

Double Dipping and Support Cases – What Constitutes Income When It Might be Awarded as Support?

By: Gunnar J. Gitlin
The Gitlin Law Firm, P.C., Woodstock, Illinois
© 2018 - March 28, 2018

Executive Summary:

Illinois statutory law, both for support and maintenance purposes, should be amended to conform with the common practice that double dipping should be avoided. This is more compelling considering the impact of the 2015 maintenance guidelines (as slightly amended 2016 and again in 2018—and likely once again effective January 1, 2019). Attorney David Hopkins (one of the individuals perhaps most responsible for the maintenance guidelines) had made this point: “As to troublesome precedents, a statutory resolution is surely the soundest course. Thus, the ISBA Family Law Section Council now has a new task on which to focus.” But this points to the inequities of current resolution to divorce cases when focusing on the statutory law.

See *Gitlin on Divorce: A Guide to Illinois Matrimonial Law—4th Edition*

Property: Section 8-14(g) “Goodwill of Businesses and Professional Practices—Double-Dipping” and 8-14(g)(10) “Goodwill of Businesses and Professional Practices—Double-Dipping” for an in depth discussion of double dipping and Illinois case law regarding business valuation.

Maintenance: § 15-15 “Maintenance After Retirement”

§ 10-3[n] “Income Other Than Regular Salary and Nonrecurring Income,” and more particularly, § 10-3[v] “Double-Dipping: A Double Count of Income.”

Discussion:

Since January 1, 2015, what constitutes income for maintenance purposes has been – for the first time – defined consistent with what constitutes income for child support. But the public policy underlying child support and maintenance differs. So, while there are valid public policy considerations in defining income differently for support and maintenance purposes, the law in Illinois now uses the same definition of what constitutes income for support and maintenance.

The amendments to the maintenance guidelines in defining income may shine a light on Illinois case law regarding support. The case law is contrary to what most Illinois divorce lawyers believe it is. There is a common misconception regarding what constitutes “double dipping” under Illinois case law for child support purposes. That misconception is that there is double dipping when an asset is allocated as part of the marital estate and later is considered as income for support.

Keep in mind that Illinois was one of the first states to recognize “double dipping” inherent in the property standards when considering personal goodwill of a business both for the purpose of property division and as a factor in distributing marital property (often in favor of the less-moneyed spouse in long term marriage cases with significant opportunity cost, etc.). But many understood the early case law regarding double dipping incorrectly and believed that personal goodwill double dipping was due to its

consideration as property and maintenance. The common theme of recent Illinois child support case law is to allow double counting: first for property purposes and the second time for child support.

A 2014 appellate court reflects the problems with this line of case law. [IRMO Pratt](#), 2014 IL App (1st) 130465, contended that it was against public policy to allow the provisions in a marital settlement agreement to stand that provided that certain property allocated as part of the divorce settlement would not be considered as income for support purposes. *Pratt* will be discussed below. But the amendments to the maintenance standards in defining income the same for maintenance and support purposes amplify this problem.

This is an instance where the common practice of Illinois divorce lawyers is correct and the appellate court is wrong. But to right this wrong, the law regarding child support needs to be amended and allow the court in its discretion to *not* engage in double dipping. Prohibited double dipping statutorily should be presumptively considered when an asset is considered twice – once when it is distributed as marital property and a second time when it is liquidated and becomes income.

Income for Support Purposes Broadly Defined: At the outset, income for support purposes is defined extraordinarily broadly as is reflected by many Illinois appellate decisions. From the seminal *Rogers* decision:

Under these definitions, a variety of payments will qualify as "income" for purposes of section 505(a)(3) of the Act that would not be taxable as income under the Internal Revenue Code...

And from another post-*Rogers* decision:

Courts have included individual retirement account (IRA) disbursements representing deferred employment earnings, receipt of company stock from employment stock options, worker's compensation awards and the proceeds from pensions as income under the Dissolution Act. See [IRMO Lindman](#), 356 Ill. App. 3d 462 (2005); [IRMO Colangelo](#), 355 Ill. App. 3d 383 (2005); *Department of Public Aid ex rel. Jennings v. White*, 286 Ill. App. 3d 213 (1997); [IRMO Klomps](#), 286 Ill. App. 3d 710 (1997).

