

## The Practitioner Family Law

## Needful Things

## Court Upholds Termination of Wealthy Spouse's Support

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**I**n *re Marriage of Terry*, 2000 Daily Journal D.A.R. 5153 (Cal.App. April 18, 2000), is the first case in which the appellate court looked at a supported spouse's separate income and then terminated spousal support based on the court's own assessment that the assets of the estate could generate sufficient income to meet the supported spouse's needs.

The court did this by applying Family Code Section 4322, looking at the facts of the case anew, and deciding that Mary Terry's estate was adequate to meet her own reasonable support needs.

The appellate court reversed the trial court, holding that the trial court improperly applied Section 4322, which provides that "[i]n an original or modification proceeding, where there are no children, and a party has or acquires a separate estate, including income from employment, sufficient for the party's proper support, no support shall be ordered or continued against the other party."

The appellate court found that Mary's estate of more than \$5 million could be reasonably invested to meet her needs and that the trial court did not properly assess the issue of whether the estate was sufficient to generate enough income for her proper support.

The parties separated in 1993 after a 34-year marriage. Thomas Terry had been a successful tax attorney, while Mary worked in the home, raising the parties' three children, all now adults. At trial in 1996, Thomas was ordered to pay spousal support of \$8,750 monthly, based on findings of the reasonable need on Mary's part of \$10,000 to \$12,000 net monthly. Also factored in was Thomas' ability to pay based on an annual income of more than \$300,000, and Mary's separate-property assets of just more than \$2 million.

Just six months later, Thomas came back to court asking for a modification of spousal support, based upon his lowered income and a recent inheritance to Mary of more than \$300,000. At that time, the trial court reduced the support payment to \$5,500.

Thomas then learned that his employment with his law firm would end Jan. 1, 1998, and moved to terminate spousal support. He began withdrawing \$5,500 monthly from his retirement account and, after further investigation, decided that finding another law firm to hire him at age 64 was "unrealistic." He apparently had no investment portfolio to speak of. He started a consulting business, which grossed less than \$13,000 during its first three months.

However, the trial court, for various rea-

sons, imputed income to him from the consulting work of about \$80,000 annually.

Meanwhile, Mary had a retirement account that had reached almost \$960,000 and she had turned 61 in January 1998. Thus, she was eligible to withdraw money from that account without penalty. Also, her portfolio in February 1998 had a value of \$3,545,788. These funds were providing a yield of 2.7 percent annually and consisted of low-basis stocks, which were purposely managed, for tax purposes, so as not to maximize income. The portfolio generated an annual income to her of \$95,130. Further, she had negotiated with one of her adult chil-

Of course, at the trial-court level, the *Terry* court did modify a support order with substantial evidence of a material change of circumstances. This change was evidenced by both a decrease in the supporting spouse's earnings and an increase in the supported spouse's income. The trial court modified support by lowering it; however, Thomas requested that support be terminated altogether.

Appellate courts are usually reticent to overturn the trier of fact, regardless of whether the resulting award appears insufficient or extravagant. However, here the trial court's award lowering support did not satisfy Thomas, nor, apparently, did it satisfy the appellate court itself, since it decided to review the matter *de novo*.

The majority further clarified that "the section 4322 concept of a 'separate estate' is not limited to the income actually and presently produced by the estate." This clarification is a very new twist on the Section 4322 "separate estate" concept. It essentially allowed the court to impute income to Mary without expressly stating so.

**The court found that Mary's estate of more than \$5 million could be invested reasonably to meet her needs.**

dren a \$200,000 promissory note, which was being timely paid, raising her income to nearly \$105,000 annually.

In other words, at this point, not only was Mary much wealthier than Thomas, but her annual income was now more than the earned income that was being imputed to him. Nevertheless, the trial court denied the order to terminate support, although it reduced it to \$2,750 monthly. The trial court recognized that under its new order, Thomas would not be able to pay his own expenses but noted that his current spouse's income was available to reduce his living expenses. (Thomas had remarried by this time; Mary had not.)

The Court of Appeal then reviewed the support issue as a question of fact and law, not just of law, which allowed the appellate court to look at the case as if it were the trier of fact. In doing so, it declared that "the trial court's job is to ascertain whether the estate reasonably could generate sufficient income for proper support, not to second-guess how the spouse will manage that estate to ensure sufficient income."

Specifically, the court framed the question under Section 4322 as "a mixed question of fact and law calling for (1) the establishment of the historical facts concerning the value and character of Ms. Terry's separate estate as well as her support needs; and (2) the application of those facts to the legal standard of sufficiency with the resulting determination as to whether that standard is met."

This was an unusual approach, as most appellate reviewing orders modifying spousal support use an abuse-of-discretion standard. This standard provides that a trial court will be reversed only upon a finding of a commission of an error of law; it does not allow for a fresh look at the facts.

The dissent in *Terry* reminds the majority that when reviewing orders modifying spousal support and applying an abuse-of-discretion standard, "such an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances."

The dissent points out that this is contrary to existing precedent by referring to a long line of case law and stating that "except where there is a showing of a lack of prudence and diligence in managing investments, or purposeful minimization of income, it appears that California courts *do look only to actual income* produced from the supported spouse's assets when deciding whether the trial court abused its discretion by making or extending a particular spousal support order, including one challenged under section 4322."

This is an important distinction. The majority could not reach its conclusion that Mary had sufficient income to meet her previously determined reasonable needs without examining the separate estate beyond her present income, as her *income* alone was insufficient to meet those needs.

In a nutshell, the dissent provides a summary of issues in this case potentially ripe for further review: "The majority holding on the standard of appellate review would not only expand the scope of litigation over spousal support orders, but would greatly enlarge the role of the appellate courts in this area, at the expense of the courts that are best suited to deal with the often fiercely contested issue of spousal support. In addition, the majority fails to provide meaningful guidance as to how the trial court should determine whether a former spouse's 'separate estate' is or has become 'sufficient for [his or her] proper support' within the meaning of section 4322."

Given the strongly worded opinion and dissent, should one of the parties decide to appeal, it will be interesting to watch what the California Supreme Court does with this ruling. If the dissent is correct, either *Terry* will be reviewed (or depublished), or there may indeed be a greater number of support cases being reviewed at the appellate level.

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