Note,
"DOUBLE DIPPING": A GOOD THEORY GONE BAD

by
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I. Introduction

"Double dipping" is an equitable distribution/spousal support concept that has gained some acceptance. Generally speaking, a double dip can be understood as counting the same income stream twice – first as an asset for the division of property and then again for the determination of spousal support.[1] The princi-

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1 This article will not consider *Grunfeld v. Grunfeld*, 731 N.E.2d 142 (N.Y. 2000), and its progeny, a line of cases specific to New York state, that consider whether it is double dipping to award in equitable distribution the enhanced income stream created by a license or degree and to also award alimony based on the that same income flow. *See* Lee Rosenberg, *Double-Dipping Lives On.* Holterman *and the Continuation of the* O'Brien *Dilemma*, 76 N.Y. ST. B.J. 50 (Sept. 2004). *See also infra* note 24.

It is also important to note that the double dipping concept does not apply to child support, i.e., it is not double dipping to award an asset to a spouse and then base child support on the stream of income produced by the asset. This is because the child, as opposed to the spouse, never "dipped" by being awarded an asset in the first place. *In re* Marriage of Zappanti, 80 P.3d 889 (Colo. Ct. App. 2003) (the fact that a retirement benefit represented a property interest subject to division does not change its status as an income source to be considered in determining a father's child support obligation); Loving v. Sterling, 680 A.2d 1030 (D.C. 1996); *In re* Marriage of Klomps, 676 N.E.2d 686 (Ill. Ct. App. 1997); Delassio v. Delassio, 570 N.E.2d 139 (Mass. 1991); Croak v. Bergeron, 856 N.E.2d 900 (Mass. App. Ct. 2006) (the court's alleged "double dipping" in treating the father's IRA funds as income for purposes of calculating child support on the father's complaint for modification and as an asset subject to equitable distribution during preceding divorce was not reversible error; because the father had used IRA funds as a replacement for earnings and for his support during orchestrated periods of unemployment following divorce, so it would have been inequitable for the trial court not to treat the IRA funds as

ple has most often been applied to pensions and similar type assets that are essentially income streams.[2]

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income); Walswick-Boutwell v. Boutwell, 663 N.W.2d 20 (Minn. Ct. App. 2003) (the court could treat a disability annuity, paid out under the Public Employees Retirement Association (PERA) statute, as both marital property and as income for purposes of awarding child support); Swanson v. Swanson, 583 N.W.2d 15 (Minn. Ct. App. 1998); McQuinn v. McQuinn, 673 N.E.2d 1384 (Ohio Ct. App. 1996) (the wife's share of the husband's pension awarded at divorce was income to the wife, since it was in payout status); *In re* Marriage of Hokin, 605 N.W.2d 219 (Wis. Ct. App. 1999); Cook v. Cook, 560 N.W.2d 246 (Wis. Ct. App. 1997); Bollig v. Bollig, 919 P.2d 136 (Wyo. 1996). *Contra* Christ v. Christ, 854 So. 2d 244 (Fla. Dist. Ct. App. 2003) (the court could not award the husband Voluntary Separation Incentive benefits as part of distribution and then base child support on those same benefits); Popel v. Popel, No. A07-1623, 2008 WL 4552771 (Minn. Ct. App. Oct. 14, 2008) (the father's pension benefit, a property award, was included in determination of his income, and thus, the support obligation was based on something other than his net monthly income, and was a deviation from the guidelines such that written findings were required by statute); Morrissey v. Morrissey, 686 N.Y.S.2d 71 (N.Y. App. Div. 1999) (a disability pension could not be included in income for child support, because part was awarded to the wife in the divorce).

[2] *See* Champion v. Champion, 764 N.E.2d 898, 902 (Mass. App. Ct. 2002) ("Commentators use the phrase 'double dipping' to describe the seeming injustice that occurs when property is awarded to one spouse in an equitable distribution of marital assets and is then also considered as a source of income for purposes of imposing support obligations."); Robert G. Turner, Jr. & Jason Bogniard, *Double Dipping is Not Necessarily Alive and Well*, 20 DOM. REL. J. OHIO 89, 89 (2008) ("Double dipping occurs when the same earnings stream is used in the determination of a business value and then used again in the determination of spousal and/or child support."); Jerry Reiss & Michael R. Walsh, *Mathematics for Imputing Income*, 80 FLA. B.J. 64 (Aug. 2006) ("when the spouse paying alimony converts this income at retirement to an income stream, the same income imputed and used to pay support while working is once again used to pay alimony at retirement. Retirement forces most people to further reduce their standard lifestyle and the result is pure "double dipping" into the future income stream to pay alimony."); Brett R. Turner, *Double Dipping*, 14 EQUITABLE DISTRIBUTION J. 49, 49 (May 1997) ("'Double dipping' is a term used to describe the supposed unfairness that results when property is awarded to a spouse in equitable distribution but is also treated as a source of income for purposes of calculating maintenance or alimony.").

The prohibition against double dipping first appeared in *Kronforst v. Kronforst*, 123 N.W.2d 528, 534 (Wis. 1963), when the Wisconsin Supreme Court stated that "[s]uch an asset cannot be included as a principal asset in making division of the estate and then also as an income item to be considered in awarding alimony."

In recent years, however, the concept has been applied to businesses, under the theory that the asset's value is based on the income it has produced or will produce; thus the business asset should not be counted as both an asset for equitable distribution and the income it produces in the future as income for spousal support.[3] This article argues that this is a misuse of the concept of double dipping, and the principle must be confined to pension-type assets where the asset *is* the income, not businesses where the asset's value and the income it produces are separate entities. Equitable distribution is a property right based on the fair market value of assets, whereas spousal support is a needs based concept based income. Income is used in the former concept only as a tool to determine fair market value. Therefore, it is not double dipping to consider income in property division and to consider income in spousal support. Part II evaluates the genesis of the double dipping theory, explaining the differences between equitable distribution and spousal support. Part III explains the capitalization of earnings method of business valuation. This leads to the conclusion in Part IV that it is not double dipping to divide an asset that has been valued in such a way and then to award spousal support based on the income stream from that business, because the capitalization of earnings method is simply a valuation method.

