

Courts Have Let Spousal Support Become the Dole of Divorce

By Fred Silberberg

Spousal support, as it is now referred to, is intended to be a stream of payments from one spouse to the other to enable the other spouse to become self-sufficient. The idea behind spousal support, as it was originally conceived, was to provide one spouse with a means by which he or she would be able to live while taking the steps necessary to provide for his or her own support at a date in the future. The point behind support was not to create a long-term financing obligation for the supporting spouse, but rather to give the supported spouse the ability to eventually take care of himself or herself.

In California, however, spousal support has, in many cases, become something completely different. It has become a system of private welfare that, rather than being administered in a means which would make it clear to the supported party that he or she had to take affirmative action to become self-supporting, allows the supported party to stay on the proverbial dole much longer than necessary. Rather than taking responsibility for oneself, the system creates incentives for the supported spouse to string things along longer than he or she should be able to. Long ago the federal government cracked down on welfare mothers. It is time for the state of California to do the same with regard to supported spouses.

There are numerous reasons for the problem. First and foremost, under Family Code Section 4336, there is a presumption affecting the burden of proof that states that a marriage of 10 years or more (from marriage to separation) is a "marriage of long duration." A marriage of long duration is one, where it is typically argued, the supported spouse should receive spousal support until "death, remarriage, or further order of court." The fact that a statute defines a marriage of long duration and sets forth such a presumption creates incentive for the support spouse to try and string along the other spouse in order to get over the 10-year mark.

The absurdity of the statute is that it fails to take into consideration the facts of each particular marriage. For example, while a marriage could be more than 10 years in length, the assets of the marital estate may be such that it is not necessary that a party receive spousal support at all. While the duration of a marriage may indeed affect the age of the supported party, and therefore, the ability of that party to become self-supporting, in practice, too much weight is given to this factor alone.

Most people contemplating divorce know about the 10-year rule. Most family law attorneys have had inquiries from people contemplating divorce, who decide to hang on to get over the 10-year mark. Some family law attorneys even counsel potential clients to hold off if they are nearing the 10-year mark so that they will have a better shot

at long-term support. This only further reinforces the mind-set of dependency.

Adding to the problem is the lack of proper guidelines concerning what is known as temporary support, which is the money paid between the time the divorce case is initiated and when it goes to trial or final settlement. In most counties, judges typically run a guideline

calculation, simply setting forth a support number that does not consider the supported spouse's ability to earn money, and does not result in an incentive to the supported spouse to promptly undertake job rehabilitation efforts. This support amount can be unreasonably high under some circumstances. The parties may have been separated for years and the earning spouse has significantly higher earnings because of post-separation efforts. The resulting support order actually significantly bumps up the supported spouse's lifestyle and creates next to no incentive to take responsibility for oneself. That, coupled with the overburdened court system, which subjects a party to extensive discovery and delays from a lack of available trial dates, generally means that the support spouse can hold on to an overly inflated support order much longer than necessary.

Beyond the temporary support order, there are the factors that go into a permanent support order, which takes effect upon the division of the property and at the conclusion of the case itself. While Family Code Section 4320 dictates a number of factors that the court is to consider in fashioning a support order, those factors are not very specific and give the trial court

