

Computer Programs Can Help Determine Spousal Support

By Frank Garfield

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One of the biggest challenges in many family law cases is agreeing on the amount of permanent spousal support. The challenge arises from the fact that there are no objective criteria. Each party's notion of fairness is entitled to equal weight when the issue is negotiated, which may lead to a standoff that can only be resolved in Court.

There are no objective criteria because the amount of permanent spousal support is based on an analysis of the statutory factors listed in Section 4320 of the *California Family Code*. That section provides as follows:

In ordering spousal support under this part, the court shall consider all of the following circumstances:

- The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:
 - The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.
 - The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
- The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.
- The ability to pay of the supporting party, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.
- The needs of each party based on the standard of living established during the marriage.
- The obligations and assets, including the separate property, of each party.
- The duration of the marriage.
- The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
- The age and health of the parties.
- Documented evidence of any history of domestic violence . . .
- The immediate and specific tax consequences to each party.

- The balance of the hardships to each party.
- The goal that the supported party shall be self-supporting within a reasonable period of time. . .
- The criminal conviction of an abusive spouse. . . .
- Any other factors the court determines are just and equitable.

An analysis of these factors is necessarily subjective. Whenever that is the case, the parties tend to emphasize those factors that support their positions, and discount those factors that may undermine their positions. Wholly apart from the validity of either party's analysis, the problem is compounded because neither party's analysis translates into a specific dollar amount. Both the analysis of the statutory factors and the conclusion that flows from that analysis are entirely subjective.

This leads to several phenomena that will be immediately recognizable to any experienced family law practitioner.

- In a hypothetical case, the attorney for the supported spouse (SS) may conclude that the range for permanent spousal support is \$6,000 to \$8,000 per month, whereas the attorney for the paying spouse (PS) may conclude that the range is \$3,000 to \$5,000 per month.
- The analysis made by each attorney is heavily influenced by the party he or she represents. It is a foregone conclusion that the attorney for SS will believe that SS is entitled to more spousal support than the attorney for PS will believe that PS is obligated to pay.
- There may be no overlap in the ranges. That is, according to the attorneys, the realistic worst case for the SS (\$6,000) is higher than the realistic worst case for the PS (\$5,000 in this example).
- Each party considers the analysis made by his or her attorney to be fair and reasonable, and the result to be not only justified but required by applicable law. Each party views the analysis made by the other party's attorney with skepticism, and regards any offer or demand based on that analysis to be in bad faith.

Against this background, determining the amount of permanent spousal support is widely regarded as a contentious and intractable issue.

The determination of child support is much less contentious and intractable. The primary reason is the use of the DissoMaster computer program (or one of its competitors) to implement mandatory statewide guidelines. The formula for determining the amount of guideline child support is set forth in Section 4055 of the *California Family Code*, DissoMaster tracks the formula, and the result is at least theoretically objective in every case. DissoMaster is also used to determine the amount of temporary spousal support with the same advantages of using DissoMaster to determine the amount of child support: It is at least theoretically objective.

The primary reason why the determination of support can never be *entirely* objective is that reasonable men and women can and do disagree about the data to be entered. For example, the parties may disagree about the custodial percentages, the amount of perquisites or other forms of nonmonetary income, whether such income should be characterized as taxable or nontaxable, and the amount of income that should be imputed to one or both parties. But even though these issues may exist at all stages of the case – at the initial Order to Show Cause and at trial – they are resolved more easily when DissoMaster is used to determine the amount of support, which is routinely done at the initial Order to Show Cause.

Largely because of the objectivity imported into the process by using a computer program, it is routinely done out of Court by conscientious family lawyers. While there is undoubtedly some slippage – even conscientious lawyers don't get it exactly right at the outset of a case unless all of the data is undisputed – most family lawyers know that the cost of litigating the difference between the parties' positions is often prohibitive; this is almost always true at the outset of the case, and is often true at the end as well.

After attorneys' fees are factored into the equation, it may be years before either party realizes the benefit of having prevailed. Thus, for example, if there is a difference of \$500 per month between the parties' positions, and they spend \$10,000 apiece to resolve it, at least one party is worse off financially for some considerable period of time (both parties in many cases).