II. Equitable Distribution vs. Spousal Support and the Resulting Theory of Double Dipping

At its root, equitable distribution of property at divorce provides that the property of the divorcing spouses should be di-

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[3] *See, e.g.*, Joseph W. Cunningham, *"Double Dipping" Revisited: Food for Thought*, 27 MICH. FAM. L.J. 6 (Jan. 1999) ("Double dipping" - or "tapping the same dollars twice" - refers to situations where a business or professional practice is valued by capitalizing its income, some or all of which is also treated as income for spousal support purposes.''); Robert J. Rivers, Jr., *The "Double-Dipping" Concept in Business Valuation for Divorce Purposes*, 8 MASS. B. ASS'N SEC. REV. 20, 20 (No. 3 2006) ("The concept of double dipping refers to the double counting of a marital asset, once in the property division and again in the support award. . . A "double-dip" occurs when the cash used as the basis to determine the overall value of the business is "also considered a component of that spouse's total income" for alimony purposes.").

vided equitably between them without regard to legal title.[4] "An economic partnership model of marriage provides the theoretical basis for the equitable distribution doctrines applied in divorce proceedings and replaces the view of spouses as separate legal actors, which prevails during marriage."[5] The idea of marriage as an "economic partnership" now suffuses property distribution law.[6]

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[4] J. THOMAS OLDHAM, DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY § 3.03[1] at 3-7 (2001) ("Title is not determinative"); 1 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 5:6 at 264 (3d ed. 2005) ("legal title is irrelevant to classification of property"); *id*., § 5:70 at 680 ("A fundamental principle of equitable distribution law provides that the classification of property does not depend on legal title). *See, e.g.*, De Liedekerke v. De Liedekerke, 635 A.2d 339, 343 (D.C. 1993); Farah v. Farah, 424 So.2d 960, 961 (Fla. Dist. Ct. App. 1983); Albert v. Albert, 298 S.E.2d 612, 613 (Ga. 1982); *In re* Marriage of Hegge, 674 N.E.2d 124, 128 (Ill. App. Ct. 1996); Stassen v. Stassen, 351 N.W.2d 20, 23 (Minn. Ct. App 1984) (citing MINN. STAT. § 518.54); Hemsley v. Hemsley, 639 So.2d 909, 914 (Miss. 1999); Bashmore v. Bashmore, 685 S.W.2d 579, 593 (Mo. Ct. App. 1985); Schultz v. Schultz, 649 P.2d 1268, 1272 (Mont. 1982) (citing MONT. CODE ANN. § 40-4-202); David v. Davis, 513 N.Y.S.2d 405 (N.Y. App. Div. 1987) (citing N.Y. DOM. REL. LAW § 236B(1)(c)); McLean v. McLean, 363 S.E.2d 95, 102 (N.C. Ct. App. 1987); Modon v. Modon, 686 N.E.2d 355, 358 (Ohio Ct. App. 1996) (citing OHIO REV. CODE ANN. § 3105.171(H)); Drake v. Drake, 725 A.2d 71, 721 (Pa. 1999) (outlining the history of title theory and its evolution into equitable distribution); Corbett v. Corbett, 437 S.E.2d 136, 138 (S.C. 1993); Mondelli v. Howard, 780 S.W.2d 769, 774 (Tenn. Ct. App. 1989) ("In the final analysis, the status of property depends not on the state of its record title, but on the conduct of the parties").

[5] Margaret M. Mahoney, *The Equitable Distribution of Marital Debts*, 79 UMKC L. REV. 445, 447 (2010).

[6] *E.g.*, Chen v. Hoeflinger, 279 P.3d 11 (Haw. Ct. App. 2012); *In re* Estate of Hjersted, 175 P.3d 810 (Kan. 2008); Dombrowski v. Dombrowski, 559 A.2d 828 (N.H. 1989); Avallone v. Avallone, 646 A.2d 1121 (N.J. Super. Ct. App. Div. 1994); Price v. Price, 503 N.E.2d 684 (N.Y. 1986); Hoyt v. Hoyt, 559 N.E.2d 1292 (Ohio 1990); Stevenson v. Stevenson, 511 A.2d 961, 964 (R.I.1986); Way v. Way, 726 S.E.2d 215 (S.C. Ct. App. 2012); Roane v. Roane, 407 S.E.2d 698 (Va. Ct. App. 1991). Rodak v. Rodak, 442 N.W.2d 489 (Wis. Ct. App. 1989). *See generally* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 91 (2004); Ruth Sarah Lee, *Locking in Wedlock: Reconceptualizing Marriage Under a Property Model*, 17 BARRY L. REV. 243 (2012); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2312 (1994). The theory of marriage as an economic partnership also found its way into the Uniform Probate Code. UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (1993).

The theory is firmly in place in the 43 common law states;[7] the other 8 states are community property states, which also allow for division of community property on an equitable basis when necessary.[8] The major differences among the states are whether all property may be divided or whether only clearly de-

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The concept of marriage as an economic partnership also suffuses federal law. For example, Congress's stated purpose in allowing the assignment of a retirement plan pursuant to a QDRO is to improve "the delivery of retirement benefits and provide greater equity under private pension plans for workers, their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home." Section 414(p)(8), Title 26, U.S.Code, as amended by the Retirement Equity Act of 1984, P.L. 98-397, 98 Stat. 1426 (1984), as quoted in Hoyt v. Hoyt, 559 N.E.2d 1292 (Ohio 1990).

