidate these assets."

Concerning the investment base available to her, wife fails to identify any missing assets with particularity, fails to specify the value of any such assets, and fails to point to any evidence in the record that demonstrates her claim. As for tax consequences, the record flatly belies wife's assertion that taxes were not considered. Wilkolaski "assumed" that wife "would have to pay taxes" to liquidate the retirement assets and he applied a "40 percent blanket tax rate in terms of what she would net out." He likewise assumed the payment of income taxes upon sale of the real estate awarded to wife in the property division. (*In re Marriage of Ackerman*, *supra*, 146 Cal.App.4th at p. 213.)

In essence, wife's arguments on this point "amount to nothing more than a request that we resolve the conflict between the experts, reweigh the evidence, and substitute our judgment for that of the trial court. We will not do so because 'resolution of conflicts in the evidence, assessment of the credibility of the witnesses and the weight to be given the opinions of the experts were all matters within the exclusive province of the trier of fact.' " (*In re Marriage of Ackerman*, *supra*, 146 Cal.App.4th at p. 204.)

III. Husband's Cross-Appeal

As noted above, husband contends that the spousal support order permits wife to "double dip" into the income stream from his business. As he sees it, wife received half of the business's goodwill value in the property division, which was measured by excess earnings, and therefore the court should not consider those earnings in assessing his ability to pay spousal support.

A. Overview: The Double Dip Concept

Called as a witness for husband, certified management consultant and author Steven Popell described double dipping as: "Using the same stream of earnings twice in a family law context: First, to determine business value and hence property division; and second, in establishing spousal support." Popell further testified, "this practice is particularly inequitable when capitalized earnings reflect the personal services of the supporting spouse . . . ."

Another author explains: "In circumstances in which the property division includes a business to be valued, it will most likely include both tangible and intangible assets. [¶] If the value of an intangible asset, such as goodwill, is charged to one party, the income stream, which is being used for the calculation of income available for support, is most likely the same income stream that was used for the computation of goodwill. Hence, the double dip." (Miod, The Double Dip in Valuing Goodwill in Divorce, p. *2, November 1999 at http://www.expertlaw.com/library/family_law/double-dip.html [as of Aug 20, 2009].)

B. Application to this Case

1. Pertinent Facts

For purposes of property division, the court valued the community's interest in BW at $5.6 million. That valuation is set forth in the court's February 2004 decision,

which followed trial in December 2003. The parties apparently agree that the court used the "capitalization of excess earnings" method.

For purposes of spousal support, as reflected in the August 2006 statement of decision that followed the 2005-2006 trial, the court decided that husband's "interest in Blazer Wilkinson LLP may be considered in setting spousal support, notwithstanding [his] $2.8 million buy-out of [wife's] community interest in capitalized future earnings of the business as part of the division of community assets." After discussing legal authority concerning this point, the court concluded that "California authorities establish a strict separation between evaluating marital assets for property distribution and evaluating those same assets as income producers for the supporting spouse." Later in its decision, the court addressed section 4320, subdivision (n), which permits consideration of any other factors pertinent to a just and equitable award; the court expressly rejected husband's "buyout of [wife's] interest in Blazer Wilkinson as a factor which should eliminate spousal support."

2. Legal Authority

a. Goodwill

To the extent that the marital community has an interest in a spouse-operated business, its intangible assets – including goodwill – are subject to valuation and division on dissolution. (*In re Marriage of Foster* (1974) 42 Cal.App.3d 577, 582; *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 818.)

Business goodwill is statutorily defined as "the expectation of continued public patronage." (Bus. & Prof. Code, § 14100.) But "there is more to goodwill than the expectation of continued patronage." (11 Witkin, Summary of Cal. Law, (10th ed., 2005; 2009 supp.) Community Property, § 101, supp., p. 111, discussing *In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090.) "The concept of goodwill in a marital dissolution context is elusive." (*In re Rives* (1982) 130 Cal.App.3d 138, 149.) " 'Accountants, writers on accounting, economists, engineers, and courts, have all tried

their hands at defining goodwill, at discussing its nature, and at proposing means of valuing it. The most striking characteristic of this immense amount of writing is the number and variety of disagreements reached.' " (*In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 108, disapproved on another ground in *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453.) Each case involving goodwill valuation must be decided on its own particular facts and circumstances. (*In re Marriage of Foster, supra*, 42 Cal.App.3d at p. 584; *In re Marriage of Rosen*, *supra*, 105 Cal.App.4th at p. 819.)

