

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

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## **Executive Summary:**

Illinois statutory law, both for support and maintenance purposes, defines income for child support and maintenance identically. As a result, Illinois case law allows double consideration of an asset: once for the purpose of property division and a second time for the purpose of determining cash flow for future payment of maintenance.

Attorney David Hopkins of Schiller, DuCanto & Fleck (one of the individuals perhaps most responsible for the 2015 maintenance guidelines) made this point in his treatise on the legislation: “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.”<sup>1</sup> But this points to the fact that current case law allow what some would argue is an improper double-counting.

See *Gitlin on Divorce: A Guide to Illinois Matrimonial Law—4<sup>th</sup> 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.”

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## **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 many or perhaps 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.

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<sup>1</sup> See: ISBA Family Law Section Newsletter, October 2014, vol. 58, no. 4, <https://www.isba.org/sections/familylaw/newsletter/2014/10/newspousalsupportguidelinesdivorcin>,

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.

An important 2014 appellate court is the apex and logical extension of this line of case law. [IRMO Pratt](#), 2014 IL App (1st) 130465, held 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.

**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.

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).

A 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.

**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. In *Colangelo* the father received all 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."

More recently, the Second Appellate court reversed the 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 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."

*Colangelo* held:

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 *Klomps*, 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).

***Lindman* – IRA Distribution May Be Considered Net Income:** Another case reflecting this trend 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. *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:** [\*IRMO Eberhardt\*](#), 387 Ill. App. 3d 226, 232 (First Dist., 2008), addresses the argument often made 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.

***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."

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 approach to this issue in Illinois.

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

As indicated above, [IRMO Pratt](#), 2014 IL App (1st) 130465, held that restricted stock and stock options constitute income for support purposes despite being allocated in divorce as property. The appellate court allowed double dipping in spite of an exclusionary clause in marital settlement agreement. *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.

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.

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## 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): The appellate court ruled that given the facts of the case an IRA may be considered as net income. 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. The appellate court affirmed the consideration of IRA distributions as income.



## 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 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:** It could be argued that 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. Yet a long line of Illinois case law allows just that: a double counting in allowing an asset to be considered as marital property and divided and also considered for the purpose of payment of child support or maintenance.

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