7 ALA. CODE ANN. § 30-2-51 (2012); ALASKA STAT. ANN. § 25.24.160 (2012); ARK. CODE ANN. § 9-12-315 (2009); COLO. REV. STAT. ANN. § 14-10-113 (2011) ; CONN. GEN. STAT. § 46b-81 (2012); DEL. CODE ANN. tit. 13, § 1513 (2009); D.C. CODE ANN. § 16-910 (2001); FLA. STAT. ANN. § 61-075 (2008); Stokes v. Stokes, 273 S.E.2d 169 (Ga. 1980); HAW. REV. STAT. ANN. § 580-47 (2006); 750 ILL. COMP. STAT. ANN. 5/503 (2010); IND. CODE ANN. § 31-15-7-4 (2008); IOWA CODE ANN. § 598.21 (2009); KAN. STAT. ANN. § 23-201 (2012); KY. REV. STAT. ANN. § 403.190 (2009); ME. STAT. ANN. tit. 19-A, § 953 (2011); MD. FAM. L. CODE ANN. § 8-205 (2006); MASS. GEN. LAWS ANN. ch. 208, § 34 (2011); MICH. COMP. L. ANN. § 552.19 (2012); MINN. STAT. ANN. § 518.58 (2010); Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994), Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994); MO. REV. STAT. ANN. § 452.330 (Supp. 2011); MONT. CODE ANN. § 40-4-202 (2010); NEB. STAT. ANN. § 42-365 (2008); N.H. REV. STAT. ANN. § 458:16-a (2004); N.J. STAT. ANN. § 2A:34-23.1 (2012); N.Y. DOM. REL. LAW § 236 (2011); N.C. GEN. STAT. § 50-20 (2011); N.D. CENT. CODE ANN. § 14-05-24 (2011); OHIO REV. CODE ANN. § 3105.171 (2012); OKLA. STAT. ANN. tit. 43, § 121 (Supp. 2012); OR. REV. STAT. ANN. § 107.105 (2011); PA. CONSOL. STAT. ANN. tit. 23, § 3502 (2010); R.I. LAWS ANN. § 15-5-16.1 (2011); S.C. CODE ANN. § 20-7-472 (2007); S.D. COMP. LAWS ANN. § 25-4-44 (2012); TENN. CODE ANN. § 36-4-121 (2012); UTAH CODE ANN. § 30-3-5 (SUPP. 2012); VT. STAT. ANN. tit. 15, § 751 (2011); VA. CODE ANN. § 20-107.3 (Supp. 2012); WASH. REV. CODE ANN. § 26.09.080 (2012); W. VA. CODE ANN. § 48-7-105 (2004); WIS. STAT. ANN. § 767.61 (2011); WYO. STAT. ANN. § 20-2-114 (2011).

8 The community property states comprise Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Washington. Wisconsin, although denominated a community property state, is an equitable distribution state for divorce purposes. *See* Kuhlman v. Kuhlman, 432 N.W.2d 295 (Wis. Ct. App. 1988).

fined marital (or community) property may be divided,[9] and whether there is a starting presumption of equal division.[10]

Spousal support, on the other hand, as presently applied, is not a property right.[11] As currently enacted and applied,[12]

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9 The all property (or hotchpot) states comprise Alabama, Connecticut, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, Washington, and Wyoming.

10 *E.g.*, OHIO REV. CODE ANN. § 3105.171(C)(1); *see also* Wanberg v. Wanberg, 664 P.2d 568 (Alaska 1983); Robertson v. Robertson, 593 So.2d 491 (Fla. 1991); Long v. Long, 734 So.2d 206 (Miss. Ct. App. 1999); Nelson v. Nelson, 25 S.W.3d 511 (Mo. Ct. App. 2000); *In re* Marriage of Hash, 838 S.W.2d 455 (Mo. Ct. App. 1992); Schoenwald v. Schoenwald, 593 350 (N.D. 1999); LaBuda v. LaBuda, 503 A.2d 971 (Pa. Super. Ct. 1986); Doe v. Doe, 634 S.E.2d 51 (S.C. Ct. App. 2006); Marion v. Marion, 401 S.E.2d 432 (Va. Ct. App. 1991).

11 *See* Danielle Morone, *A Short History of Alimony in England and the United States*, 20 J. CONTEMP. LEGAL ISSUES 3 (2011). Compare Chapter 5 of the American Law Institute's Principles of the Law of Family Dissolution, which is entitled "Compensating Spousal Payments" and is probably the most innovative of the rules proposed by the ALI Principles. It essentially converts spousal support into a property right. *See* Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 606-07 (2008).

12 The law of alimony is in the midst of an identity crisis. It was well understood a generation ago; today, it is often seen as a relic of earlier times. The reluctance to abolish it shows that at some level, in some cases, it must serve an important purpose. Modern academics have been pondering the nature and purpose of alimony for some time now, without clear success. *E.g.*, Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 10 n.20 (1989) ("our intuition favoring spousal claims under certain facts is correct, even if we have never had a clear understanding of why"); Ira Mark Ellman& Sanford L. Braver, *Lay Intuitions about Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209 (2012); David Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L.J. 325 (2009); Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 PIERCE L. REV. 163 (2007); Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 64 (2008) ("Spousal support, however, remains the most difficult of the economic issues to resolve because it lacks both the underlying rationale of the other issues as well as any standards by which to predict the amount of the award."); Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us about Women, Guilt, and Spousal Support after Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 46 (2011) ("Alimony now represents neither a duty of the husband nor an entitlement of the wife.").

spousal support retains many of its common law theoretical underpinnings. The scholar Herbie DiFonzo notes,

> At common law, wives surrendered their property rights at the altar in exchange for their husbands' commitment to support them during the marriage, which was supposed to last until death. Alimony arose as a way for the law to enforce the husband's support obligation after a divorce a mensa et thorn, which today we would call a legal separation, since the spouses were still considered married although separately domiciled. In modern times, spousal support is a fluid doctrine whose consistency conformed to the shape of the rationale into which it was poured: spousal need, maintenance of marital living standards, support at subsistence level, punishment for sexual transgression, reward for fidelity, contractual right, and partnership duty.[13]

The result is that property division and spousal compensation are considered separately, the former an untangling of assets, the latter a support obligation derived primarily from income.[14]

From the doctrine that equitable distribution and spousal support serve different purposes, and that the former is a division

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13 J. Herbie DiFonzo, *Toward a Unified Field Theory of the Family: the American Law Institute's Principles of the Law of Family Dissolution*, 2001 B.Y.U. L. REV. 923, 945-46.