Even if the parties manage to avoid litigating the issue of support at the outset of the case, all too often it is litigated at the end. In some instances, this is because the parties settled it at the beginning so that it would be litigated only once instead of twice; in other instances, whether it was settled or litigated at the beginning, one or both parties can't live with the temporary arrangement. While the latter problem may result from several circumstances, one of the most common is that temporary spousal support is usually higher than permanent spousal support. *Marriage of Schulze* (1997) 60 Cal.App.4th 519. The SS is looking at a decrease that will compound his or her financial problems. In contrast, the same decrease will provide a measure of relief to the PS.

The goal should be to import as much objectivity into the negotiation of permanent spousal support as possible. Some subjectivity will remain, but there are tools and techniques available to make the problems inherent in determining the amount of permanent spousal support analogous to the more manageable problems involved in determining the amount of child support.

Judges are prohibited by law from using DissoMaster to determine the amount of permanent spousal support. *Marriage of Zwyciel* (2000) 83 Cal.App.4th 1078; *Marriage of Schulze, supra*. But that does not mean that DissoMaster cannot be used as a tool. In at least one case, the Court of Appeal approved a trial court decision that “the computer program offered the fairest and least expensive method of fixing future spousal support given the fluctuating nature of each party's income.” *Marriage of Olson* (1993) 14 Cal.App.4th 1.

Lawyers routinely use DissoMaster as the starting point for their own analyses. Judges have also

been known to “take a peek” at DissoMaster before making the required analysis of the statutory factors. Some cynics even believe that judges use DissoMaster to determine the amount, and then make the analysis necessary to justify that result, instead of the other way around.

Even though permanent spousal support is lower than guideline spousal support, DissoMaster can still be used to import some objectivity into the negotiation process. The hypothetical assumption used throughout this article is that the PS has earnings of \$240,000 per year and the SS has no earnings. Using this hypothetical, guideline spousal support would be \$6,978 per month. DissoMaster can be used in several ways to determine permanent spousal support.

Floating shares. By modifying the setting for spousal support to floating shares, which allocates the tax benefit between the parties, the result would be \$6,758. This may be unacceptable to the payor because the result is too close to the guideline amount.

Using the “B” factor. The “B” factor allocates the entire tax benefit of deductible spousal support to the payor, and results in support of \$4,899. This may be unacceptable to the payee as it is widely regarded as the low end of the range.

Splitting the difference. Some couples are willing to split the difference between guideline and the “B” factor. This would produce a result of \$5,938.

Discounting the guideline. One well-known judicial officer routinely discounts the guideline by 15%. This would produce a result of \$5,931. That percentage is arbitrary. It has credence only because it is used by a well-known judicial officer. But for that, there is no reason the percentage couldn’t be 10% or 20%.

Allocating the net spendable. It is also possible to back into a permanent spousal support order by using percentages of the net spendable. Giving the payor 67% and the payee 33% produces a support order of \$5,500.

None of this is to say that the negotiation of permanent spousal support will ever become easy. Differences of opinion with respect to custodial percentages, perquisites, imputed income, and other issues may or may not have been resolved. Left unresolved, they will of course complicate the analysis.

A final technique for bridging the gap between the parties involves the principle of retroactivity. The Court may not be able to retroactively modify a prior support order, *Marriage of Murray* (2002) 101 Cal.App.4th 581, but the parties may agree to do so by stipulation.

Assume that the parties disagree with respect to their custodial percentages. The parties may negotiate a parenting plan that on paper divides physical custody 65% to one party and 35% to the other party. One party may claim that that this allocation is only in theory; that in practice, the custodial percentages are significantly different. This dispute might arise if one party has the right to physical custody every other weekend from Friday after school until Monday before school, but routinely returns the children on Sunday evening.

The parties could agree to support orders based on the custodial schedule in the Judgment on the

understanding that those support orders would be revised retroactively, say, in January of each year based on the actual custodial percentages for the preceding calendar year. To the extent that the schedule involves a hidden agenda – most obviously to increase or decrease the amount of support – an arrangement along these lines would redress the situation.

If there is only one variable – the custodial percentages in this example – the amounts of spousal support and child support can be redetermined using the same formula that enabled the parties to determine those amounts in the first place. This approach also works if there are multiple variables; such as the custodial percentages and the actual amounts of each party's income.

The DissoMaster is not a perfect tool. None of the various techniques yields an entirely objective result. However, using any of these techniques is more likely to enable the parties to negotiate a result they can live with than debating the statutory factors.

Franklin R. Garfield is a family lawyer and mediator in Los Angeles.

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