

# P E N N S Y L V A N I A LAW WEEKLY

## **The Rule Against Double Dipping**

*Sums for support purposes cannot be considered for equitable distribution*

By Dorothy K. Phillips  
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Like the famous rule against perpetuities, which we all learned during law school, the rule against "double dipping" – considering the same funds for both support and equitable distribution purposes – is also set in stone.

The Superior Court underscored that point last month when a panel decided *Berry v. Berry*, PICS Case No. 06-0618 (Pa. Super. May 2, 2006) Panella, J. (15 pages).

Three issues were raised by Susan M. Berry, the mother in the case, on appeal: (1) Did the trial court err in classifying a severance payment for Douglas R. Berry, the father and Susan's husband, in determining support, rather than reserving the issue for equitable distribution of marital assets? (2) Did the trial court err in determining that a partnership accrual account constituted income for support purposes rather than a marital asset? and (3) Did the trial court err in permitting Douglas Berry's income to be reduced by mandatory pension contributions; mandatory political action committee contributions; loan principal repayments; and un-reimbursed business expenses? Of these three issues, the Superior Court determined that the classification of severance pay constituted a case of first impression in the state's appellate courts.

Douglas Berry began employment with the accounting firm of KPMG in 1983. He was made a partner in 1995. In June 2004, KPMG terminated his employment. Termination was conducted according to KPMG's bylaws and accordingly, made a severance payment of \$306,000, equal to seven months of Douglas Berry's base salary from the prior year. KPMG also paid a pre-tax distribution of the balance of his accrual account (\$109,000), representing income earned by him in prior periods but not yet distributed. One month after termination, Douglas Berry became employed at the accounting firm of Parente Randolph.

On Jan. 30, 2004, Douglas Berry filed for divorce and on May 6, Susan Berry filed a complaint for spousal and child support. That matter came before a conference officer on Sept. 13 and an order was entered on Sept. 20 determining Susan's net monthly income to be \$4,150 and Douglas' monthly net income to be nearly \$40,000. Susan was given an annual earning capacity of \$65,000 and Douglas was assigned gross earnings for 2004 in the amount of nearly \$740,000. An order for \$3,150 bi-weekly for child support and almost \$4,000 bi-weekly for spousal support was entered, retroactive to May 3.

The support order was modified as of Jan. 1, 2005 with Douglas Berry to pay child support and spousal support bi-weekly in the amount of \$3,900 for child support and \$1,500 for spousal support as the parties shared custody as of that date.

# P E N N S Y L V A N I A LAW WEEKLY

Douglas Berry filed exceptions in the trial court and requested a special support hearing. Susan Berry argued at the hearing that the severance pay and accrual account should not be considered for support purposes pursuant to Section 4302 of the Domestic Relations Code (23 Pa. C.S.A.). The mother argued that instead, those two accounts should be considered as marital assets subject to equitable distribution pursuant to 23 Pa. C.S.A. Section 3501. The trial court rejected Susan Berry's arguments and found both the severance pay and accrual account were income pursuant to 23 Pa. C.S.A. Section 4302 and were therefore included in Douglas Berry's income.

On June 9, 2005, the trial court entered an order, retroactive to May 13, 2004, requiring Douglas Berry to pay \$1,900 bi-weekly for the two children and \$3,000 bi-weekly for spousal support. The order further required Douglas to pay \$1,800 bi-weekly for child support and \$1,400 bi-weekly for spousal support effective Jan. 1, 2005 in that the parties shared equal custody of the children. Susan filed a timely appeal from the trial court's decision.

Citing *MacKinley v. Messerschmidt*, 814 A.2d 680 (Pa. Super. 2002), the Superior Court found that the court must consider all forms of income. However, considering that there is a prohibition against double dipping for support and equitable distribution purposes, a trial court may not include income as support which constitutes marital property pursuant to 23 Pa. C.S.A. Section 3501. The court cited *Miller v. Miller*, 783 A.2d 832 (Pa. Super. 2001) and *Rohrer v. Rohrer*, 715 A.2d 463 (Pa. Super. 1998) for the proposition that a court cannot double dip by including funds for both support and equitable distribution purposes. Obviously, if monies are included for support purposes, they will be precluded from being considered as marital assets. Susan Berry argued that both the severance payment and accrual account were marital assets and by the same being considered for support purposes, the mother would only get \$3,000 of child support for seven additional months while if these monies were considered as marital assets, the total would be in excess of \$415,000. Susan Berry argued that if these accounts were considered as income for support purposes, Douglas Berry would get a windfall since double dipping is not permissible and the inclusion would preclude the monies from being considered at equitable distribution.