14 *E.g,* Mickey v. Mickey, 974 A.2d 641, 654 (Conn. 2009) (although the purpose of the property division statute is to unscramble the spouses' current property interests, the purpose of the alimony statute is to recognize the obligation of support that spouses assume toward each other by virtue of the marriage); *In re* Marriage of Hansen, 733 N.W.2d 683, 702 (Iowa 2007) (alimony is distinct from the distribution of property, and may be awarded to a spouse in addition to the distribution of property; "alimony" is a stipend to a spouse in lieu of the other spouse's legal obligation for support); D.L. v. G.L., 811 N.E.2d 1013, 1030 (Mass. App. Ct. 2004) (alimony and property division serve different purposes); Cuccia v. Cuccia, 90 So.3d 1228, 1237 (Miss. 2012) (alimony and equitable distribution are distinct concepts); Vanderpool v. Vanderpool, 250 S.W.3d 791, 796 (Mo. Ct. App. 2008) (spousal maintenance and the appropriate division of marital property are distinct matters); Webster v. Webster, 716 N.W.2d 47, 53 (Neb. 2006) (while the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and should be considered separately); Dalrymple v. Kilishek, 920 A.2d 1275, 1279-80 (Pa. Super. Ct. 2007) (the purpose of equitable reimbursement is compensation, while the purpose of alimony is to ensure that the reasonable needs of the person who is unable to support him or herself through appropriate employment are met); Gravel v. Gravel, 980 A.2d 242, 250 (Vt. 2009) (spousal support is intended "to compensate a homemaker for contributions to family well-being not otherwise recognized in the property distribution"); *see generally* TURNER, *supra* note 4, § 8:21 at 884.

of assets while the latter is a transfer of income, comes the concept of double dipping. A simple definition of "double dipping" is consideration of an asset, typically a pension,[15] as property subject to division at divorce, and then consideration of the income stream that the same asset produces for purposes of determination of spousal support. As stated in *Champion v. Champion*, "Commentators use the phrase double dipping to describe the seeming injustice that occurs when property is awarded to one spouse in an equitable distribution of marital assets and is then also considered as a source of income for purposes of imposing support obligations."[16]

The concept of double dipping is most often applied to pensions and other similar retirement assets,[17] because in the case of

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15 Theoretically, the "double dipping" theory is not related exclusively to pensions, but to any asset that has been divided. *E.g.*, *In re* Marriage of Fisher, 939 P.2d 149 (Or. Ct. App. 1997) (future insurance renewal commissions which were property for distribution were not income for spousal support); Sieber v. Sieber, FD02-5672-006 (Allegheny Pa. Court of Common Pleas, Apr. 1, 2005) (the trial court erred by including in the husband's income the bonuses which were received prior to the retroactive filing date, the result of which is "double-dipping" insofar as those bonuses have been previously divided and the wife has already received a share of them); Hubert v. Hubert, 465 N.W.2d 252 (Wis. Ct. App. 1990) (accounts receivable cannot be both property and income for support).

16 764 N.E.2d 898, 902 (Mass. App. Ct. 2002). *Accord* Diffender v. Diffenderfer, 491 So.2d 265, 267-68 (Fla. 1986), overruled by Acker v. Acker, 94 So.2d 384 (Fla. 2005) ("[I]njustice would result if the trial court were to consider the same asset in calculating both property distribution and support obligations. If the wife, for example, has received through equitable distribution or lump sum alimony, one-half of the husband's retirement pension, her interest in his pension should not be considered an asset reflecting his ability to pay.").

17 "Double dipping" is most often applied to the following types of retirement vehicles:

> Defined Contribution Plans. A defined contribution plan does not provide any guaranteed benefits to the participants. Instead of a guaranteed benefit, the plan establishes individual accounts for the participants based solely on what has been contributed along with any interest and investment earnings or losses attributable thereon, as well as forfeitures from the accounts of other participants which have been allocated to the account. Examples of defined contribution plans are profit sharing plans, money purchase pension plans, §401(k) plans, and employee stock ownership plans. Defined contribution plans are analogous to savings accounts because participants' rights to benefits are limited to the balance in their accounts.

pensions or other retirement assets, the asset *is* the income that will eventually be distributed. There is no difference between the value of the pension and the income it will provide. Indeed, the value of the pension decreases as one approaches death, and if such things could be calculated, the value of the pension on the day of death is zero: the entire asset is distributed as income from retirement to death. Thus, to award the pension as an asset, and to then consider the pension as income is to award the same "thing"— asset or income— twice. It's double counting.[18]

> Defined Benefit Plans. A defined benefit plan promises the participant a specific benefit at the time of retirement. The amount of the benefit is usually determined by the use of a formula that includes years of service, date of retirement, and salary. There are no separate accounts maintained for participants. In order to ensure that there are sufficient assets to pay retirement benefits, defined benefit plans are actuarially funded on an aggregated basis utilizing various assumptions. In other words, contributions are not made on behalf of individual participants.
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> Individual Retirement Accounts. Individual retirement accounts (IRAs) are trusts created and organized in the United States for the exclusive benefit of an individual or his/her beneficiaries and are governed by §408 of the Internal Revenue Code. IRAs are similar to defined contribution plan accounts.

