Commentary

Double Dipping in the Divorce Context Is Inherently Unfair

By Alan S. Pralgever and Gerald Shanker

Since the seminal case of *Steneken v. Steneken*, 873 A.2d 501 (N.J. 2005), the New Jersey Supreme Court has consistently ruled on issues involving "double dipping" in matrimonial cases in a manner significantly different than virtually any other court in the nation. In our view, it has done so incorrectly, as the position makes little or no economic sense. The New Jersey Supreme Court's position is simply not economically fair, justified or sustainable in our view, and should be reconsidered. Instead of resulting in "equitable distribution," the *Steneken* case actually functions effectively as an unfair financial penalty or tax.

The concept of "double dipping" concerns the double counting of a marital asset—once in the context of property for equitable division purposes, and once in the context of alimony and/or child support. The concept of "double dipping" is premised on the fact that the same cash flows capitalized to determine the present overall value of a spouse's business for purposes of equitable distribution, is also considered as a component of that spouse's income for purposes of alimony and child support calculations. For example, if a spouse gets half of the value of his/her spouse's business, the theory is that he should not secure alimony and child support on the basis of *all* of the income that s/he makes from that business after the divorce is finalized because that would in effect be rewarding that spouse twice for the same valued asset. In most cases, one would have to borrow or take more income out of the business to buy out his/her spouse as well, adding insult to injury with regard to the "double counting" of income.

A simple way to think about this would be to consider a real estate purchase. If the spouse in a divorce case bought his/her spouse out of the marital home and paid her for her 50 percent interest in equitable distribution, he would not then also receive the increased value of the house when she later sells it, assuming the real estate market was to rise after the divorce. Yet, that is preciously what the New Jersey Supreme Court seems to suggest with regard to determining alimony and child support after the divorce, once a spouse secures half the value of the other spouse's business as part of a divorce settlement or decision. Instead, the paying spouse's post-marital income should be "normalized" so that the spouse who has been bought out for equitable distribution purposes is not benefited twice. This concept, which recognizes the economic aspect of a buy-out, is the one espoused by virtually every state but New Jersey.

One of the leading cases on this issue comes from the Court of Appeals of the State of New York, *Grunfeld v. Grunfeld*, 94 N.Y. 2d 696 (2000). In *Grunfeld*, the court described the concept of double dipping in the following manner: "We agree with the defendant that the Supreme Court [the trial court in New York State] impermissibly engaged in the 'double counting' of income in valuing [the husband's] business which was equitably distributed as marital property, and awarding maintenance to the [wife]…."

In *Grunfeld*, the valuation of the husband's business involved calculating the husband's projected future excess earnings. Thus, in valuing and distributing the value of the husband's business, the Supreme Court converted a certain amount of the husband's projected future income stream into an asset, which is precisely what a discounted cash flow valuations analysis does. However, the trial court also calculated the amount of maintenance to which the wife was entitled based on the husband's total income which must have included the excess earnings produced by his business. As the Court of Appeals concluded, this was improper.

> Once a Court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout." *Grunfeld*, 94 N.Y. 2d at 705, *citing McSparron v. McSparron*, 87 N.Y. 2d 275 (1993) *see also Rattee v. Rattee*, 767 82d 415 (n.h. 2001) (business income exceeding "reasonable compensation" that was utilized to calculate value of business was properly disregarded for support calculation purposes thus avoiding "the double dip").

Notwithstanding the fact that the concept of "double dipping" is widely discredited in most states, the New Jersey Supreme Court, commencing with *Steneken v. Steneken*, 873 A.2d 501 (N.J. 2005), specifically, and in our view improperly, re-defined the concept of "double dipping" for purposes of setting alimony and child support. Justice Rivera Soto writing the majority opinion instead relied on a concept of what he referred to as overriding "fairness and equity" which he defined this as follows:

> Because we embrace the premise that alimony and equitable distribution calculations, albeit interrelated, are separate, distinct, and not entirely compatible financial exercises, and because asset evaluation methodologies applied in an equitable distribution setting are not congruent to factors relevant to alimony considerations, we conclude that the circumstances here present a fair and proper method of both awarding alimony and determining equitable distribution.
>
> We find no inequity in the use of the individually fair results of paying due to the use of an asset valuation methodology normalizing salary in an on-going close corporation for equitable distribution purposes, and the use of actual salary received in the calculus of alimony. The interplay of those calculations does not constitute "double counting." *Steneken v. Steneken*, 873 2d 501, 507 (N.J. 2005).