There are various methods for valuing business goodwill. (See, e.g., Mauldin, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community* (1981) 56 Tul. L.Rev. 313, 333.) A "proper means of arriving at the value of such goodwill contemplates any legitimate method of evaluation that measures its present value by taking into account some past result." (*In re Marriage of Foster*, *supra*, 42 Cal.App.3d at p. 584.) In California, one recognized valuation technique is the "capitalization of excess earnings" method. (See, e.g., *In re Marriage of Rosen, supra*, 105 Cal.App.4th at pp. 818-819; *In re Marriage of Ackerman, supra*, 146 Cal.App.4th at p. 200.) "The excess earnings method focuses on the earning power of the business to determine what rate of return the predicted earnings will yield in light of the risks involved to attain them." (*In re Marriage of Rosen*, at p. 818, internal quotation marks omitted.) Broadly speaking, this approach first compares the operator's earnings with those of an average peer to determine reasonable compensation and then capitalizes excess earnings above that figure. (*In re Marriage of Ackerman*, at p. 200.)

Whatever method is used, "goodwill may not be valued by any method that takes into account the post-marital efforts of either spouse," because those efforts constitute separate property. (*In re Marriage of Foster, supra*, 42 Cal.App.3d at p. 583; see § 771, subd. (a).) "To some degree, goodwill always contemplates continuity of business." (*In re Marriage of King* (1983) 150 Cal.App.3d 304, 310.) But the contemplation of continuity "does *not* mean that the postseparation results of husband's efforts can, or

should, be included in the goodwill formula" utilized. (*Ibid.*; see also, e.g., *In re Marriage of Duncan, supra,* 90 Cal.App.4th at pp. 633-634.) "In this regard, the value of goodwill existing at the time of marital dissolution is separate and apart from the expectation of the spouses' future earnings." (*In re Marriage of Duncan*, at p. 634.)

b. Double Dipping

So far as we are aware, there are no California decisions addressing double dipping in the context of a former community property business operated by one spouse following separation. But there is case authority on the point from other jurisdictions, which husband proffers. And there are California cases addressing the double-dipping issue in the context of former community property pensions, which husband discusses and distinguishes.

Foremost among the out-of-state cases cited by husband is *Grunfeld v. Grunfeld* (2000) 94 N.Y.2d 696. There, the court reiterated New York's rule against double counting income associated with professional licenses. (*Id*. at p. 704.) In the court's words, insofar as the "same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being twice charged with distribution of the same marital asset value, or with sharing the same income with the nonlicensed spouse." (*Id*. at p. 705.) Such double counting can be avoided either "by reducing the distributive award" in the property division or "by reducing the maintenance award [citation]." (*Id*. at p. 705.) "Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout [citations]." (*Ibid*.) On the other hand, however: "There is no double counting to the extent that maintenance is based upon spousal income which is not capitalized and then converted into and distributed as marital property." (*Id*. at p. 707.)

The California cases discussed and distinguished by husband are *In re Marriage of White* (1987) 192 Cal.App.3d 1022, and *In re Marriage of Epstein* (1979) 24 Cal.3d 76. In *White*, the husband contended that "the parties' property division agreement removed

the pension from the trial court's jurisdiction." (*In re Marriage of White, supra,* 192 Cal.App.3d at p. 1027.) To hold otherwise, the husband asserted, meant that the wife would "twice receive the benefit of the pension, once upon dissolution and again for support. This, according to [the husband's] reasoning, is 'double dipping.' " (*Ibid.*) Despite the "superficial appeal" of the husband's argument, the court found it to be "inherently unsound." (*Ibid.*)

As the *White* court observed, "spousal support considerations are separate and distinct from property division concepts." (*In re Marriage of White, supra,* 192 Cal.App.3d at p. 1026.) Quoting secondary authority, the court concluded that it created no "error of double counting" to award a pension to the earner spouse "and then to take the earner spouse's receipt of pension benefits into account in determining whether there should be any alimony awarded to either spouse." (*Id.* at p. 1027, internal quotation marks omitted.) The *White* court also discussed other California pension cases that implicitly rejected the double-dipping theory. (*Id.* at pp. 1027-1028.) In light of this authority, the court concluded that the husband's "now separate property pension must be considered along with other appropriate factors when gauging his ability to pay just and equitable spousal support." (*Id.* at p. 1029.)

