

**SPOUSAL SUPPORT:  
THE DIFFERENCES BETWEEN TEMPORARY AND TRIAL SUPPORT  
AND HOW TO PROVE THE ELEMENTS**

**Presenters:**

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**1. TEMPORARY AND TRIAL SUPPORT SERVE DIFFERENT PURPOSES AND ARE ADJUDICATED IN DIFFERENT ENVIRONMENTS**

**A. Temporary Spousal Support**

- 1) The purpose is to maintain the status quo
- 2) The practical consideration is the need for an expedient method of establishing a temporary support order
- 3) It is intended to be a short term solution

**B. Trial Spousal Support**

- 1) The purpose is to make a determination of spousal support based on §4320's policy considerations
- 2) The practical consideration is the recognition of the long term consequences of the trial determination and the parties' right to a full evidentiary hearing ala *Elkins*
- 3) It is intended to be a long term solution

**2. THE DIFFERENCES BETWEEN TEMPORARY AND TRIAL SUPPORT**

**A. Temporary Spousal Support**

- 1) **Guideline Temporary Spousal Support – the Trial Court's Path of Least Resistance**
  - a. **The Court May Use Guideline For Temporary Support**
    - (1) Computerized guidelines may be used to determine temporary spousal support based solely on the parties' incomes, with adjustments for child support. (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.)

- (2) Computerized guidelines may be used even when the calculated amount exceeds a recipient's living expenses because she had been living frugally and creating savings during marriage. (*In re Marriage of Winter* (1992) 7 Cal.App.4th 1926, 1932.)
- b. **The Guideline Factors: "Garbage In, Spousal Out"**
  - (1) Incomes, actual or imputed
  - (2) Income tax considerations (e.g., filing status, dependency exemptions, itemized deductions)
  - (3) Other considerations (e.g., health insurance, union dues, mandatory pension contributions)
- 2) **Non-Guideline Temporary Spousal Support – Think About It!**
  - a. **The Court's Role – Amount of Temporary Support Is Within The Court's Discretion**
    - (1) The amount of temporary spousal support awarded by a court is a matter of discretion and will not be reversed absent a clear showing of abuse of discretion. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 165.)
    - (2) Subject only to the general "need" and "ability to pay," the amount of temporary spousal support award lies within the court's sound discretion. (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 594.)
  - b. **Purpose - To Maintain Pre-separation Status Quo**
    - (1) "Temporary support is used to maintain the parties' living conditions and standards as close to the status quo as possible pending trial." (*In re Marriage of Burlini* (1983) 143 Cal.App.3d 65, 68.)
    - (2) Courts may properly look to the parties' accustomed marital lifestyle as the main basis for a temporary support order. *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.)

c. **Legal Framework - Should Be Limited To Actual Needs**

- (1) Family Code section 3600: “During the pendency of any proceeding for dissolution of marriage . . . the court may order . . . the husband or wife to pay any amount that is necessary for the support of the wife or husband . . . .”
  - a) Your court’s local rules may require the application of guidelines.
    - i. However, a local rule is invalid to the extent that it conflicts with a state statute, such as Family Code section 3600. (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1275.)
- (2) Advocacy – analogize with Family Code section 4057(b): “The presumption [of guideline formula child support] may be rebutted by admissible evidence showing that the application of the formula would be unjust or inappropriate in the particular case . . . because . . . (3) The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children.”

B. **Trial Spousal Support**

1) **The Court’s Role - The Court Must Consider All §4320 Factors**

- a. A trial court may not determine trial spousal support with a computer program designed for computing temporary spousal support. (*In re Marriage of Zywiciel* (2000) 83 Cal.App.4th 1078, 1081-1082.)
  - (1) A computer program may used when PAYOR has a fluctuating income, provided that the court has considered all §4320 factors. (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 9.)
  - (2) A court may award a percentage of earnings rather than a definite sum as spousal support, provided that such support is proportionate to MSOL. (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87.)