[Jennings v. White](#) was an early case reviewing case law for types of income that constitute income in determining support:

It is well-settled law that the legislature's inclusive language--"all income from all sources"--is to be broadly applied. See [IRMO Dodds](#), 222 Ill. App. 3d 99, 103 (1991). Section 505's language has been construed to include various items such as a tax refund attributable to maintenance payments made to a former spouse ([IRMO Pylawka](#), 277 Ill. App. 3d 728, 732 (1996)); deferred compensation contributions (*Posey v. Tate*, 275 Ill. App. 3d 822, 826 (1995)); a military allowance ([IRMO McGowan](#), 265 Ill. App. 3d 976, 976-77 (1994)); severance pay received in the year prior to the period for which support was due ([IRMO Benkendorf](#), 252 Ill. App. 3d 429, 447 (1993)); a parent's "pro forma" capital account to which his firm made allocations based on the firm's annual performance ([IRMO Winne](#), 239 Ill. App. 3d 273, 285 (1992)); income from investments and bonuses from a closely held corporation ([IRMO Olson](#), 223 Ill. App. 3d 636 (1992)); passive income from bonds and securities ([IRMO Harmon](#), 210 Ill. App. 3d 92 (1991));

and non-recurring income (*IRMO Hart*, 194 Ill. App. 3d 839, 850 (1990)). ***

The case then discussed *DeRossett*, where the Illinois Supreme Court in 1996 considered whether a workers' compensation award constituted marital property. The court noted that the IMDMA's definition of marital property as "all property acquired by either spouse subsequent to the marriage" creates a rebuttable presumption that all property acquired after the marriage is marital property and then stated:

Given the analogous language of section 505, regarding income for child support purposes, we hold that section 505 creates a rebuttable presumption that all income, unless specifically excluded by the statute, is income for child support purposes.

Because of this broad definition, the question of whether an asset can be considered both for property distribution and for support (and maintenance) becomes of critical importance. We will see that these cases build on each other but many of the building blocks are fact sensitive.

Klumps – Retirement Benefits Divided at Time of Divorce Constitute Income when Payor

Receives: *IRMO Klumps*, 286 Ill.App.3d 710 (Fifth Dist., 1997). The opening paragraph aptly summarizes the case:

Richard Klumps appeals from the order of the St. Clair County circuit court which set child support for his two minor children at 25% of his net income from his wages for his current employment and 25% of his net income from his monthly military pension derived from his former United States Air Force service. Richard argues that the trial court erred in using his retirement benefits for assessing the proper level of child support, since those benefits were previously determined to be marital property and Barbara Klumps, Richard's ex-wife, was awarded a share of those benefits in the judgment of dissolution. We disagree with the argument that the court erred in using Richard's share of his retirement income for assessing child support, and therefore, we affirm.

The appellate court analogized the retirement benefits to accounts receivable of a business. The appellate court stated, "The accounts receivable of a divorcing spouse's business are often used to assess the value of the spouse's business, whether classified as marital or nonmarital property. The income from those same accounts receivable, when actually received, is then available for use in determining net income for child support purposes." It cited the *IRMO Lee*, 246 Ill.App.3d 628 (1993) and *IRMO Tietz*, 238 Ill.App.3d 965 (1992) for that proposition. Both had involved accounts receivable – with *Lee* addressing a medical practice and *Tietz* a law practice. But in each case the appellate court merely affirmed the trial court's discretion where the trial court refused to attempt to differentiate the accounts receivable from later income. Clearly, this approach would have been impracticable. In any event, the appellate court stated:

The accounts receivable described in *Lee* and *Tietz* are similar to Richard's interest in his retirement benefits at the time of the dissolution. At that time, Richard's pension was partially earned, with a known value, but had not yet been collected. The pension was clearly marital property subject to equitable distribution. *IRMO Weiler*, 258 Ill.App.3d 454 (1994). However, the fact of its classification as marital property prior to the date

Richard began collecting it in monthly installments does not bar it from use in determining net income for child support.

The *Gitlin on Divorce* comment to the 1997 *Klumps* decision had stated:

The father in *Klumps*, the appellant, relied heavily on *Harmon*. The father's brief stated that *Harmon* "is authority that an item may be a marital asset or income, but not both." *Harmon* said nothing of the sort. The Second District in *Harmon* passed on whether various types of income of the child support obligors would be included in calculating net income. The *Harmon* court considered passive income the mother received from bonds or securities -- passive income which was reported on her tax return but not actually received, gift income, and also interest income. The interest income was being paid to her by the child support recipient, the father who was paying the mother \$750 per month interest on account of a property settlement balance due to her of \$90,000. The appellate court did not discuss rationale for excluding interest. It merely stated:

Finally, we also agree with respondent that the monthly interest payments which comprise her share of the marital assets should not be used to calculate her net income. (See IRMO Hart (1990), 194 Ill. App.3d 839, 850.) We therefore conclude that the trial court did not abuse its discretion in determining respondent's net income. [Emphasis added.]