See TURNER, *supra* note 4, at § 6:2 at 5-7. *See also* Joy M. Feinberg, *Sizing Up the Pension Pot*, 24 FAM. ADVOC. 12 (Fall 2001); Dylan A. Wilde, *Obtaining and Equitable Distribution of Retirement Plans in a Divorce Proceeding*, 49 S.D. L. REV. 141 (2003).

[18] *See* N.J. STAT. ANN. § 2A:24-34(b); Ellis v. Ellis, 699 So.2d 280 (Fla. Dist Ct. App. 1997) (overruled by *Acker*, 94 So.2d 384); *In re* Marriage of Graham, 202 P.3d 109 (Kan. Ct. App. 2009); Kruschel v. Kruschel, 419 N.W.2d 119 (Minn. Ct. App. 1988); Balven v. Balven, 734 S.W.2d 909 (Mo. Ct. App. 1987); *In re* Marriage of Colling, 910 P.2d 1165 (Or. Ct. App. 1996); Cerny v. Cerny, 656 A.2d 507 (Pa. Super. Ct. 1995); Stemper v. Stemper, 403 N.W.2d 405 (S.D. 1987); Pelot v. Pelot, 342 N.W.2d 64 (Wis. Ct. App. 1983).

It is important to remember that most states have *not* adopted the rule that a pension cannot be both property, divided at divorce, and a stream of income, considered for spousal support, because in most states, both income and assets may be considered in the consideration of a spousal support award. *In re* Marriage of White, 237 Cal. Rptr. 764, 767-68 (Cal. Ct. App. 2d Dist. 1987) (containing an especially good discussion of the issue); Krafick v. Krafick, 663 A.2d 365 (Conn. 1995); Acker v. Acker, 94 So.2d 384 (Fla. 2005); Walker v. Walker, 942 So.2d 605 (La. Ct. App. 2006); Riley v. Riley, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); Adlakha v. Adlakha, 844 N.E.2d 700 (Mass. Ct. App. 2006); McCallister v. McCallister, 517 N.W.2d 268 (Mich. Ct. App. 1994); Walswick-Bout-

A new trend has arisen, however, that would seek to apply the double dipping theory, a minority view to begin with, to a business. The theory is that when a business is valued using a capitalization of earnings approach, it is double dipping to both distribute the business and then base spousal support on the income the business produces. As will be explained below in Part IV, this is a misapplication of the double dipping rule.

III. Valuation of a Business: The Capitalization of Earnings Approach

It must be remembered that any valuation method is trying to reach the same goal: the determination of fair market value.[19]

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well v. Boutwell, 663 N.W.2d 20 (Minn. Ct. App. 2003); *In re* Marriage of Halpert, 970 253 (Or. Ct. App. 1998); Braderman v. Braderman, 448 A.2d 613 (Pa. Super. Ct. 1985); Sachs v. Sachs, 659 A.2d 678 (Vt. 1995); Moreno v. Moreno, 480 S.E2d 792 (Va. Ct. App. 1997). *See also* Annotation, *Pension of Husband as Resource Which Court May Consider in Determining Amount of Alimony*, 22 A.L.R.2D 1421, 1423 (1952) ("As a general proposition, it has been held or stated in numerous cases that the pension of a husband may properly be considered as a resource in determining the amount of alimony to be awarded to the wife).

Of course, the key to application of the theory of double dipping is that the asset was divided at divorce. Thus, benefits that accrue *after the marriage* and were not treated as property at the time of divorce can be treated as income for purposes of spousal support, even in the states that prohibit double dipping. Littleton v. Littleton, 555 So.2d 924 (Fla. Dist. Ct. App. 1990); Riley v. Riley, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); Innes v. Innes, 542 A.2d 39 (N.J. Super. Ct. App. Div. 1988); Staver v. Staver, 526 A.2d 290 (N.J. Super. Ct. Ch. Div. 1987); Olski v. Olski, 540 N.W.2d 412 (Wis. 1995).

19 TURNER, *supra* note 4, at § 7:8 at 650. *E.g.,* Fortson v. Fortson, 131 P.3d 451, 462 (Alaska 2006); Brooks v. Brooks, 997 A.2d 504, 510 (Conn. App. Ct. 2010; Baker v. Bielski, 248 P.3d 221, 232 (Haw. Ct. App. 2011); Cuccia v. Cuccia, 90 So.3d 1228, 1234 (Miss. 2012) (property division in divorce cases should be based upon a determination of the fair market value of the assets, and such valuations should be the initial step before determining division); Wood v. Wood, 361 S.W.3d 36, 38 (Mo. Ct. App. 2011) (in a dissolution proceeding, the object of a business valuation is to determine fair market value for the purpose of application of the equitable distribution rules to arrive at a fair property division); *In re* Marriage of Bartsch, 88 P.3d 1263, 1266 (Mont. 2004); *In re* Gordon, 797 A.2d 867, 869 (N.H. 2002); Wiliamson v. Williamson, 719 S.E.2d 628, 631 (N.C. Ct. App. 2012) (in an equitable distribution proceeding incident to divorce, the trial court should determine the net fair market value of the property based on the evidence offered by the parties); Nuveen v. Nuveen, 795

Fair market value is defined under generally accepted accounting principles as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts."[20]

There are three general approaches for establishing the value of a business: (1) the income approach: past or future income or cash flow streams are applied to a capitalization rate or discount rate to reach present value; (2) the market approach: values or sales of comparable businesses, or interests in comparable businesses, are the bases for value of the subject business; (3) the asset approach (or asset-based approach, adjusted net asset approach, and other variations on the term): a value for each balance sheet item is determined (including intangibles, which may or may not appear on the balance sheet) and then added together (assets less liabilities).[21]