- b. Nor may a trial court use a computer-calculated temporary support figure as a "baseline," even if it adjusts the calculation. (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 526-527.)
- c. A trial court has broad, but not unlimited, discretion in granting or denying permanent spousal support, as well as in fixing its amount and duration. (*In re Marriage of Morrison* (1978) 20 Cal.3d 437, 454.)
- d. The court's discretion is restricted by MSOL and by the parties' respective needs and ability to pay. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 296.)
- e. The court must give consideration, and not merely note, the §4320 factors, and must consider the totality of the parties' circumstances without relying on any particular factor as being determinative. (*In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 917-920.)
  - (1) The court may base its decision on the factors having the most significance. (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1521-1522.)
- f. The court must make specific factual findings. (§4332)

## 2) Purpose

- a. The purpose of permanent support cannot be definitively stated, but must be made on a case-by-case basis by application of the §4320 factors. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469.)
- b. Its purpose is sometimes;
  - (1) To maintain;
  - (2) To compensate;
  - (3) To rehabilitate; and/or
  - (4) To punish.

## 3) Legal Framework

- a. The court must consider each of the §4320 factors (*In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 917-920) which are as follows:

4) **Family Code section 4320 factors – a skeleton**

- a. Each party's ability to pay: earnings or earning capacity (§4320(a)(c)(g)(l)), including:
  - (1) RECIPIENT'S marketable skills, considering retraining expenses (§4320(a)(1))
  - (2) Impairment of RECIPIENT'S earning capacity for domestic duties (§4320(a)(2))
  - (3) Goal that RECIPIENT be self-supporting within a reasonable period of time (§4320(l))
- b. Needs of the parties based on MSOL (§4320(d))
- c. Health of the parties (§4320(a)(h))
- d. Obligations/assets (including separate property) of the parties (§4320(e))
- e. Contributions to PAYOR'S education/career (§4320(b))
- f. Tax consequences (§4320(j))
- g. Domestic violence (§4320(i)(m))
  - (1) Documented evidence of §6211 domestic violence (§4320(i))
  - (2) Criminal conviction of domestic violence within 5 years triggering §4325 presumption (§4320(m))
- h. Balance of hardships (§4320(k))
- i. Any other factors (§4320(n))
- j. Duration issues

5) **Family Code section 4320 fleshed out**

- a. **Each party's ability to pay (§4320(a)(c)(g)(l)), including:**
  - (1) **Actual earnings**
    - a) Consider all income sources:

- i.* Don't forget perquisites
- ii.* Don't forget unreported income (tips, cash)
- iii.* Don't forget exercised stock options. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 286.)
- iv.* Perhaps use §4058 as a check list

(2) **Earning capacity – imputed income**

a) **Earned income**

- i.* Ability to earn can be considered, regardless of the PAYOR'S good faith, when s/he has the ability and opportunity to work, but lacks the willingness to work, even if s/he is not deliberately attempting to avoid support obligations. (*In re Marriage of Ilas* (1993) 12 Cal.App.4th 1630, 1630, 1638.)
- ii.* Earning capacity should be based upon an objectively reasonable work regimen, not upon an extraordinary work regimen requiring excessive hours or continuous substantial overtime. (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 235-236.)
- iii.* Court may not consider PAYOR'S earning ability to work if s/he is 65 and has retired, unless retirement merely a pretext for avoiding support obligations. (*In re Marriage of Reynolds* (1998) 63 Cal.App. 4th 1373, 1378-1379.)

b) **Investment income**

- i.* The court should consider the reasonable income potential from investment assets.. (*In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 930.)

ii. IRA Accounts – The court may consider amounts invested in retirement accounts as income available for support where PAYOR has reached age 59 1/2 and is thus eligible to withdraw the accruals without penalty. (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 13.)