Then the case concluded:

We have found no case, and we have not been directed by either party to any case, discussing the precise issue raised in this appeal. However, it is plain that the ruling of the trial court herein was in harmony with the clear mandate of the Act. If we were to allow retirement income to be excluded from net income when setting child support merely because those benefits, prior to their receipt, were used to determine an equitable distribution of the parties' marital property, we would be adding provisions to the Act that do not exist. We will not twist the clear meaning of the Act to invent an otherwise nonexistent rule that would be contrary to the purpose of making "reasonable provision for spouses and minor children during and after litigation." 750 ILCS 5/102(5).

Again, though, this is a fact-based case. The wife in 1992 had been awarded only 35% of the husband's retirement at the time of the divorce. The key caveat as provided in the appellate decision was:

We find it significant that Richard did not argue that the property distribution was made inequitable by the court's order setting child support from his retirement income. Our review of the record reveals that the property distribution remains fair and equitable.

But later cases cited in the holding fail to mention this critical language provided by *Klumps*.

Colangelo – Post-Decree Distributions of Stock Options: Unvested at Time of Divorce but Awarded Solely to Husband: *IRMO Colangelo*, 355 Ill. App. 3d 383 (2d Dist. 2005), is an important post-*Rogers* case addressing the argument that cash flow received from the support payor should not be considered income when it represented funds awarded in the initial divorce – because doing so would be

improper double dipping.

This, again, is a case in which the facts are critical – because the asset in question was not divided equally or even equitably as would usually be the case. In *Colangelo* the father received 100% of the unvested stock options – as his part of the net marital estate. The appellate court recited the facts as:

The trial court divided the marital property with the intent to award 48% to Julius and 52% to Vicki. As pertinent here, Julius received 50% of the net value of vested stock options in NCI "if & when *** exercised" and 100% of unvested stock options in NCI. Because the vested and unvested stock options had yet to be exercised, the judgment listed their value as "unknown." In all, Julius's share of the marital property was valued at \$152,777 plus his 50% share of the vested stock options and his 100% share of the unvested stock options. Vicki's share of the marital property was valued at \$164,264 plus her 50% share of the vested stock options... Julius was ordered to pay monthly child support [in an amount certain]. Also, the court ordered Julius to pay, as child support, "20% of net of any bonus/commission/overtime received."

And note that we have a recent case reversing a trial court's award when the trial court did just that—divided the vested stock options equally but awarded the unvested stock options to the husband solely. See [IRMO Micheli](#), 2014 IL App (2d) 121245. The importance of this fact to the decision is apparent when the appellate court stated, "Second, we note that the trial court allocated the unvested stock options to Julius..." The remainder of the decision was prefaced with the caveat, "However, even if the stock distribution is marital property as Julius claims..."

In any event, the issue was whether the former husband's stock distributions should be considered income for the purpose of paying guideline child support. The appellate court rejected the former husband's argument asserting the doctrine of *res judicata*. The appellate court noted that the trial court in the original divorce did not address whether stock distributions could be considered income for child support purposes. The trial court awarded the stock options as marital property but had also previously ruled that the former husband was to pay "[20%] of net of any *bonus/commission/overtime* received." Before deciding the petition for a rule to show cause, the trial court did not rule on whether the stock at issue was a bonus that was income for child support purposes. And that was the critical problem for the appellate court.

The appellate court then addressed the double-dipping argument:

[W]e note that the trial court allocated the unvested stock options to Julius. These stock options subsequently became vested and were distributed, and it is this distribution that is at issue. Because the unvested stock options transformed into a realized distribution, it would seem that the distribution is not marital property being counted as income, but instead the fruits of the marital property. *However, even if the stock distribution is marital property as Julius claims, the pertinent case law persuades us that marital property can also be income for child support purposes.* In *IRMO Klomps*, 286 Ill. App. 3d 710 (1997), the court ruled that the petitioner's retirement benefits constituted income for child support purposes even though the same retirement benefits had been divided as marital property. *Klomps*, 286 Ill. App. 3d at 713-17. The court found that section 505(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505(a)) compelled such a result. *Klomps*, 286 Ill. App. 3d at 713-17. (Emphasis added).