The California Supreme Court has also addressed the issue – albeit in dicta – in *In re Marriage of Epstein, supra,* 24 Cal.3d 76. In *Epstein*, our state's high court rejected the "husband's contention that an award of support beyond his mandatory retirement date . . . would conflict with the equal division of community property requirement . . . ." (*Id.* at p. 91, fn. 14.) The court noted that spousal support was scheduled to terminate "almost three years prior to the date of husband's retirement." (*Ibid.*) "Moreover," the court observed, "even if a future award of spousal support must come from husband's half of the community property there is no requirement excluding such property as a source of that support. As the Court of Appeal below 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.' " (*Ibid.*)

3. Analysis

As noted above, husband frames his double-dipping claim as a question of law. We decline to treat it as such, however, because the evidentiary record does not support the factual premise of husband's argument. Moreover, we conclude, California law does not support husband's theory.

a. The evidence does not support husband's claim.

Husband's challenge to the spousal support order is premised on the factual assertion that the court's earlier valuation of BW was based on husband's post-separation efforts. We find no evidentiary support for that premise. This record neither demonstrates that husband's income has been double counted nor proves that the spousal support award is inequitable.

The Property Division: The parties have not provided us with any of the evidence – either documentary or testimonial – that was presented at the 2003 trial where the community's interest in BW was valued. The ensuing 2004 decision is part of the record before us, but we find nothing in that decision that proves husband's assertion. To the contrary, the decision does not explicitly identify the methodology employed nor does it indicate exactly what intangibles were valued.

Testifying for husband at the 2005-2006 trial, Popell surmised that the court capitalized excess earnings.[5] But as Popell testified: "Strictly speaking, they didn't

[5] In reaching that conclusion, Popell's approach was "to examine [the 2004] decision and examine the evidence that had been submitted to the court, and essentially reverse engineer the valuation . . . ." Popell's result was not precise, but it was "very close . . . within a few percent." He therefore was "confident that that is the way the court approached it."

project into the future and bring that future stream of earnings back as you would from a predictable stream of pension income, for example."

On this record, then, there is no proof that BW was valued using a stream of *future* income belonging to husband. (Compare, *In re Marriage of Slater* (1979) 100 Cal.App.3d 241, 247 ["the wife's accountant erroneously included some of the husband's postdissolution earnings"]; *In re Rives, supra,* 130 Cal.App.3d at pp. 150-151 [valuation method was improper, where it was based entirely on expectation of husband's future efforts]; *In re Marriage of King, supra,* 150 Cal.App.3d at pp. 309-310 [same].)

Husband argues that goodwill based on excess earnings *necessarily* derives from post-separation efforts. As a general legal proposition, he says, the capitalization of excess earnings approach "is in essence a way of talking about expected future earnings. To argue otherwise is splitting hairs." Husband cites uncontradicted testimony by Popell to that effect. (See *In re Marriage of McTiernan & Dubrow, supra,* 133 Cal.App.4th at p. 1099, fn. 7 ["the 'excess earning' method of valuing goodwill in a professional corporation . . . is not far removed from a prediction about future earnings"].)

We reject the notion that the valuation method used here compels a determination that BW's goodwill value is tied to husband's future efforts. First, we need not accept Popell's testimony as proof of such a finding. Just because "the expert's testimony was not contradicted by other expert testimony does not make it conclusive on the trial court or on us." (*In re Marriage of Rosen, supra,* 105 Cal.App.4th at p. 820.) Moreover, an entity's future earnings do not always correspond with the owner's contribution of labor. As the California Supreme Court has long recognized, goodwill may exist separate and apart from the services of the person who created it: "Although the goodwill of a business may be the result of the personal skill, talent, experience, or reputation of an individual connected with the business, it may attach to and continue with the business even after the separation of the individual on whom it was founded [citations]." (*Smith v. Bull* (1958) 50 Cal.2d 294, 302; but see *In re Marriage of Geraci, supra,* 144

Cal.App.4th at p. 1291 ["evidence was undisputed" that "all income generated by [the business] was based on [husband's] personal skill, efforts and industry"].) The earnings of an ongoing business thus do not always derive solely from the personal efforts of its operator, nor is there evidence that such is the case here.

