

“WHAT’S YOUR NUMBER?”

I.

STEP-BY-STEP WORKSHEET

HOW TO THINK YOUR WAY TO “YOUR NUMBER” IN SPOUSAL SUPPORT DETERMINATIONS

A. EVALUATE ECONOMIC FACTORS LISTED IN FAMILY CODE SECTION 4320. [FC §§4320(a)(1) (2); (c); (d); (e); (j)]

1. CALCULATE THE MSOL IN TERMS OF NET AFTER-TAX DOLLARS AVAILABLE TO THE PARTIES DURING THEIR MARRIAGE. “NETTING IT OUT”

- a. Goal: arrive at “income-based” tentative spousal support number
- b. Use income for last 3-5 years of marriage (ideal)
- c. Use most recent years if MSOL has been a rising standard of living. (*Ostler & Smith* (1990) 223 Cal.App.3d 33)
- d. MSOL not defined by actual expenditures in all cases: (*Weinstein* (1991) 4 Cal.App.4th 555)
- e. MSOL the same whether income is spent or saved: (*Draupeau* (2001) 93 Cal.App.4th 1086)
- f. Adjust MSOL achieved by spouse(s) who worked unreasonable hours during the marriage: (*Smith* (1990) 225 Cal.App.3d 469)
- g. MSOL can be product of liquidation of separate property capital during marriage. (*De Guigne* (2002) 97 Cal.App.4th 1353): Marital income \$240,000/year, but husband liquidated separate property capital to create annual MSOL of \$450,000. Total award of child support - (\$15,000 vs. \$4,844 GL, and spousal support - \$12,500) exceeded husband’s monthly gross income. Trial court affirmed as no abuse of discretion.
- h. Arrive at “net” MSOL based upon marital income, as adjusted by case law.

2. **DETERMINE THE NEEDS OF THE PARTIES BASED UPON THEIR MARITAL NET AFTER-TAX INCOME**
 - a. Query? What percentage of marital net dollars is needed by a divorced spouse to maintain the MSOL in terms of net after-tax dollars?
 - b. Don't they always "need" 100% of former marital net?
3. **DETERMINE ACTUAL PRESENT INCOME OF PARTIES**
4. **DETERMINE IMPUTED INCOME, IF ANY**
5. **ARRIVE AT PRESENT INCOME FIGURE FOR EACH PARTY**
6. **CALCULATE GUIDELINE CHILD SUPPORT, IF ANY**
7. **EXAMINE THEN-EXISTING NETS. ASK, "HOW MANY NET DOLLARS ARE AVAILABLE FOR SS?"**
8. **PUT DISSOMASTER/X-SPOUSE INTO "USER" MODE AND "AUDITION" DIFFERENT SPOUSAL SUPPORT AMOUNTS**
 - a. Tells you net after tax dollars to each party
 - b. Tells you tax consequences of each spousal support amount on each party
 - c. Tells you ability to pay in terms of net after-tax effect on payor
 - i. What about gambling debts?
 - ii. What about payor spouse who runs up debt after DOS and before trial?
 - iii. Payor has new spouse, new kids that eat up ability to pay? What do you do?
9. **ARRIVE AT AN "INCOME-BASED" TENTATIVE SPOUSAL SUPPORT NUMBER**
10. **CONSIDER ASSETS AND OBLIGATIONS AND ADJUST TENTATIVE SPOUSAL SUPPORT NUMBER ACCORDINGLY**
 - a. Have to determine division of community assets/debts before can set spousal support

- b. Separate property must be considered: "Once community property has been divided and separate property confirmed, the dissolved marriage gives rise to two separate estates, each belonging to a newly single parent. Prospectively, all support will be paid from the supporting parent's separate property, whether that property comes from premarital holdings, a division of community property, salary or other income earned after the dissolution. (see *De Guigne, supra*)

11. ARRIVE AT ADJUSTED TENTATIVE SPOUSAL SUPPORT NUMBER

B. BUMP TENTATIVE SPOUSAL SUPPORT ORDER WITH EQUITABLE "FAIRNESS" FACTORS: [FC §§4320(b); (f); (g); (h); (i); (k); (l); (m); (n).]

1. Supported party's present or future earning capacity impaired by periods of unemployment incurred during marriage to permit supported party to devote time to domestic duties.
2. Extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.
3. Duration of the marriage.
4. Ability of supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
5. Age and health of the parties.
6. Documented evidence of any history of domestic violence, as defined in section 6211, between the parties, including, but not limited to, consideration of **emotional distress resulting from domestic violence** perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.
 - a. How does "emotional distress" translate into spousal support dollars?
 - b. Covers DV between Him and Her, and Her and Him.
 - c. Need to show "emotional distress" from DV, or is DV alone sufficient reason to increase/decrease spousal support? Spousal support as "payback?"

- d. Need to show DV *caused* decreased earning/earning capacity?
7. The balance of the hardships to each party.
8. The goal that supported party shall be self-supporting within a reasonable period of time.
9. The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4324.5 or 4325.
10. Any other factors the court determines are just and equitable.

C. PROCESS, BALANCE, AND ARRIVE AT YOUR NUMBER

II. OSTLER-SMITH

A. OSTLER- SMITH IN SPOUSAL SUPPORT DETERMINATIONS

1. The assumption underlying the calculation of annual gross income is that past income is a good measure of future income. However, the law recognizes that is not always the case. [See *County of Placer v. Andrade* (1997) 55 Cal.App.4th 1393.]
2. *Ostler & Smith, supra*. Trial court ordered Clyde to pay Vicki a total of \$5,900 per month for herself and the two minor boys, allocating \$3,000 to spousal support and \$1,450 to each child. As additional spousal support, Clyde was ordered to pay to Vicki a sum equal to 15 percent of his annual gross cash bonus when received and 10 percent of his annual gross cash bonus as child support for each child.
3. Query? What's the process for determining the percent of "extra income" the court will order under *Ostler & Smith*?
 - i. Just continue the percent number for base income?
 - ii. Pick a number – any number?
 - iii. In *Ostler-Smith* husband protested the 15% figure. The Court of Appeal noted, "Here, the record reflects that the court weighed and considered *each circumstance* required under [the statute], and the record supports the trial court's exercise of discretion."
 - iv. In *Mosley 2.5* (unpublished), trial court adopted an *Ostler-Smith*

percentage (7%), less than half of the percentage set in the [2002] judgment (15%). In response to the wife's argument that trial court had to apply all 4320 factors to setting *Ostler-Smith* figure, Justice Moore opined: "If Dawn had wanted an opportunity to review Judge Pollard's thought process, she should have requested a statement of decision. **We presume Judge Pollard considered the applicable factors. Indeed, she took the time to articulate many of them in her findings and order after hearing.**" [Nb: **Reference the base amount of spousal support.**]

- v. Message: The determination of an *Ostler-Smith* figure should be based upon an analysis of all of the factors listed in Family Code Section 4320.

III.

SECTION 4320 AND ATTORNEY'S FEES

A. FAMILY CODE SECTION 2032

1. **SECTION 4320 MUST BE ADDRESSED IN DETERMINING ATTORNEY'S FEES:**
 - a. "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." (Family Code Section 2032, in relevant part.)
2. **WHEN PREPARING TO ARGUE AN ATTORNEY'S FEES ISSUE, ASK YOURSELF, "WHAT'S MY NUMBER?!"**