## **A Crucial Question**

The Superior Court posited that the trial court did not consider the crucial question of the time period when certain income was earned. Obviously, marital property includes all property acquired by either party during the marriage as well as any property acquired post-separation until the date of divorce if that property is acquired in exchange for marital assets, citing *Fishman v. Fishman*, 805 A.2d 576 (Pa. Super. 2002) as well as 23 Pa. C.S.A. Section 3501.

The Superior Court determined that with respect to the partnership accrual account, the money was earned during the marriage and was therefore marital property subject to equitable distribution. The Superior Court found that the trial court abused its discretion by finding that the partnership accrual account (\$109,000 before taxes) was available for support purposes.

# P E N N S Y L V A N I A LAW WEEKLY

Using the same standard of examining the time period when income was earned, the Superior Court next addressed the severance pay. After examining the decisions of other states concerning classification of severance pay, the *Berry* court found that the majority of states had considered that the determination of the classification revolved around whether the severance pay was used to compensate the employee for efforts made during the marriage or whether it was to replace post-separation earnings. In this case, the severance agreement in KPMG's bylaws indicated that the intent was to replace post-separation earnings and that payment was conditioned on termination. In the instant matter, the severance pay arose post-separation. The Superior Court therefore held that the severance pay constituted income and did not qualify as a marital asset. It is the intent as expressly stated in the bylaws of the company as to whether the severance pay is compensation for efforts during the marriage or whether that pay replaces post-separation earnings which determines whether severance pay will qualify as income or as a marital asset.

Susan Berry's final argument was that the trial court erred in permitting Douglas Berry's net income to be reduced by mandatory pension contributions (nearly \$55,000); mandatory political action committee, or PAC, contributions (\$550) loan principal payments (more than \$15,500); and un-reimbursed business expenses (\$15,500). That income reduction was more than \$86,000. The Superior Court found the trial court just accepted Douglas' expert's opinion that the various expenses were deductible from his gross income, without making its own inquiry. There are some situations when un-reimbursed business expenses may be deducted in determining gross income if the expenses constitute bona fide expenses. Pennsylvania Rule of Civil Procedure 1910.16-2(c)(1) specifically provides for certain deductions from monthly gross income to arrive at net income, one of which is mandatory pension contributions, citing Pennsylvania Rule of Civil Procedure 1910.16-2(c)(1).

The *Berry* court stated:

"We find that the trial court abused its discretion with respect to the deducting the Mandatory Pension Contributions to arrive at gross income. Mandatory Pension Contributions do not qualify as business expenses such that they can be deducted pursuant to Rule 1910.16-2(a)(2). However, as noted *infra* in this Opinion, this deduction is properly taken when determining monthly net income." The Superior Court found that with respect to the remaining deductions for un-reimbursed business expenses, mandatory PAC contributions, and loan principal payments, the record only repeated Douglas Berry's expert's conclusions that the deductions were proper. The Superior Court therefore held that the trial court abused its discretion because it did not make its own independent review of said expenses. The Superior Court found that the record supported that Douglas' pension contribution was in fact mandatory and qualified to be deducted from monthly gross income. The Superior Court therefore vacated the child support order and remanded the matter to the trial court to recalculate Douglas Berry's income.

# P E N N S Y L V A N I A LAW WEEKLY

For practicing attorneys, one lesson to be learned from *Berry* is that certain deductions may qualify to reduce gross income but that the burden of proof is on the person so requesting to show the bona fide nature of the deductions. With regard to severance pay, the intent set forth for severance pay by the employer's agreement is controlling as to whether such pay will qualify as a marital asset or as support. With regard to an accrued partnership account, any account that accrued during the course of the marriage constitutes a marital asset subject to equitable distribution. It is wise for the practitioner to review this information prior to trying a case for support because once used for support purposes, income will not qualify again as an asset for equitable distribution purposes. •

*For more information contact Dorothy K. Phillips, Esq at (215) 568-7757.*