The trial court in addressing double dipping had stated, "And the basis is that the Court has defined this as property. And to me it would be the same as if you received a piece of real estate, and then after the judgment, sold the real estate and got capital gains on it. And now this is considered to be income, and that is income, but it's not income for purposes of child support, because it's property that was divided in a judgment for dissolution." I agree with the trial court's reasoning.

But the holding of *Colangelo* was:

Julius's contention is that once the stock options were allocated as marital property, they could not later be classified as income for child support purposes. Julius does not dispute that if the stock options had not been awarded as marital property, they would meet the definition of "income" once distributed. Further, the trial court's child support order listed bonuses as one source of income, and there is no deduction listed in section 505(a)(3) for a stock bonus. Therefore, under *Klumps*, we find that, *even though the unrealized stock options were allocated to the parties as marital property, the realized stock distribution met the definition of "income" for purposes of determining child support*, and the trial court erred in finding that the stock distribution was not income. Thus, we reverse the trial court's denial of Vicki's petition for a rule to show cause and remand for further proceedings. (Emphasis added).

So keep in mind the somewhat limited nature of this opinion: 1) the asset in question had not been equitably allocated as part of the marital estate even though it clearly had been part of the marital estate; 2) the judgment had defined income as including bonuses and it was not clear whether the stock awarded should have been considered as a "stock bonus."

***Lindman* – Case Not on Point re Double Dipping But Ruling IRA Distribution May Be Considered Net Income for Unemployed Father Given Facts of Case:** Another example of a bad case continuing the trend in making bad law is the Second District's 2005 *IRMO Lindman*, decision, 356 Ill. App.3d 462 (2d Dist. 2005). [For a good discussion of IRA distributions of child support, review a recent Second District Rule 23 decision that provides a summary of the applicable case law](#) - starting at paragraph 33, page 14 of the decision (see 2012 IL App (2d) 100681-U).

Lindman held that the trial court did not err when it refused to grant petitioner's petition to reduce child support because he lost his job and was receiving distributions of IRA awarded him in dissolution proceeding. According to *Lindman* the distributions from his IRA were properly considered §505 "income," therefore making his net income greater than when support was set. Significant factors in the trial court's award were the fact that the ex-husband lost his job due to alcohol abuse and that at the time of the divorce he earned approximately \$80,000 annually. But two years before filing his petition for modification (2000 and 2001), the ex-husband had a gross income of \$160,000 and \$100,000, respectively. *Lindman* contains several quotes establishing the comprehensive sweep of what constitutes income for support purposes. Then it tangentially noted the potential double-dipping argument:

In passing, we note a potential "double counting" issue that petitioner does not raise. See *IRMO Zells*, 143 Ill. 2d 251, 256 (1991); see also *IRMO Schneider*, 343 Ill. App. 3d 628, 639 (2003) (Bowman, J., dissenting in part). [But note the difference between how *Schneider* handled double dipping compared to *Zells*. Neither case was on point in terms of the majority decision and this was the reason the appellate court case cited the

dissenting opinion.] Consider, for example, the following situation. In year one, a court sets a parent's child support obligation at X. This amount is based on a calculation of the parent's year one net income, which includes money the parent puts into an IRA. In year five, the parent begins receiving disbursements from the IRA, and, that same year, the parent asks the court to modify his or her child support obligation. To determine whether modification is proper, the court looks to see whether there has been a change in the parent's net income. See 750 ILCS 5/510. In making that determination, the court considers as part of the parent's year five net income the amount of the disbursements from the IRA. It may be argued that the court is double counting this money, that is, it is counting the money on its way into and its way out of the IRA. In other words, the money placed into the IRA from year one to year five is being counted twice. To avoid double counting in this situation, the court may have to determine what percentage of the IRA money was considered in the year one net income calculation and discount the year five net income calculation accordingly. As noted, this issue is not before us today.

Here, petitioner does not argue that the IRA money has been double counted. Moreover, the record does not reveal whether the IRA includes money that was considered in the original (year one) determination of petitioner's net income, so any evaluation of this argument on petitioner's behalf would be mere speculation. Thus, for present purposes, it is sufficient to note that this potential issue could arise in future cases.

Note the Rule 23 decision mentioned above tried to elucidate the current state of Illinois case law:

The trial court noted that the IRA was allocated to Thomas at the time of dissolution and that to include it as income would result in an impermissible double counting. Pursuant to *Lindman*, the "double counting" issues arises if Thomas contributed to the IRA after the dissolution and the contributions were considered as income in calculating the base amount of child support. See *id.* at 470 (double counting is when, relative to net income for child support purposes, the money is counted on its way into and its way out of the IRA). Double counting does not arise merely because the IRA was allocated as part of the dissolution judgment. Nonetheless...