N.W.2d 308, 313 (N.D. 2011) (the fair market value of a business is ordinarily the proper method for valuing property in a divorce); Buist v. Buist, 730 S.E.2d 879, 883 (S.C. Ct. App. 2012) (a court must determine the fair market value of property); Ricks v. Ricks, 169 S.W.3d 523, 527 (Tex. Ct. App. 2005); McReath v. McReath, 800 N.W.2d 399, 408 (Wis. 2011) (property valued for the purpose of dividing the marital estate should be valued at its fair market value);

20 Treas. Reg. § 20.2031-1 (b) (2012).

21 Jay E. Fishman & Bonnie O'Rourke, *Value: More Than a Superficial Understanding Is Required*, 15 J. AM. ACAD. MATRIM. LAW. 315 (1998) (comparing standards of valuation, such as fair market value and investment value, used to estimate the worth of closely held businesses at dissolution); Richard M. Teichner & Erik J. Bolinder, *What'sIt Worth? Important Issues in Business Valuations*, 52 ADVOCATE 31 (Sept. 2009). *See also* Robert W. Levis , *Valuation of Businesses in Colorado Divorces*, 32 COLO. LAW. 73 (June 2003) ("The three generally accepted approaches to valuing a business are as follows: (1) Asset-Based Approach; (2) Income Approach (including the Capitalization of Earnings Method); and (3) Market Approach. The popular Excess Earnings Method is a hybrid of the Asset-Based and Income Approaches"); Brett R. Turner, *Valuation of Businesses in Divorce Cases: An Annotated Survey of Methods*, 10 DIVORCE LITIG. 1 (Feb. 1998) (summarizing the IRS guidelines for valuing close corporations, covering assessments regarding different portions of a business (such as the physical assets and accounts receivable), considering a businesses' book value and liabilities, contemplating methods for attaching a monetary value to goodwill (such as the excess earnings approach, the comparable sales approach, and subjective estimation methods), and presenting ways of assessing the going concern value of a business).

The methodologies include: (1) for the income approach: capitalization of earnings, capitalization of excess earnings for a determination of goodwill (i.e., after calculating a return on assets) or discounted future earnings plus residual value; (2) for the market approach: use of comparable public company data and of comparable merger and acquisition data; (3) for the asset approach: establishment of fair market value, replacement value or liquidation value of the assets and liabilities.

In the income approach, a capitalization rate (or "cap rate") is applied to an earnings figure that is expected or is most likely to occur, i.e., a projected earnings amount for the following year that is indicative of the earnings for all future years. Depending on the circumstances, this projected earnings figure may be based on the average or weighted average of prior years' net income, pre-tax income, EBIT, EBITDA, cash flows or some other measurement of earnings. The historical data need to be adjusted for any anomalies or anything else that is not recurring or representative of future events. A discount rate is applied to the stream of future earnings for a specified number of years and the sum of the present value of each year's discounted earnings is then added to the value of the business as of the end of the last year specified (i.e., terminal value). This terminal value is normally determined by applying a capitalization rate to the earnings in the final year and then discounting this capitalized earnings amount to present value. A discount rate applied to a stream of future earnings inherently includes a growth rate and thus is higher than a capitalization rate applied to a projected earnings amount (unless there is negative growth, in which case the discount rate would be lower than the capitalization rate).[22]

It bears repeating: Whatever the method, the goal is the determination of fair market value. Thus, an examination of earnings is merely a tool in determination of the current value of the asset.

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22 Teichner & Bolinder, *supra* note 21, at 33. Stated more simply, for marital dissolution purposes, the most commonly applied form of income approach is the capitalization of earnings method. Under this method, "expected" earnings (usually some average of historical earnings) are "capitalized" (divided by a capitalization rate), using a risk-adjusted "investor" required rate of return.

IV. It Is Not Double Dipping to Divide an Asset That Has Been Valued Using the Capitalization of Earnings Approach and Then Award Spousal Support Using Income From the Business.

As noted in the previous section, the income approach to valuation is nothing more than a tool to determine current value. It is, in this regard, no different from the other approaches (market approach and asset-based approach) in its ultimate goal of determining fair market value. Since no one would argue that valuing a business using the market approach results in double dipping, no one should argue that valuing a business using an income approach also results in double dipping.[23]

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[23] I am not including in this argument personal goodwill determined by the excess earnings method. Personal goodwill is, in essence, the value of future income, and an argument can be made that the inclusion of personal goodwill and an award of alimony based on that same income constitutes double dipping. The argument has been laid out thus:

> When the main value of a business (such as a service business or professional practice) is goodwill derived from its ability to generate future income, the appraisal typically involves determining the reasonable compensation of the owner, that is, what the owner would earn working for someone else if he or she did not own the business. The extra income (sometimes called excess compensation) earned over and above that reasonable compensation represents the investment return of the business and is an important element in the value of the business. To the extent that a nonowner spouse shares in excess compensation that was rolled into the value of the business, some practitioners argue that this same income should be excluded from consideration in support calculations because to include it would amount to a double dip by awarding a share of that excess compensation as part of the property division, and then another share of the same income stream as part of a support award.

JUDITH KELLY, MARILYN CURTIS & RICHARD ROANE, MICHIGAN FAMILY LAW § 15.40 at 15–46 (7th ed. ICLE 2011). Another commentator stated the argument differently:

> If professional goodwill is simply reputation, and represents only future earning capacity, it is included in the basis for awarding support, maintenance and child support. to include goodwill in the valuation of an asset, the business, and as future income upon which support awards are based values the same capacity twice. Rather than consider professional goodwill as property, appropriate consideration of profes-

The argument that when a business has been valued using an income approach there is a double dip in the award of alimony was made in *Steneken v. Steneken*.[24] In *Steneken*, the husband's business was valued using a capitalization of earnings method. The trial court determined his reasonable compensation was $150,000. Because Mr. Steneken had received annual distributions of $208,000, the trial court determined that he had excess earnings of $58,000, and capitalized this money to determine the value of the business. Mr. Steneken retained the business and Mrs. Steneken was given other marital assets as an offset for her share of the value of the business.