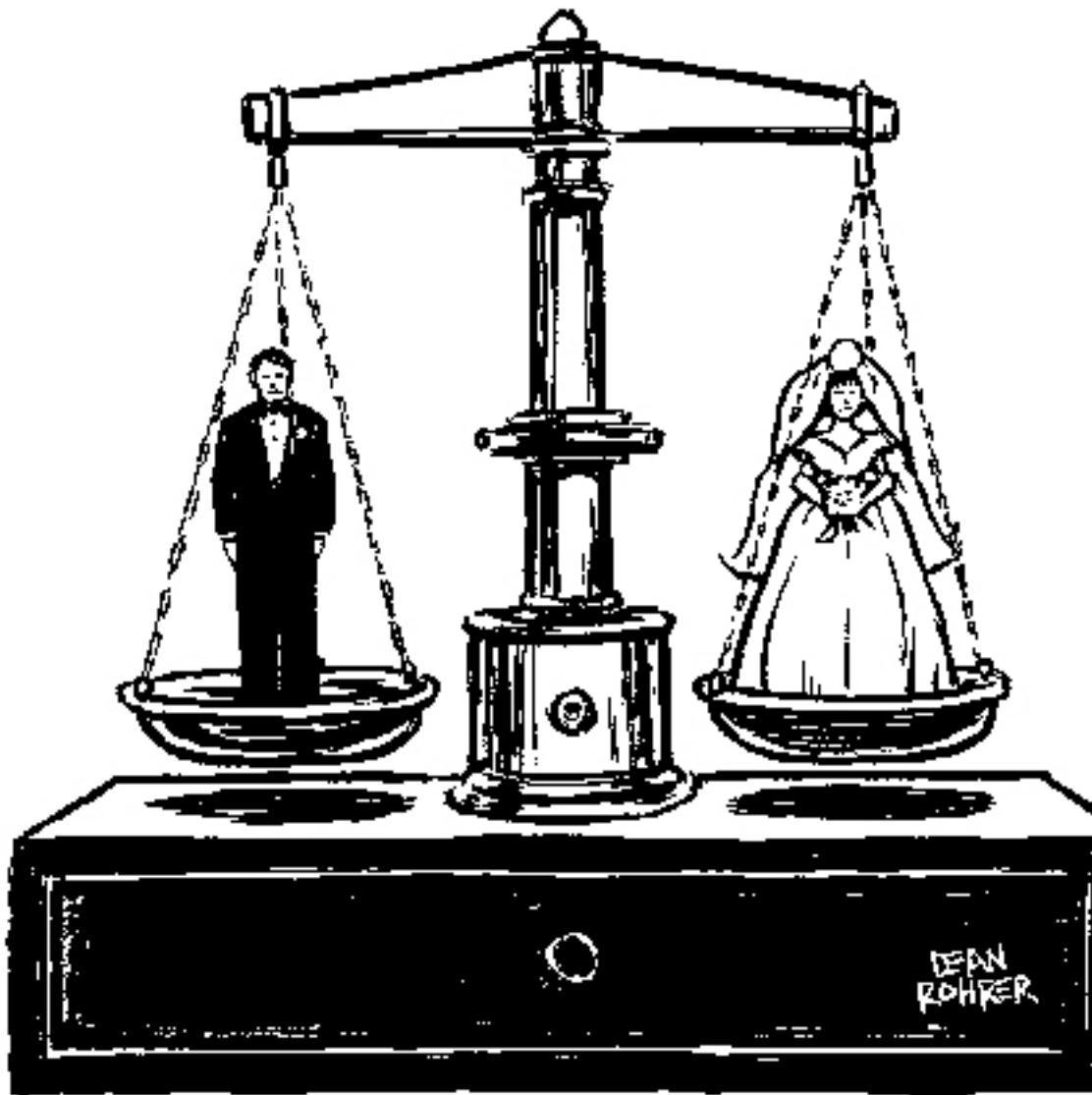
great latitude in determining both the amount and duration of spousal support. That latitude, coupled with the present public policy in favor of spousal support almost always causes the court to rule in favor of the supported spouse, both as to the amount of support and the duration of support. Once the support order is set, it then becomes the burden of the party paying support to show sufficient circumstantial changes to justify a reduction.

Because the law is inequitably stacked in favor of the party receiving support, there is little incentive for that party to take financial responsibility for himself or herself. Instead, what exists is an atmosphere of entitlement and dependence. This is clearly not what was originally intended by the concept of support.

Our courts would be significantly less burdened if, in fact,

divorcing parties knew that they would have to take responsibility for themselves. There would be less litigation over the issue of spousal support, less expenditure of attorneys fees arguing over the issue and conducting extensive discovery on it, and cases would likely settle more expeditiously. But even more important than any of that, there are actual benefits to the supported spouse that would be reaped if that spouse were required to take responsibility for himself or herself after a reasonable transition period.

If spousal support were intended to be awarded for the shorter, and not the longer, term, people would be forced to take responsibility for themselves. As a result of that, we would have more productive members of society; the supported spouse would experience a boost in self-esteem and independence, which would, in turn benefit not only the spouse, but also his or her children. The disincentive to remarry would be vitiated. If we make it clear that one is ultimately responsible for himself or herself, the party given that responsibility would, in the end, become a happier and more productive member of society than he or she would be, if they remained on the proverbial dole.



Fred Silberberg is a certified family law specialist and a partner at Silberberg & Ross in Brentwood. The firm specializes in family law.