In sum, so far as this record reflects, the court's 2004 decision "valued [the business] without including any potential or continuing income to [husband], and thus without implicating section 771, subdivision (a)." (*In re Marriage of Duncan*, *supra*, 90 Cal.App.4th at p. 634; see also, e.g., *Smith v. Bull*, *supra*, 50 Cal.2d at p. 304 [valuation of the partnership's goodwill did "not involve the profits" earned "subsequent to dissolution" of the partnership].) In any event, since husband did not appeal the valuation decision, he has lost his opportunity to challenge it. (See, e.g., *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1685.)

The Spousal Support Award: Implicitly acknowledging that it is too late to disturb the 2004 valuation, husband directs his challenge to spousal support as awarded in the 2006 statement of decision and confirmed in the 2007 order. Consistent with that focus, Popell testified that the only way "to prevent a double dipping inequity from occurring" – now that the property division is complete – "is to limit spousal support to an amount that is based on reasonable compensation."

That opinion evidence apparently did not persuade the court. As reflected in the statement of decision, the court applied section 4320, subdivision (n), expressly considering whether the award was just and equitable in light of husband's double-dipping claim, but it ultimately found adversely to him on that point. We find no abuse of discretion in this factual determination, since the court also determined that wife's former community property eventually would be expected to produce projected earnings for her self-support. (Cf. *In re Marriage of Olson*, *supra*, 14 Cal.App.4th at p. 11 [court did not abuse its discretion "in treating both parties the same in this regard"].)

In sum, the evidentiary record supports the court's explicit factual finding that the spousal support award is not inequitable, as well as its implicit determination that there was no double counting of husband's income.

b. The court's determination is legally proper.

Husband's theory not only lacks factual support, it lacks legal support as well.[6]

In its 2006 statement of decision, the trial court correctly recognized that persuasive California authority undermines husband's position. (*In re Marriage of Epstein, supra*, 24 Cal.3d at p. 91, fn. 14; *In re Marriage of White, supra*, 192 Cal.App.3d at p. 1029.) We reject husband's arguments to the contrary.

First, we consider and reject husband's attempts to distinguish the cases relied on by the trial court. We see no reason to distinguish the cited cases merely because they involve pensions awarded in the property division, while our case involves a spouse-operated business. (See *In re Marriage of Slater, supra*, 100 Cal.App.3d at p. 245 [partnership interest is "an interest in a going business analogous to pension rights"].) While it is true that pension benefits derive from community assets generated during the marriage, so too does business goodwill. After divorce, "the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. Under the principles of community property law, the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of the husband's earnings and accumulations during marriage." (*Golden v. Golden* (1969) 270 Cal.App.2d 401, 405.) We likewise perceive no principled basis to treat earnings derived

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[6] In testimony at the 2005-2006 trial, both of husband's experts acknowledged as much. Popell addressed the property division aspect of the double-dipping theory. When cross-examined on his understanding of current California law, Popell agreed that "if you were going to do a small business valuation based on a capitalization of earnings . . . you are not allowed for that valuation to look at future earnings[.]" Wilkolaski addressed the support prong of the theory. He testified to his understanding that once a value has been established for a personal service business, income generated by the business is properly considered for purposes of spousal support under California law.

from active employment differently from "passive" income derived from pensions or investments. (Cf. *In re Marriage of Dacumos* (1999) 76 Cal.App.4th 150, 154-155 [for child support purposes, earning capacity includes "income that could be derived from income-producing assets as well as from work"].)

