Double Dipping in the Divorce Context is Inherently Unfair

By Alan S. Praglaver and Gerald Shanker

Since the seminal case of Steneke v. Steneke, 873 A.2d 501 (N.J. Super. 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, justifiably or sustainable in our view, and should be reconsidered. Instead of resulting in “equitable distribution,” the Steneke 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 the income or/and child support calculations. The theory of “double dipping” is premised on the fact that the same cash flows capitalized to determine the 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/hers spouse’s business, the theory is that he should not secure alimony and child support on the basis of all of the income that he/she makes from that business after the divorce is finalized because that would in effect be rewarding that spouse twice for the same value of net. In most cases, one would have to borrow or borrow more money out of the business to buy out his/hers 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 house purchase. If the spouse in a divorce court case bought his/her spouse out of the marital home and paid her for her 50 percent interest in equitable distribution, he would not 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 precisely what the New Jersey Supreme Court seems to suggest with regard to determining alimony and child support after the divorce, only a spouse pays 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, while it recognizes that the economic aspect of a buy-out, is 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 and the Supreme Court that the court in New York State impermissibly engaged in the ‘double counting’ of income in valuing [the husband’s] business, which was capitalized to determine 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 considered a certain amount of the husband’s projected future income stream into an asset, which is precisely what a discount to present value 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 273 (1993) see also Rattee v. Rattee, 767 N.Y.S.2d 415 (N.Y. 2003) (business income exceeding “reasonable compensation” that was utilized to calculate a greater 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 discussed in the divorce community, to our knowledge, the New Jersey Supreme Court, commencing with Steneke v. Steneke, 873 A.2d 501 (N.J. 2005), specifically, and in our view improperly, utilized the concept of “double dipping” for purposes of calculating 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 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 valuation methodologies applied in an equitable distribution setting are not controlled for factors to alimony considerations, we conclude that the circumstances present here a fair and proper method of both awarding alimony and determining equitable distribution.

We find no inequity in the use of the same data. In fact, individually fair results of paying due to the use of an asset valuation methodology normalizing salary in the context of equitable distribution purposes, and the use of actual salary received in the calculus of alimony. The inherent flaw of those calculations does not constitute “double counting.” Steneke v. Steneke, 873 A.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 divorce in 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 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 as to achieve 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,” it should not be considered again for purposes of calculating alimony and child support. Thus, absent some effort to “normalize” the same business stream for purposes of calculating alimony and child support, “double dipping” inevitably occurs.

What makes the Steneke decision even more irrefutable and unfair is the fact that Mr. Steneke’s business valuation was used in determining that he had a reasonable, normalized compensation of $150,000. However, because Mr. Steneke had received annual distributions of $280,000, far in excess of the normalized compensation in which his wife had benfitted from during their marriage, the trial court determined that he had excess earnings of $38,000 per year, and real capitalized this money to determine the value of the business. Mrs. Steneke retained the business, and Mrs. Steneke was given other marital assets in addition to her share of the value of the business. The trial court was then confronted with the issue of whether the future excess earnings of $38,000 were Mr. Steneke’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 considered pro rata.

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