***Eberhardt* – IRA Distributions as Net Income Where Payor Evasive and Had a Pattern of Non-Disclosure Given Alleged Sudden Downturn in Business:** [*IRMO Eberhardt*](#), 387 Ill. App. 3d 226, 232 (First Dist., 2008), addresses the claim that there is an improper double counting occurs when IRAs that are awarded in a property settlement are later liquidated and viewed as income. The appellate court cited *Klumps* for its above quoted discussion of the language of the IMDMA:

"If we were to allow retirement income to be excluded from net income when setting child support merely because those benefits, prior to their receipt, were used to determine an equitable distribution of the parties' marital property, we would be adding provisions to the Act that do not exist.

Again, the facts were controlling in this case and we have another case of bad facts leading to our body of case law. In applying the facts and not finding an abuse of the trial court's discretion the appellate court stated:

Here, as in *Croak*, [an out of state case relied upon] the court found Stephen to be

evasive and less than straightforward about his finances. It found a pattern of nondisclosure. The court did not believe Stephen's story of a sudden downturn in business. The court addressed the double counting issue, calling it a misguided argument on Stephen's part because the IRA income was less of an influence on the court's decision than the perception that Stephen's testimony was not credible. The court also noted that Stephen apparently spent money for his own benefit rather than meeting his court ordered support obligations to his children.

But note that these double dipping cases such as *Lindman* and *Eberhardt* might be revisited at some time in light of the Illinois Supreme Court's 2012 *McGrath* decision.

***Schacht* – Portion of Award Already Distributed as Property to Support Recipient Cannot be Again Considered for Support Purposes:** The case that is usually cited for the stance that cash flow can be support or maintenance but not both was the *Schacht* case. The actual holding of the case, though, was that the court may consider worker's compensation benefits both as property for settlement purposes and as an income stream but may not consider *entire award* as both. [*IRMO Schacht*](#), 343 Ill.App. 3d 348 (2d Dist. 2003). The trial court originally calculated respondent's child support obligation on the assumption that he was receiving approximately \$1,500 per month in TTD. Later, there was a lump-sum payment intended to replace that income. However, the support payor received only half of the lump-sum award because the trial court awarded petitioner 30% of the sum as marital property and set aside another 20% to create trusts for the children's educations. The support amount remained unchanged. The case states:

In other words, respondent received only half of the worker's compensation settlement, but continued to pay child support as if he had received the entire amount. As a result, the settlement proceeds were nearly exhausted by the time respondent filed his motion to reduce support. While *Dodds* holds that a worker's compensation award may be considered income to the receiving spouse, it presupposes that he receives the entire award. Where, as here, a settlement is apportioned as marital property under [*DeRossett*](#), "it follows that a child support award based on that settlement must be reduced proportionately."

Therefore, "Under the circumstances of this case, the court committed an impermissible 'double counting' of the settlement proceeds. See *IRMO Talty*, 166 Ill. 2d 232, 236 (1995). Furthermore, if the court imputed income to the Defendant, the court must make express findings." Therefore, the appellate court vacated the judgment and remanded the matter.

Once again, in *Schacht* we were faced with a payor who was less than credible. The former husband in that case was clearly underemployed as the appellate court mentioned:

It appears that the trial court's intent was to encourage respondent to find a job. The findings supporting the creation of the college trusts refer to evidence that respondent was capable of working. A court may impute income to a party in calculating child support if it finds he is voluntarily unemployed or underemployed. See *Sweet*, 316 Ill. App. 3d at 107. However, if the trial court deviates from the guideline amounts set out in the statute (750 ILCS 5/505(a)(1) (West 2002)), it must make express findings. *Sweet*, 316 Ill. App. 3d at 108.

In any event, this case involves a very limited view of what constitutes double dipping for the purpose of §505's definition of income. Nevertheless, it does appear to be consistent with the majority of majority of these fact based appellate court cases.

A discussion of *McGrath*, 2012 IL 112792 (May 24, 2012), will be beyond the scope of this article. But it is suggested that the Illinois Supreme Court's case suggests that the Court was concerned with cases that had considered the scope of what constitutes income in an overly broad manner.