b. **Needs of the parties based on MSOL(§4320(d))**

- (1) A RECIPIENT'S need is an essential element in determining her entitlement to support independent of the PAYOR'S ability to pay. (*In re Marriage of Beust* (1994) 23 Cal.App.4<sup>th</sup> 24, 30.)
- (2) "Needs" must be considered in relationship to MSOL. (*In re Marriage of Siegel* (1972) 26 Cal.App.3d 88, 92.)
- (3) The required MSOL finding is merely a general description of the parties' station in life and is satisfied by use of such terms as upper, middle, or lower income. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 491.)
- (4) MSOL when? MSOL is a general description of the station in life the parties had achieved *by the date of separation*. (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1560; emphasis supplied.) The *Nelson* court cites *In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 485, which refers to the station in life the parties had achieved by the date of separation. See also *Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33 where the court rejected a seven year average of marital expenses as not giving sufficient weight to the upward mobility the parties achieved nearer the date of separation.
- (5) The actual MSOL is of reduced significance where:
  - a) In a short marriage MSOL was maintained with PAYOR'S separate property assets. (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1519-1521.)

- b) The parties lived beyond their means, MSOL may be based on the family's average income, rather than on their expenses. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191.)
  - c) The parties lived at an MSOL below their means because one spouse was a compulsive gambler or substance abuser. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 489.)
  - d) The parties deliberately maintained a low marital standard of living. (*In re Marriage of Watt* (1989) 214 Cal.App.3d 340, 351-352.)
- c. **Obligations/assets (including separate property) of the parties (§4320(e))**
- (1) Income from income-producing assets received in the property division must be considered in determining a need for support. (*In re Marriage of Winick* (1979) 89 Cal.App.3d 525, 528-529.)
  - (2) Improvident management of assets, which would have been sufficient to provide self-sufficiency, may justify termination of support. To hold otherwise, would discourage sound investment and prudent management. (*In re Marriage of McElwee* (1988) 197 Cal.App.3d 902, 909-910.)
  - (3) No spousal support should be ordered where there are no children, and RECIPIENT has a separate estate sufficient for her proper support.. (§4322.)
    - a) Separate estate includes RECIPIENT'S share of community property. (*In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 929-931.)
- d. **Contributions to PAYOR'S education/career (§4320(b))**
- (1) Nothing in §4320(b) indicates that RECIPIENT'S contribution to the attainment of PAYOR'S education or career is limited to direct education expenses. The notion of "contributing to the attainment" of an education is broader than the §2641 concept of "payments made for" education or training. (*In re Marriage of Watt* (1989) 214 Cal.App.3d 340, 350.)

- (2) RECIPIENT'S contribution may have been in the form of homemaking and child care services. (*In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, 49.)

e. **Duration issues**

- (1) The higher the MSOL and the lower the RECIPIENT'S earning ability, the stronger the case for support over a longer period of time. (*Marriage of Kelley* (1976) 64 Cal.App.3d 82, 94.)

### 3. **HOW TO PROVE THE ELEMENTS**

#### A. **Temporary Spousal Support**

##### 1) **Guideline Temporary Spousal Support**

- a. Incomes, actual or imputed (*see proof of Trial Spousal Support section B.1.b. below*)
- b. Income tax considerations (e.g., filing status, dependency exemptions, itemized deductions)
- c. Other considerations (e.g., health insurance, union dues, mandatory pension contributions)

##### 2) **Non-Guideline Temporary Spousal Support**

- a. Needs based on status quo
  - (1) Client testimony
  - (2) Historical expense records

#### B. **Trial Spousal Support**

##### 1) **THRUST: How does RECIPIENT prove:**

- a. RECIPIENT'S needs
  - (1) Expenses based on MSOL
    - a) Historical financial records
    - b) Historical lifestyle testimony
    - c) Photographs, videotapes

