

In re Marriage of Tong & Samson

Economics has been called the “dismal science.” A turbulent and troubled economy and precipitous loss of jobs has marked the economic landscape for the past several years. This case involves loss of a job after 28 years, accompanied by a severance pay package. When severance pay accompanies a forced lay-off, a question arises as to how the severance pay affects calculation of spousal support when coupled with the fact of unemployment, as a change of circumstances. That is *Tong & Samson*. In May 2008, husband was ordered to pay temporary support to wife in the sum of \$15,031 per month, plus an *Ostler-Smith* 35% of all compensation in excess of \$45,000 per month. In June 2008, husband requested to modify support on the grounds that his commissions as a mutual funds wholesaler had decreased. The parties stipulated that husband would pay temporary support to wife in the sum of \$9,059 per month, plus 35% of his compensation in excess of \$25,000 per month. In June 2009, husband was advised he was being laid off after 28 years. Months later, in September 2009, husband received a severance package in the sum of \$294,000. The severance package consisted of 12 months of salary (\$100,000), a lump sum payment in lieu of 6 months of commissions (\$152,853), a health care component of \$1,500 and a master retirement plan component of \$3,422. Final earnings and unused vacation time brought the total payment to \$309,700.

In March 2011, husband filed an Order to Show Cause seeking clarification concerning the effect the severance pay had on spousal support, as well as his request to terminate support based on wife’s cohabitation. Husband requested the trial court to allocate his severance package over 13 months for spousal support purposes rather than as a single month *Ostler-Smith* payment. The trial court ordered arrearages which it attributed to the month the severance funds were received. In doing so, the trial court found that husband was attempting to retroactively modify the temporary support order because he waited so long to seek modification. In addition, the trial court refused to modify support based on wife’s cohabitation.

The Court of Appeal reversed in part and affirmed in part. It reversed the trial court’s ruling that husband’s severance pay should be allocated entirely in the month it was received as an *Ostler-Smith* payment, instead of being spread out over time. The Court of Appeal based its reversal on the following: (1) most of husband’s severance pay was designed to compensate him for 12 months of lost salary and 6 months of lost commissions – it did not represent a single month of compensation and should not have been treated as such for purposes of calculating the *Ostler-Smith* percentage; and (2) on remand, the trial court has discretion to choose an appropriate method for allocation and is not limited to husband’s proposal of spreading it out over 13 months. The Court of Appeal affirmed the trial court’s decision not to modify or terminate wife’s \$9,059 award of support, because she successfully rebutted the *Family Code* Section 4323(a)(1) presumption of reduced need because of cohabitation, given that her partner only contributed \$800 per month toward food. The trial court had noted that husband did not base his request on his unemployment.

Loss of job issues can be expected with more frequency in this fragile economic climate. Whether accompanied by a severance pay package or not, issues of changed circumstances, earning capacity, ability to find new employment, financial impetus for relocation, not to mention the emotional strains inherent in these situations, will undoubtedly form the fabric of family law cases in the foreseeable future.

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