Compare *Marsh* and *Pratt*:

***Marsh* – Paper Loss Leading to Non-Recognition of Income:**

Marsh held that money received from post-divorce sale of shares of stock owned before divorce was not income for purposes of support. *IRMO Marsh*, 2013, IL App (2d) 130423. The marital settlement agreement in *Marsh* had provided that the husband would retain ownership of “[h]is shares owned in Wisted’s Supermarket.” (There was an identical provision for petitioner to retain ownership of “[h]er shares owned in Wisted’s Supermarket.”) In addition, the MSA included the following provisions concerning child support:

“A. [Respondent] shall pay to [petitioner], as and for the support of the minor child ***, the sum of \$731 per month commencing April[] 2012. [Respondent’s] child support payments will be offset against [petitioner’s] maintenance payments ***. As a result of this offset, the amount to actually be withheld from [respondent’s] paycheck shall be \$231 per month.

B. In addition to the specific dollar amount in paragraph one of this order, and also retroactive to include April of 2012, [respondent] shall pay 20% of all additional income, every three months, and shall provide [petitioner] income records sufficient to determine and enforce the percentage amount of such additional support.”

In February 2013 the ex-wife filed a petition for rule. The former wife alleged that in December 2012, her former husband received \$275,000 in income from the sale of his shares of Wisted’s stock and failed to pay her 20% of that income as required. According to the ex-wife’s affidavit she averred:

“2. During the course of our marriage, my father gave [respondent] and me shares of stock in Wisted’s Supermarket Inc.

3. The transfer of these shares to me and [respondent] was a gift and Wisted’s Supermarkets, Inc. paid for all personal income tax obligations that [respondent] and I incurred as a result of our ownership of the stock. In addition, depending on the profitability of the company, [respondent] and I have received stock distributions in addition to the funds to cover taxes.”

In the former husband’s response he indicated that he sold the stock at a “loss” and accordingly did not receive any income subject to payment of support. He attached an affidavit from a CPA indicating that the cost basis of the stock was more than the amount sold. The cost basis was determined based on the value of the stock at the time it was gifted to the former husband and then adjusting the basis yearly by the amount of the net income or losses of Wisted’s proportionate to the number of shares owned in

relation to the total number outstanding from the date of the gift through year end 2011. The affidavit by the CPA indicated that there would be additional income for 2012 and that therefore the cost basis would actually increase somewhat. The affidavit further stated:

7. That the reason that the income/loss impacts the basis of the stock is that, the shareholders['] proportionate share of those earnings/losses [is] passed through to them by a K-1, as this [is] a sub-chapter S corporation. The shareholder than [sic] pays the income taxes on these earnings even though the earnings have not been distributed. The increasing of the basis of the stock is a proper accounting procedure to prevent double taxation of the same earnings.

At the hearing neither party presented evidence. The trial court found that there was no increase in the former husband's wealth and denied the former wife's petition. The appellate court affirmed. The appellate court reviewed the matter de novo as to what constituted income per case law including *Rogers* and *McGrath*.

The quotes from the appellate court decision are instructive:

In *Rogers*, the supreme court discussed the plain and ordinary meaning of the term "income":

"As the word itself suggests, 'income' is simply 'something that comes in as an increment or addition ***: a gain or recurrent benefit that is usu[ually] [sic] measured in money ***: the value of goods and services received by an individual in a given period of time.' *Webster's Third New International Dictionary* 1143 (1986). It has likewise been defined as '[t]he money or other form of payment that one receives, usu[ually] [sic] periodically, from employment, business, investments, royalties, gifts and the like.' *Black's Law Dictionary* 778 (8th ed. 2004)." *Rogers*, 213 Ill. 2d at 136-37.

Illinois courts have also defined "income" as " "a gain or profit" [citation] and is "ordinarily understood to be a return on the investment of labor or capital, thereby increasing the wealth of the recipient" [citations].'" *In re Marriage of Worrall*, 334 Ill. App. 3d 550, 553-54 (2002) (quoting *Villanueva v. O'Gara*, 282 Ill. App. 3d 147, 150 (1996)) .

The argument of the former wife was that when the stock was sold her ex-husband realized "new money" he did not have before and thus realized a gain. The former husband contended that he "simply converted" the stock he was awarded into cash and the cash was already income he owned."