This reasoning however was rejected in a lengthy dissent by Justice Virginia Long, joined by Justices Barry Albin and James Zazzali, who suggested that "double dipping" was inappropriate and referred to the New York decision, *Grunfeld v. Grunfeld*, and New Hampshire case, *Rattee v. Rattee*, 146 N.H. 44, 767, A.2d 415 (N.H. 2001). As Justice Long concluded:

> To me, the answer is neither to allow the unfettered dual use of a single income stream nor to require the regular reconciliation adopted by the trial judge who felt compelled to use the same figure in both calculations. Rather, judges should be able to use the "real" income for alimony and the "normalized" income for corporate valuation so long as the ultimate outcome recognizes that a single income source (the difference between the real and normalized income) played a part in both.

In reality, once the buy-out of an interest in a business or partnership is determined in order to determine the "buy-out" price, it should not be considered again for purposes of calculating alimony and child support. Thus, absent some effort to "normalize" that income stream for purposes of calculating alimony and child support, "double dipping" inevitably occurs.

What makes the *Steneken* decision even more inequitable and unfair is the fact that Mr. Steneken' s business valuation was used in determining that he had a reasonable, normalized compensation of $150,000. However, because Mr. Steneken had received annual distributions of $208,000, far in excess of the normalized compensation, which his wife had benefitted from during their marriage, the trial court determined that he had excess earnings of $58,000 per year, and capitalized this money to determine the value of the business. Mr. Steneken retained the business, and Mrs. Steneken was given other marital assets as an offset for her share of the value of the business. The trial court was then confronted with the issue of whether the future excess earnings from Mr. Steneken's business, income that had already been valued and divided in equitable distribution, should still again be considered for purposes of establishing his alimony obligation. The trial court determined that the excess income stream should not be included precisely because Mrs. Steneken had received her share of the value of excess income by way of equitable distribution; and thus based Mr. Steneken's support obligation on his normalized compensation of $150,000.

To illustrate this point, consider the treatment of qualified retirement plans. Once the qualified plan assets are divided, the retirement benefits received by each spouse are not considered in support calculations, because to include such distributions would give the recipient an improper second bite of the apple. Yet, the New Jersey Supreme Court seems to ignore this equitable and legal concept when it awards a spouse half the value of a business for the purpose of equitable distribution, and then fails to "normalize" income for purposes of alimony and child support. All this is clearly economic, so that as a function of equity, the income derived from the buy-out should not be counted twice. Thus, by using the "actual," as opposed to "normalized," income to evaluate alimony and child support, the Supreme Court in *Steneken* in effect then made the "double dipping" calculus. The husband in effect was unfairly forced to pay "twice" for the wife's equitable interest in the business.

Although we most frequently encounter business valuations that employ an income approach, businesses are also valued using transaction or market based approaches. In those situations, the double dipping issue should be addressed on a case-by-case basis.

It should also be noted that both New Jersey and New York prohibit "double recovery" in the valuation of businesses when buying out shareholders. See *Balsamides v. Perle*, 160 N.J. 352 (1999), and its companion case, *Lawson Mardon Wheaton v. Smith*, 160 N.J. 383 (1999), which deal with corporate/partnership split ups relating to oppression and find the oppressors should not be rewarded for their oppression by double counting. *See Musto v. Vidas*, 333 N.J. Super 52 (App. Div. 2000); *Cawley v. SCM Corp.*, 72 NY2d 465 (1988). In both states, a party gets bought out of the business, but is not entitled to double recovery from the future business income.

It seems to us that this issue warrants reconsideration by the New Jersey Supreme Court, and that absent same, some kind of legislative action would be desirable as a function of equity and fairness to avoid "double recovery." ■

Pralgever is a partner at Greenbaum Rowe Smith & Davis in Roseland. Shanker is a CPA, and a partner at Kreinces Rollins & Shanker in Paramus.

Opinion Submissions
The *Law Journal* welcomes op-eds. Please send proposals to Law Editor Juliette Gillespie at JGillespie@alm.com.