The trial court was confronted with the question of whether the future excess earnings from Mr. Steneken's business—income that already had been valued and divided in equitable distribution—should again be considered for the purpose of establishing his alimony obligation. The trial court ruled that the excess income stream should not be included (because Mrs. Steneken had received her share of the value of excess income by

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> sional goodwill is as an aspect of income potential. The goodwill value is then reflected only in the maintenance and support awards. Any additional consideration of goodwill value is duplicative and improper.

Helga White, *Professional Goodwill: Is It a Settled Question or Is There "Value" in Discussing It?*, 15 J. AM. ACAD. MATRIM. LAW. 495, 503 (1998). *See also* Jennifer D. Ary-Hogue, *Peace on Earth, Goodwill in Divorce: Revisiting* Travis *in Light of Oklahoma's Revised Ethical Rule Allowing the Sale of Law Practice Goodwill*, 61 OKLA. L. REV. 585, 601-602 (2008) (the benefits of the fair market value approach include "eliminat[ing] double awards in divorce settlements. For instance, double dipping into the value of goodwill may occur when the professional spouse's income is used to compute goodwill, which would then be divided as a marital asset, and also used again to compute future income to set a support award."); Donald John Miod, *The Double Dip in Valuing Goodwill in Divorce* 10, *available at* http://www.expertlaw.com/library/family_law/double-dip.html (last visited October 3, 2012) ("Charging one party in a marital dissolution with the community property goodwill and using the same earnings to compute spousal support is counting the same income twice."). *See, e.g.*, Taylor v. Taylor, 386 NW2d 851 (Neb. 1986); Holbrook v. Holbrook, 309 N.W.2d 343 (Wis. Ct. App. 1981) (treating goodwill as a separate asset constitutes double counting).

This is basically the same reasoning used in New York that finds double dipping in awarding the excess income value of a professional degree or license and also awarding alimony. The way to avoid this double dipping is to exclude personal goodwill from the value of the business.

24 873 A.2d 501 (N.J. 2005).

way of equitable distribution), and therefore based Mr. Steneken's support obligation on his reasonable compensation of $150,000.

The New Jersey Supreme Court *reversed* the trial court's decision. The court found that alimony and equitable distribution serve distinct purposes, and therefore there is no prohibition against such a double dip. Accordingly, the court concluded that Mr. Steneken's actual income should be utilized for determining his alimony obligation.

What the New Jersey court did can be explained by understanding how capitalization works:

> [Double dipping] exists whenever an income-based valuation method is applied to a closely held business enterprise or a professional practice. For all such valuation methods, including holder's interest, a determination of reasonable, or "market value," compensation for the owner is made. "Double dipping" is avoided by limiting the owner's income for purposes of alimony to the amount determined as "reasonable compensation" or the "market value" of services.
>
> For instance, consider a professional who owns his or her practice and averages net income of $175,000 annually. Further, assume that the average annual income of nonowner professionals, performing similar services and with comparable experience, is $125,000. In determining the value of the practice's incremental earnings, only the difference between the owner professional's average income of $175,000 and that of comparable nonowner professionals of $125,000 is capitalized (generally at an earnings multiple ranging from two to four) and incorporated in the value of the practice.
>
> Thus, there is no double dipping of income if alimony is based on the $125,000 "market value" of the professional's services. And, as noted, this is no difference when valuing a professional practice according to the holder's interest method than when valuing a commercial company in the many situations where corporate profits are paid out as bonuses to the owners in addition to reasonable compensation for their services.[25]

One year later, New York decided *Keane v. Keane*.[26] In that case, the supreme court appellate division held that consideration of the husband's monthly rental income from his body shop repair business in the computation of the award of maintenance to wife constituted impermissible double counting, where a capitalization of income method had been utilized in appraising full

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25 Joseph W. Cunningham, *Equitable Distribution and Professional Practices: Case Specific Approach to Valuation*, 73 MICH. B.J. 666 (July 1994).

26 861 N.E.2d 98 (N.Y. 2006).

market value of body shop property and that value had been used in calculating the wife's distributive award of marital property. The court of appeals reversed, recognizing that when income is utilized in valuation, income is just a means to an end to finding current value:

> We do not see why an inquiry as to double counting should depend on the valuation method used. After all, any valuation of an income-producing property will necessarily take into account the income-producing capacity of that property. To prevent any income derived from any income-producing property from being "double counted" would, therefore, significantly limit the trial court's considerable discretion in equitably distributing marital property and awarding maintenance.[27]

Unlike a pension, where the asset *is* the income, or enhanced earnings or goodwill, which *are* future income, an asset will continue to exist forever, and is thus distinguishable from income.[28]

The double dipping argument was made, and rejected, years before in *In re Marriage of Huff*.[29] In that case, the court held that the district court's use of the excess earnings method in valuing the husband's partnership interest in a law firm did not result in "double dipping" by wife, on the theory that an excess earnings approach converted his future income into property which was then divided between spouses, and the same future income was then used as a source from which wife's maintenance was paid. The court reasoned that the excess earnings approach capitalized excess earnings based on a comparison of the husband's past earnings to past earnings of attorneys in same area with same education, experience and capabilities, thereby providing valuation which represented the present value of the husband's partnership interest, and did not convert the husband's future income into property.[30]

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27 *Id.* at 100.

28 *Id.* at 101 ("Here, the rental property was split between the parties for distributive purposes. The rental income from that property was then considered in determining maintenance. The property will continue to exist, quite possibly in the husband's hands, long after the lease term has expired, as a marketable asset separate and distinguishable from the lease payments.")