The Second District appellate court stated:

The question, here, is whether respondent's stock was analogous to the savings account in *McGrath*. Petitioner seeks to distinguish *McGrath* by arguing that, "[u]nlike in *McGrath*, where pre-existing funds were being withdrawn from a savings account, the [respondent] in this case *did* receive money that he did not previously have (or pay child support from), as a gain or increment in addition to funds he had before he sold his gifted shares of stock." (Emphasis in original.) However, the fact that, at the time of dissolution, the asset was in the form of stock rather than money is a distinction without a difference,

because the stock was a liquid asset, readily converted into cash. Thus, the mere conversion of the stock to money did not result in a gain for respondent. The cash proceeds simply took the place of the shares of stock. See *In re Marriage of Anderson*, 405 Ill. App. 3d 1129, 1135 (2010) (proceeds from reverse stock split not income where the cash proceeds took the place of the former shares of stock). Further, the fact that respondent had been gifted the shares is of no consequence. Whether the shares were gifted or purchased, respondent received the shares prior to the dissolution and was the owner at the time of dissolution.

The former wife tried to rely on the 2005 *Colangelo* opinion holding that distributions from vested stock options are income in determining support. But the appellate court explained the background of the opinion as:

There, at the time of dissolution, the trial court allocated unvested stock options to the father as marital property. Id. at 385. The stock options subsequently became vested and were distributed. Id. at 386.

On appeal, the father maintained that to count the stock distributions as income would amount to double-counting the value of the asset, because the unvested stock options had previously been distributed to him as marital property. Id. at 389. We found that the trial court should have considered the father's stock distributions as income for child support purposes. Id. We stated: "Because the unvested stock options transformed into a realized distribution, it would seem that the distribution is not marital property being counted as income, but instead the fruits of the marital property." Id.

The *Marsh* appellate court tried to distinguish *Colangelo* as simply a different factual scenario and the holding did not apply: "Certainly, as this court noted, when the stock options vested and resulted in stock distributions, there was a gain. Id. at 392. Here, unlike in *Colangelo*, there was no gain. Indeed, the evidence established that respondent sold the shares at a loss."

***Pratt* – Exclusionary Clause Thrown Out**

But compare [IRMO Pratt](#), 2014 IL App (1st) 130465, where the appellate court held that restricted stock and stock options constitute income for support purposes despite being allocated in divorce as property, and in spite of an exclusionary clause in marital settlement agreement. This part of this decision is another example of bad facts making "bad law"—at least in the First District.

Pratt first discussed the rebuttable nature of the presumption:

The guidelines create a rebuttable presumption that child support conforming to the guidelines is appropriate. [Citation.] This presumption also applies in modification proceedings.

The appellate court stated in somewhat shocking breadth:

Murray's claim that the MSA contains a provision that "[a]ll restricted stock and stock options awarded to Murray or Sharon as an award of his/her share of the marital estate *** shall not be deemed income for child support purposes" is true. This provision precluding certain sources of income from consideration for child support purposes is

against Illinois public policy and is thus void. We shall not enforce it.

I disagree. But keep in mind that the decision is a limited one, merely affirming the ability of the trial court to modify support the decision given the circumstances – “The trial court here acted within its authority when it modified that provision and included earnings from Murray's sale of restricted stock options as income for child support purposes.”

The crux of the decision regarding the double-dipping argument will be quoted at some length:

Murray contends, however, that it is fundamentally unfair to include this income because he was awarded the restricted stock options as marital property in the dissolution judgment and, by receiving a portion of the income from the sale, Sharon is "double dipping." He argues that Sharon received her portion of the stocks as marital property and now she is receiving as child support a portion of Murray's income from his share. This is not "double dipping." The trial court can consider marital property as income for child support purposes, even if the income comes from vested stock options awarded as marital property to one of the parties. *In re Marriage of Colangelo*, 355 Ill. App. 3d 383, 390 (2005); see also *In re Marriage of Klomps*, 286 Ill. App. 3d 710, 714-15 (1997).

Murray disagrees that *Colangelo* applies, arguing that unlike the stock options at issue here, the deferred compensation in *Colangelo* was "not valued, not listed in the agreement, not separately split between the parties, nor separately saleable." We note that Murray does not support this argument with any citations to authority. Nonetheless, the court in *Colangelo* did not base its determination on the type of deferred compensation at issue before it, but on the fact that deferred compensation and retirement benefits are income and they are not listed in the Act as an applicable deduction from income. *Colangelo*, 355 Ill. App. 3d at 392. The trial court acted correctly and did not abuse its discretion in finding that Murray's earnings from restricted stock option sales in 2011 constituted income for child support purposes.