- d) CPA to budget/forecast
- (2) Health issues – both expense and inability to work
  - a) Client testimony
  - b) Medical records
  - c) Expert medical testimony
    - i. Treating physician
- (3) Obligations
  - a) Income and expense declaration
  - b) Financial records
    - i. Use compilations (Evid. Code §1523(d))
- (4) Income tax consequences
  - a) CPA testimony
  - b) Blocked SupporTax/DissoMaster
  - c) New mate income – for tax impact only
- b. PAYOR’S ability to pay
  - (1) Actual income
    - a) Earned income
      - i. Income tax returns are presumptively correct. (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 332.)
      - ii. Employment records
      - iii. See your CPA:
        - i) Self-employed spouse
        - ii) Unreported income
        - iii) Perquisites, etc.

- b) Investment income
  - i.* Income tax returns
  - ii.* Financial records
- (2) Imputed income
  - a) Earned income
    - i.* Vocational training counselor (§4331(a))
    - ii.* Headhunters
    - iii.* Job offers
    - iv.* Want ads – be careful!
  - b) Investment income
    - i.* Financial advisor/asset manager
    - ii.* CPA on investment returns
- c. Fairness factors
  - (1) Periods of unemployment
    - a) Client testimony
  - (2) Education/retraining needs
    - a) Vocational training counselor
  - (3) Contributions to PAYOR’S education/career
    - a) Client testimony
    - b) If recent enhancement – expert testimony on future income
  - (4) Needs of dependent children
    - a) Client testimony usually sufficient
    - b) Psychologist or other expert testimony for special needs children

- (5) Age issues
  - a) Vocational training counselor
- (6) Health issues
  - a) Client testimony
  - b) Medical records
  - c) Expert medical testimony
    - i.* Treating physician
    - ii.* CCP §2032.020 physical or mental examination of PAYOR
- (7) Marriage duration
  - a) Petition and response
- (8) Domestic violence
  - a) Documented history
    - i.* Medical records
    - ii.* Police reports
    - iii.* Photographs
  - b) Criminal conviction
    - i.* Certified court records
  - c) Psychologist testimony regarding emotional distress
- (9) Balance of hardships
  - a) Issue-dependent
- (10) Other factors, just and equitable
  - a) Issue-dependent

- 2) **PARRY: How does PAYOR prove:**
- a. RECIPIENT'S needs shouldn't be considered that high based on MSOL
    - (1) Fueled by separate property
      - a) Client testimony
      - b) Financial expert testimony
    - (2) Fueled by borrowing
      - a) Income insufficient for MSOL
        - i.* Financial records of debts
        - ii.* Client testimony
        - iii.* Financial expert testimony
    - (3) Fueled by unreasonable work regimen
      - a) Client testimony
      - b) Employment/work records
  - b. PAYOR'S ability to pay shouldn't be considered that high
    - (1) Health issues
      - a) Client testimony
      - b) Medical records
      - c) Expert medical testimony
        - i.* Treating physician

- (2) Age issues
  - a) Approaching retirement age
    - i.* Retirement needs
      - i)* Client testimony
      - ii)* Financial expert
  - b) Vocational training counselor
  - c) Headhunter
- c. Fairness factors
  - (1) Age issues
    - a) Nothing new
  - (2) Health issues
    - a) Nothing new
  - (3) Marriage duration
    - a) Nothing new
  - (4) Domestic violence
    - a) Documented history
      - i.* Medical records
      - ii.* Police reports
      - iii.* Photographs
    - b) Criminal conviction
      - i.* Certified court records
    - c) (No need for psychologist testimony regarding emotional distress!)

- (5) Balance of hardships
    - a) PAYOR'S own needs based on MSOL
  - (6) Other factors
    - a) Issue-specific
- 3) **RIPOSTE: How does RECIPIENT prove:**
  - a. RECIPIENT lacks ability to pay
    - (1) Needs of dependent children – one-way defense to ability to pay(!)
    - (2) [For other factors, see above discussion regarding proof that PAYOR'S ability to pay isn't that high]