

Settling Divorces
By Frank Garfield
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Family lawyers need to focus on the goal of their representation: Is it to go to trial and win? Or is it to resolve the case to the client's satisfaction? There are those who would say that going to trial and winning is the ultimate object of litigation, the *sine qua non* of our adversarial system. But in family law cases, victory is rarely clear cut. In cases with multiple issues, it is not uncommon to win some and lose some. Clients have a tendency to undervalue the ones they win and overreact to the ones they lose. This is one of the factors that makes going to trial risky business for the lawyers.

If the goal is a satisfied client – defined as a client who is willing to sign off on an agreement – the concepts of winning and losing recede. The goal becomes a negotiated deal that both parties can live with.

In attempting to achieve that goal, lawyers are not bound to follow the rules that would apply if they were in a courtroom. To the contrary, deviating from the law can create opportunities for resolving issues by settlement that would not be available in Court.

Several examples illustrate a principle that all litigators would do well to remember: There are times when following the law may not be the best option if the goal is settling the case. *Permanent spousal support*. The amount of permanent spousal support is to be determined based on an analysis of the statutory factors listed in Section 4320 of the *California Family Code*:

- a. 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:
 - i. 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.
 - ii. 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.
- b. 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.
- c. 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.
- d. The needs of each party based on the standard of living established during the marriage.
- e. The obligations and assets, including the separate property, of each party.

- f. The duration of the marriage.
- g. 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.
- h. The age and health of the parties.
- i. Documented evidence of any history of domestic violence between the parties . . .
- j. The immediate and specific tax consequences to each party.
- k. The balance of the hardships to each party.
- l. The goal that the supported party shall be self-supporting within a reasonable period of time. . . .
- m. The criminal conviction of an abusive spouse
- n. Any other factors the court determines are just and equitable.

The problem is that analysis of those factors does not yield an objective answer.

Judges are forbidden by law to use the DissoMaster computer program to determine the amount of permanent spousal support. *Marriage of Zywiec* (2000) 83 Cal.App.4th 1078. However, there is no law that says lawyers cannot use the DissoMaster as a tool. By computing the guideline amount and the amount obtained by using the “B” factor, counsel can establish a range within which the negotiations may take place. This imports some objectivity into the process, and avoids a prolonged and unproductive discussion of the statutory factors.

Solely for purposes of illustration, if payor has an income of \$100,000 per year and payee has an income of \$25,000 per year (actual or imputed), the range would be between \$1,348 and \$1,890 per month. If the payor has an income of \$250,000 per year, and payee has an income of \$25,000 (actual or imputed), the range would be between \$4,317 and \$6,771 per month. Once the range has been narrowed in this manner, most couples manage to find a compromise they can live with.

Modification. There are instances in which the parties do not agree on the amount of cash flow available for support. This is particularly true when the payor has fluctuating income. The payor does not wish to base support orders on exaggerated estimates of his or her income; the payee does not wish to base support orders on estimates of the payor’s income that are artificially or temporarily low.

In Court, a judge is required to base support on reliable evidence of each party’s income; absent unusual circumstances, the past calendar year (or the most recent 12-month period) is usually regarded as reliable. *Marriage of Riddle* (2005) 125 Cal.App.4th 1075. If the estimates turn out to be too high or too low, either party may file an Order to Show Cause to modify the amount of support based on a material change in circumstances.

There are two problems with this approach to getting the amount of support right: First, support orders may only be modified prospectively. Any inequity resulting from an inaccurate estimate may not be rectified retroactively. Second, one party or the other has to file an Order to Show Cause with all its

attendant burden, inconvenience, uncertainty, risk, and (if lawyers are involved) expense.

In mediation, the parties can base support orders on estimates, and then adjust the amount of support payable retroactively once the actual amounts of the parties' incomes are known. Even simpler, especially if the payor's income is the only one that fluctuates, is to provide that a specified percentage of the payor's income over the estimated amount will be paid as additional support. Arrangements of this kind neatly address both problems: First, any inequity based on an inaccurate estimate may be rectified retroactively. Second, going to Court or even getting back into mediation is not required; the formula or percentages may be negotiated in advance and incorporated into the Judgment. This approach works well for couples who are trying to get it right.

Pension plan contributions. In Court, pension plan contributions are treated differently depending on whether they are mandatory or voluntary. If a contribution is mandatory, it reduces the amount of payor's income and reduces the amount of support. The theory is that a mandatory contribution is not available as income. In contrast, if a party makes a voluntary contribution to a retirement plan, such a contribution is not only considered income available for support; by creating a deduction, it *increases* the amount of support. *Calif. Fam. Code § 4059(a)*. Conversely, if the payee is making a voluntary contribution, it would *reduce* the amount of support.

Using the same examples as in the discussion of permanent spousal support, and solely for purposes of illustration, on an income of \$100,000 per year, if payor makes a mandatory contribution of \$15,000 to a retirement plan, the amount of spousal support goes down: The ranges would be between \$1,020 and \$1,396. If the same payor makes a voluntary contribution of \$15,000 to a retirement plan, the amount of support payable goes up: The ranges would be between \$1,520 and \$2,150. On an income of \$250,000 per year, if the payor makes a mandatory contribution of \$40,000 to a retirement plan, the ranges would be between \$3,574 and \$5,442. If the same payor makes a voluntary contribution of \$40,000 to a retirement plan, the ranges would be between \$4,908 and \$7,481.

In mediation, the parties often agree to treat all pension plan contributions the same way, regardless of whether they are mandatory or voluntary, in the interest of promoting an equitable result instead of getting into an argument over legal technicalities.

Family residence. When one party wants to end up with the family residence, the dispute usually centers on the fair market value of the property. Invariably, the party who wants to buy thinks that value is lower than the party who wants to sell. As a matter of law, if the property is awarded to one party or the other, brokers' commissions, closing costs, and unrealized capital gains taxes (if any) are not taken into account. *Marriage of Stratton* (1975) 46 Cal.App.3d 173. Theoretically, this puts the buyer at a disadvantage, and provides the seller with a windfall. However, as the buyer has no legal obligation to buy, it also provides the basis for a deal that both parties can live with: The buyer can agree to a higher price than she thinks is justified if hypothetical brokers' commissions, closing costs, and capital gains are taken into account. The seller ends up with more money in his pocket than if he forced a sale. Once again, deviating

from the law enables the parties to achieve a better result overall.

In Court, the parties and their attorneys are bound by the law. They rightly expect the trial judge to follow it. Out of Court, the parties and their attorneys have considerable flexibility. In many instances, disregarding the law entirely enables the parties to achieve a settlement that would not otherwise be possible.

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