

In re Marriage of Berger (01/29/09 - 170 Cal.App.4th 1070)

Date of Marriage-1991 / Date of Separation -11/2002 / 2 Children

During the marriage, H was a partner at PriceWaterhouseCoopers (earning as much as \$600,000/year). Prior to separation, H left PwC and started X-Scapes, a landscaping business. Starting in 2005, H and other officers of the company voluntarily agreed to salary reductions and deferments of income due to financial difficulties of the company. From inception, X-Scapes never generated a profit. H's deferred salary is accruing on the company books and will either be paid out at a later date or will be converted to additional ownership equity.

At trial H's I&E showed living expenses at \$21,372 per month and he had taken out a \$1.9 million construction loan for the purchase and construction of a home in Laguna Beach. H testified at this time that he was receiving approximately \$2,000 per month from X-Scapes and he was meeting his current expenses by utilizing his cash assets.

The Court ordered \$0 per month spousal support, \$1,115 per month child support and \$0 in attorney's fees based on H's actual income of \$2,000 per month from X-Scapes, excluding the salary that he was voluntarily deferring, and by imputing a 4.5% rate of return on his personal assets. (The court also imputed the same rate of return on W's personal assets.) W appealed.

Issues:

1. W argues that the court abused its discretion in refusing to impute income to H based on his ability to earn income at the levels he had before voluntarily departing PwC.
2. Alternatively, W argues that H's voluntary decision to continue working at X-Scapes while deferring income and utilizing his "substantial assets" to support himself should not be justification for reducing his support obligation. Therefore either H should be treated as if he was receiving the deferred income or this should be considered a "special circumstance" which warrants departure from guideline.

Conclusions:

1. Court of Appeals held that there was no evidence that H had the opportunity to earn his previous level of income on a going-forward basis and therefore, the court was correct in refusing to impute income at the level H was earning at PwC.

2. Court of Appeals reversed the ruling. H should either be treated as if he is receiving the income he is deferring or this should be treated as a special circumstance to justify departure from guideline.

Basis:

- a. H's "company is providing the proof of his ability to earn and the value in the form of the salary accruing for him. The fact that he is choosing to plow that salary back into the company cannot be spun into a basis for ignoring those earnings."
 - b. H could just have easily chosen to retain his salary and utilize his other assets to fund monthly capital investments in the company.
 - c. H has not viewed the deferral of his salary as justification for curtailing his own current lifestyle therefore he must likewise continue to meet his support obligations. Court appeared to emphasize that if H was in dire straits and had financial concerns regarding personal solvency it was not evident in his reported living expenses.
3. Finally, since the Court of Appeal has concluded that H be treated as if he were receiving the deferred income, the decision to award attorneys fees must be reconsidered under these circumstances as well.