***Virdi* – 2014 Trial Court Properly Did Not Consider Former Husband's Income Withdrawals from his Retirement Account as Income Given Facts of the Case**

[IRMO *Virdi*](#), 2014 IL App (3d) 130561 (June 2014)

A recent case involving possible “double dipping issues” involving property and income is *Virdi*. The parties in *Virdi* were divorced in 1998 following a 28-year marriage and the wife was granted maintenance of \$10,000 per month. In August 2011, the trial court granted the former husband's petition to modify maintenance to \$1,500 a month. The appellate court upheld that decision on unpublished decision.¹ While that appeal was pending, the former wife filed a petition to modify the \$1,500-a-month maintenance award, arguing that a substantial change in circumstances had occurred since that award was imposed. The trial court denied her petition to modify. The former wife appealed urging that the trial court abused its discretion in denying her petition to modify maintenance.

The key issue was whether there was a substantial change in circumstances and this discussion will not focus on that aspect of the case - except the implications involving double dipping. In a key passage, the appellate court stated:

¹ IRMO *Virdi*, 2013 IL App (3d) 120546 U.

Narveen also points to the distributions Prem has begun taking from his IRA as proof of a change in circumstances. However, Prem's distributions do not qualify as income for the purpose of calculating maintenance. The initial distribution of property took into account the parties' existing retirement accounts. In the years following, Prem chose to supplement his saving by investing his income, while Narveen used her savings to support a business that has not made any profit in over 20 years.

Executive Summary re Double Dipping Cases from Illinois:

Pension Distribution:

- ☞ [*IRMO Klomps*](#), 286 Ill.App.3d 710 (Fifth Dist., 1997). Retirement benefits allocated only 35% to the wife in the divorce may be considered as income to the husband for support purposes given the caveat that, "We find it significant that Richard did not argue that the property distribution was made inequitable by the court's order setting child support from his retirement income. Our review of the record reveals that the property distribution remains fair and equitable."

IRA Distribution Cases:

- ☞ [*IRMO Lindman*](#), 356 Ill. App.3d 462 (2d Dist. 2005): This case was not on point re double dipping but the appellate court ruled that given the facts of the case an IRA may be considered as net income for the unemployed father. In this case the IRA distributions were properly considered §505 "income," making his net income greater than when support was set.
- ☞ [*IRMO Eberhardt*](#), 387 Ill. App. 3d 226 (First Dist., 2008): The issue was whether there is an improper double counting when improper double counting occurs when IRAs that are awarded in a property settlement are liquidated and viewed as income. Comment: All similar cases turn on the facts. In this case given father's credibility gap, the appellate court affirmed the consideration of IRA distributions as income.
- ☞ [*IRMO Virdi*](#), 2014 IL App (3d) 130561: The trial court properly did not consider former husband's income withdrawals from his retirement account as income given facts of the case in case focusing on whether there was a change in circumstances.

Regular Withdrawal Case:

- ☞ [*IRMO McGrath*](#), 2012 IL 112792: Illinois Supreme Court: Funds an unemployed parent regularly withdraws from savings account should not be included in calculating net income under §505(a)(2). This case is a trend case potentially bringing into question the line of cases regarding double dipping.

Stock Options or Other one Time Income Cases:

- ✎ [*IRMO Colangelo*](#), 355 Ill. App. 3d 383 (2d Dist. 2005): The father's exercise of stock options that had been unvested at the time of the divorce and awarded solely to him constituted income for support – even though the unrealized stock options were allocated to the parties as marital property.

[*IRMO Marsh*](#), 2013, IL App (2d) 130423: Money received from post-divorce sale of shares of stock owned before divorce was not income for purposes of support. Case attempts to distinguish *Colangelo* due to lack of gain.
- ✎ [*IRMO Pratt*](#), 2014 IL App (1st) 130465: Restricted stock and stock options constitute income for support purposes despite being allocated in divorce and despite exclusionary clause.

Conclusion: There should be a rebuttable presumption that there is prohibited double dipping when an asset is considered twice: once for the purpose of distributing marital property and a second time when it is considered as income for the purposes of paying child support or maintenance. This change is necessary because the current case law tends to be fact specific and tends to be skewed in favor or allowing double counting because cases with unusual facts are the ones that are published—and these cases are ones ruling only that the trial court did not abuse its discretion. More specifically, in most of the underlying cases, the support recipient was not awarded a 50% share of the underlying asset – leading to the affirmance of the trial court's discretion.

The Gitlin Law Firm, P.C.
663 East Calhoun Street
Woodstock, IL 60098
815-338-9401
© 2018
Last Updated on: March 28, 2018

G:\DOCS\WRITINGS\DOUBLE DIPPING FOR SUPPORT AND MAINTENANCE.DOCX