

# Spousal Support: Blazing a New Trail

In a case of first impression, *In re Marriage of Blazer*, 176 Cal. App. 4th 1438 (2009), held that under Family Code Section 4320 it was within the trial court's discretion to calculate a husband's income without regard to all income received from the business where there existed a valid reason for funds to be reinvested in the business.

In *Blazer*, Scott Blazer and Karen Blazer divorced after 20 years of marriage. During their marriage, Scott and a business partner started a brokerage company called Blazer-Wilkinson LLC (BW), which bought and sold fruit and produce. In the divorce, Scott was awarded the community interest in BW, which the family law court valued at \$5.6 million. Part of the court's valuation of BW was for the goodwill of the business, which the court based on BW's income stream.

During the divorce, a temporary spousal support order was made, which required Scott to pay Karen \$57,000 per month. In January 2006, the court made a permanent spousal support order that reduced spousal support to \$20,000 per month. At the trial on permanent spousal support, the parties disagreed on whether all of Scott's business earnings should be considered in determining spousal support. Karen argued that all of Scott's income should be used whereas Scott argued that his income should first be reduced by his new business-related investments.

Scott contended that some of his income needed to be reinvested in the company in order to properly capitalize the company. Scott presented testimony from a forensic accountant that BW was "very thinly capitalized" for a business, with such high gross revenue that the company was "endangered" by the level of capital.

Scott also contended that some of his income was needed to vertically integrate the company. Scott explained that BW was a seller of or middleman for fruit and produce; that it neither grew nor took possession of the product. Scott testified that after the parties separated, it became clear that BW's business as a buying broker needed to be changed because the retail side was looking to cut out the middleman to lower costs. Scott testified that BW expanded by transforming from



a middleman to include growing and distribution. BW formed two new companies in order to expand into these areas. Scott invested over \$1.4 million of his BW income into these new ventures.

In making its spousal support order, the trial court excluded from Scott's income the funds used to capitalize and vertically integrate BW. The court found that these expenditures were reasonable expenses that should not be charged against Scott's income when assessing his "reasonable" income for purposes of spousal support.

Both parties appealed from the order. Karen argued that the court abused its discretion by failing to use all of Scott's income in determining support, contending that it was Scott's "choice" to spend the money on vertical integration and capitalization of the company.

Scott contended that the court erred by unfairly "double dipping" in basing spousal support on income from the business, which income stream had already been used by the court in arriving at the value of the business. The *Blazer* court rejected both arguments. The court did not publish its decision regarding Scott's double dipping argument, thus this article focuses solely on Karen's challenge that the court failed to consider all of Scott's business income.

The *Blazer* court observed that while there exists statutory and case law supporting a very expansive definition of what constitutes income for child support purposes, there exists no statute or case law that defines what constitutes income for spousal support purposes. The court found inapposite the line of cases cited by Karen, which she argued required that all income of a spouse be used in determining spousal support. The first case was *Marriage of Smith and Ostler* (1990) 223 CA.3d 33, which held that a supporting spouse was required to pay spousal support based on a percentage of future bonuses. The second case was *Marriage of Mosely* (2008) 165 CA.4th 1375, which held that "any bonus actually received must be counted as part of [obligor's] annual gross income for purposes of spousal and child support." The final case was *Marriage of Kerr* (1999) 77 CA.4th 87, which held that a supporting spouse was required to pay spousal support based upon income that could include future stock options.

The *Blazer* court distinguished these cases by observing that they all dealt with an employee spouse's income in determining spousal support, whereas this case involved the issue of self-employment income.

The court then addressed Karen's argument that the child support definition of income should be applied to spousal support. It questioned how well the statutory and case law regarding income for child support purposes applies to spousal support, observing that child support and spousal support "serve different purposes, implicate different policies, and are governed by different rules."

The *Blazer* court observed that child support awards are highly regulated and relatively fixed orders based on strict statewide guide-

lines. In contrast, case law requires spousal support awards to be "the product of a truly independent exercise of judicial discretion" and the main spousal support statute requires the weighing of several different factors, including any "factors the court determines are just and equitable."

The *Blazer* court cited several examples of how child support and spousal support are treated differently. Under child support law, a child has a right to be maintained in a lifestyle consonant with his parent's station in society whereas the spousal support statute (Family Code Section 4320) requires only a consideration of the parties' standard of living in awarding spousal support.

Further, whereas the parties may waive spousal support, public policy prohibits the waiver of child support. Also, the state's legislative policy on child support is to make children "the state's top priority" and the legislative policy on spousal support is for spouse's to be self-supporting within a reasonable period of time.

Given the conflicting policies and purposes of child and spousal support orders, the *Blazer* court declined to adopt a rigid rule that would require all of Scott's income to be used in making a spousal support order. Instead, it held that the trial court's determination of what represents income available for support is committed to the sound discretion of the court.

The *Blazer* court then stated that the trial court properly exercised its discretion in attributing Scott's reinvested earnings to the business instead of to husband because substantial evidence supported that determination, to wit, Scott's testimony and the testimony of Scott's expert that BW would not exist unless it diversified.

In support, the court cited *Marriage of Dick* (1993) 15 CA.4th 154, which held that a court may look past the apparent form of ownership in which a spouse's assets are held to determine the spouse's true interest in them and their availability, in assessing the spouse's ability to pay support. The court also cited *Marriage of Olson* (1993) 14 CA.4th 1, which held that a trial court had discretion to determine whether to consider as income available for spousal support contributions made by a participant to his retirement plan as well as accruals or accrued earnings of that plan which are not withdrawn.

Finally, the court offered dicta that even if the child support statute (Family Code Section 4058) was applied to the facts in *Blazer*, it would support the trial court's decision because that statute excludes from income "expenditures required for the operation of a business." The *Blazer* court's decision is significant because it resolves for the first time the question of whether the child support definition of income applies to spousal support cases. The *Blazer* court answered this question with a resounding no and emphasized that the strict rules and guidelines of child support are ill suited to spousal support determinations because spousal support decisions must involve the independent exercise of judicial discretion. Family Code Section 4320 and case law interpreting it require the weighing of numerous different factors.

Also significant about the *Blazer* decision is the different rules that now exist between employee spouses and self-employed spouses. The *Blazer* court did not overturn, criticize or even question the existing line of cases regarding what constitutes an employee spouse's income available for spousal support. Under those cases, any income of an employee spouse, whether it is salary, bonus income or exercise of stock options must be counted as income for the purpose of calculating spousal support. It is questionable whether this dichotomy makes sense. Why should there be greater discretion to a trial court in self-employment cases and less discretion in cases with employee spouses?

Finally, the *Blazer* decision is important to child support cases. In dicta, the *Blazer* court suggested that reinvestment of self-employment income back into a business for viability purposes can constitute a "business expense" and hence, be excluded from income under the child support statute's definition of income. This interpretation of the child support statute expands judicial discretion in determining income available for child support by allowing court's greater flexibility in determining what constitutes a "business expense." This expansion of judicial discretion is ironic given the *Blazer* court's previous discussion of child support rules being fixed and highly regulated.

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