29 834 P.2d 244 (Colo. 1992).

30 *Accord In re* Marriage of Bookout, 833 P.2d 800 (Colo. Ct. App. 1991) (the trial court's decision to base an order of maintenance and child support upon the husband's future income did not inequitably award the wife a double recovery, even though the husband's physical therapy practice was valued, for

equitable distribution purposes, by means of capitalizing his yearly earnings); Miller v. Miller, 705 S.E.2d 839 (Ga. 2010) (the trial court's award of portions of the husband's medical practice in an alimony award and in property division as "business alimony" did not constitute impermissible "double dipping" regarding the husband's income in a divorce action; the wife's valuation expert deducted reasonable salary expenses for the husband under both capitalization methods, and thus separate bases for alimony award and property division were clearly acknowledged before the court); Drury v. Drury, Nos. 2006-CA-000447-MR, 2006-CA-000529-MR, 2007 WL 2687589 (Ky. Ct. App. Sept. 14, 2007) (the valuation method used to value a landscaping business was based upon the husband's past earnings, and thus there was no double recovery); Clark v. Clark, 782 S.W.2d 56 (Ky. Ct. App. 1990) (awarding the wife a portion of the husband's future earnings and a portion of husband's professional corporation's goodwill value did not amount to double recovery, where the corporation's goodwill was determined by capitalizing the corporation's past excess earnings, not future earnings); Skrabak v. Skrabak, 673 A.2d 732 (Md. Ct. Spec. App. 1996) (accounts receivable from a former husband's professional practice could be considered in valuing marital property and determining the amount of alimony; accounts receivable were not divided between spouses but were used as a valuation tool, and created constant cash flow continually reimbursing the corporation, and there was thus no double counting of assets). *Compare* Head v. Head, 523 N.E.2d 17, 20 (Ill. Ct. App. . 1988) ("We therefore conclude that adding $117,000 to the value of the professional corporation awarded to the husband based upon a stream of future income was error because it results in a 'double count' of potential future income by considering such income in both the valuation of the asset and considering it in apportioning the total marital assets and awarding maintenance."); Sampson v. Sampson, 816 N.E.2d 999, 1005 (Mass. App. Ct. 2004) (remand was required in a divorce action to determine whether "double counting" had occurred in property division regarding the former wife's business and her salary and to address any other inequities; the capitalized income method used to value the business required subtraction of the former wife's salary from the business income, while expert testimony credited by the judge did not adjust directly for salary but rather subtracted the other employee's salary as appropriate for a "part-time owner," and the judge made no similar adjustments to income when determining the former wife's need for support); Loutts v. Loutts, No. 297427, 2012 WL 4210296 (Mich. Ct. App. Sept. 20, 2012) ("we decline to adopt a bright-line rule with respect to "excess" income and hold that courts must employ a case-by-case approach when determining whether "double dipping" will achieve an outcome that is just and reasonable"); Heller v. Heller, No. 07AP-871, 2008 WL 2588064 *7 (Ohio Ct. App., June 30, 2008) ("In this case, the evidence clearly indicates that the value assigned to defendant's interest in H & S did not include defendant's compensation for his daily labor, but did include his share of all of H & S's future excess earnings; that is, it included the present value of all of defendant's future stock dividends. In making its property division, the trial court divided this asset equally between the parties. But the trial court then awarded to plain-

The Colorado court expanded its reasoning in *In re Marriage of Banning*.[31] The husband in *Banning* argued:

> No matter what method of valuation is used, it does not change the nature of the asset being valued. Goodwill still represents potential future income. . . .[Thus], if a portion of income is valued and divided as a currently existing asset, that portion must be subtracted from potential future income when calculating maintenance and child support.[32]

The court disposed of his argument, reminding the litigants that valuation does nothing more than value a currently owned asset, not a future asset. Thus, there is no double dipping when alimony is awarded from future earnings:

> [T]he reasoning in husband's argument relies on no less a fallacy than that claimed for the reasoning in *Huff*. Husband's argument assumes the participating spouse is purchasing goodwill at the time of the dissolution, with the purchase price paid out of future income. If that were the case, then it might follow that the participating spouse should not have to pay for the purchase out of future income and, at the same time, treat the same income as available for purposes of calculating child support and maintenance. That, however, is not the case.
>
> The excess earnings method of valuation, like other similar ones, relies on a fictional purchase and sale of goodwill. In fact, at the time of dissolution the goodwill to be valued and divided has already been accumulated. It is an existing intangible asset, no different from any other marital asset that is fully owned.[33]

Thus, unless the asset *is* the income, the double dipping argument must fail.

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tiff, in addition to her one-half of that asset, another 20 percent of defendant's half. . . . In ordering this result, the court "double dipped," or awarded part of the same asset to plaintiff twice.").

31 971 P.2d 289 (Colo. Ct. App. 1998).

32 Id. at 293.

33 *Id.* at 293-94. *Accord* Champion v. Champion, 764 N.E.2d 898 (Mass. App. Ct. 2002) (calculation of alimony using income from a sole proprietorship assigned to the husband in a divorce action was not "double dipping," given that a collection of receivables that transformed into a stream of income were replaced by new receivables that maintained the value of the business while providing income to the husband from which alimony was derived); Bagnola v. Bagnola, No. 2003-CA-00120, 2003 WL 22501764 (Ohio Ct. App. 2003) (the husband's earned income from three business ventures was "inextricably tied to the valuations of each company" and thus was necessarily a basis for the determination of spousal support).

V. Conclusion

The double dipping argument is attractive to those who wish to limit spousal support. It is inappropriate, however, to employ such an argument merely because the valuation method of the business relies on an examination of income. Only when the asset *is* the income is the double dipping argument tenable.