Next, we rebuff husband's contention that the discussion in *Epstein* is not persuasive because it is dicta. As a general proposition, "the dicta of our Supreme Court are highly persuasive." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 328.) More particularly here, the comments in *Epstein* have convincing force because they reflect the reality that post-dissolution earnings often will be generated by former community assets. As a matter of property rights, post-separation earnings unquestionably are the earner's separate property. (§ 771, subd. (a).) But the separate property character of the earnings does not prevent the court from recognizing them as income available for spousal support. (§ 4320, subd. (c).) "Child and spousal support must be based upon the supporting spouse's future earnings or income." (*In re Marriage of Marx* (1979) 97 Cal.App.3d 552, 561; see also, e.g., *In re Marriage of Kerr, supra*, 77 Cal.App.4th at p. 94 [proceeds from exercise of stock options received as part of post-separation employment compensation are "properly considered for purposes of setting support"].) Because the pertinent discussion in *Epstein* "demonstrates compelling logic, we adopt its reasoning and apply it in this case." (*People v. Smith* (2002) 95 Cal.App.4th 283, 300.)

We also disagree with husband's contention that *White* "is of questionable logic." As stated in *White*: " 'Double counting' of a pension occurs only on those occasions when jurisdiction is reserved over the pension, and it is divided 'in kind' as payments fall due. 'Then each spouse is, properly speaking, an owner of a portion of those benefits and it would be incorrect to attribute the whole to either spouse for alimony determination purposes. When, however, all marital property division is effected at divorce and one spouse is awarded the entire pension, it is not in any way improper to consider the

pension benefits as entirely [the supporting spouse's] income for purposes of alimony determination. Some courts have not understood this.' " (*In re Marriage of White*, *supra*, 192 Cal.App.3d at p. 1027, fn. omitted.) Husband complains that the *White* court offers "no explanation" for treating "the same asset" differently, based on whether it is received in monthly payments or as a lump sum.[7] But the issue is simply whether the supporting spouse should be charged with receipt of the entire pension benefit payment when assessing ability to pay spousal support. With an in-kind division, the answer is no, since the non-earner, supported spouse also receives half of the benefit as it comes due.[8]

To sum up, California authority offers no basis for treating husband's earnings from his ongoing business differently from income generated by other assets divided at dissolution, for purposes of setting spousal support. To repeat what the California Supreme Court confirmed in *Epstein*, " '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.' " (*In re Marriage of Epstein*, *supra*, 24 Cal.3d at p. 91, fn. 14.)

Nor do the cited decisions from other jurisdictions persuade us to a different result. For one thing, there is no indication that those decisions reflect community property

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[7] We observe that husband effectively proffered this very distinction below, through the trial testimony of his expert, Popell. Discussing a similar scenario as a hypothetical, Popell concluded that an in-kind division of BW would return wife sufficient income to obviate the need for spousal support and thus avoid double dipping. Husband summarizes that testimony in his appellate brief.

[8] In either event, the court *must* divide the pension equally if it is wholly a marital asset. (*In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 428; see § 2550.) By contrast, spousal support remains discretionary. (*In re Marriage of Gillmore*, at p. 428.) One component of that discretionary determination is assessing whether the pension or its earnings are properly characterized as income available for spousal support. (Cf. *In re Marriage of Olson*, *supra*, 14 Cal.App.4th at p. 12.)

principles or arise from statutory provisions similar to California's. Moreover, as explained above, there is no evidence that the business valuation in this case was based on husband's future income. "There is no double counting to the extent that maintenance is based upon spousal income which is not capitalized and then converted into and distributed as marital property." (*Grunfeld v. Grunfeld, supra,* 94 N.Y.2d at p. 707.) Since there is no proof that the value assigned to BW includes husband's future earnings, there is no basis for treating the spousal support award as a double dip.

For all of the foregoing reasons, we reject husband's contention that the spousal support award constitutes an impermissible double counting of his separate property or his income.

DISPOSITION

The March 2007 order is affirmed. The parties shall bear their own costs.

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McAdams, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
Duffy, J.

Trial Court:	Monterey County Superior Court Superior Court No. DR38292
Trial Judge:	Honorable Adrienne M. Grover
Attorney for Appellant Scott Blazer:	Sucherman Insalaco Michelene Insalaco Lowell H. Sucherman Jamet Simmonds
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Blazer v. Blazer
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