

1 MICHAEL C. PETERSON [SBN 267208]
2 THURMAN W, ARNOLD, III, CFLS [SBN 107101]
3 The Law Firm of Thurman W. Arnold, III
4 225 South Civic Drive, Suite 1-3
5 PALM SPRINGS, CA 92262
6 TEL: (760)320-7915
7 FAX: (760)320-0725

8 Attorney for Petitioner,
9 KENNETH G. [REDACTED]

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF RIVERSIDE

13 IN RE MATTER OF:

14 PETITIONER: KENNETH G. [REDACTED]

15 and

16 RESPONDENT: NORMAN D. [REDACTED]

CASE NUMBER: [REDACTED]

PETITIONER'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
REPLY

DATE: January 22, 2015
TIME: 8:15 a.m.
DEPT: 2E

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18 I. TEMPORARY SPOUSAL SUPPORT "NEEDS" INCLUDE SAVINGS
19 AND INVESTMENTS; TEMPORARY SUPPORT AWARDS ARE NOT
20 BASED ON ACTUAL, MINIMIZED LIVING EXPENSES OF THE
21 RECIPIENT, AND ARE PROPERLY BASED ON COMPUTER
22 "GUIDELINE" CALCULATIONS

23 During the pendency of a dissolution or legal separation action, the court may
24 order either party to pay "any amount that is necessary" for the other party's support,
25 consistent with the requirements of Fam.C. §§ 4320(I) and (m) and 4325. Fam.C. §
26 3600(a).

27 The amount of the award lies within the trial court's sound discretion. A party's
28 ability to pay encompasses far more than the salary/wage income of the spouse from
whom temporary support is sought (e.g. return on investment is also part of income),

1 and it may properly consider the “big picture” concerning the parties assets and income
2 available for support in light of the marriage standard of living. *Marriage of Wittgrove*
3 (2004) 120 CA4th 1317, 1327, 16 CR3d 489, 496 [holding that the trial court’s setting
4 amount of temporary spousal support at \$30,000 per month was not abuse of discretion
5 where ‘guideline’ spousal support would be about \$34,000, the husband’s income was
6 \$1.7 million per year, the wife’s income was \$128,000 per year, and the parties’ marital
7 standard of living include accumulating savings of \$200,000 to \$300,000 per year.
8 [Emphasis added].

9 Whereas “permanent spousal support” provides financial assistance, if
10 appropriate, as determined by the financial circumstances of the parties after their
11 dissolution and the division of their community property, “temporary spousal support” is
12 utilized to maintain the living conditions and standards of the parties in as close to the
13 status quo position as possible pending trial and the division of their assets and
14 obligations. *Id.*; underlines added.

15 A § 3600 award is utilized to assure a spouse substantially the same living
16 conditions to which he or she has been accustomed pending final judgment. *Marriage*
17 *of Gruen* (2011) 191 CA4th 627, 637, 120 CR3d 184, 191. In determining temporary
18 spousal support, a court is not limited by a supported spouse’s actual living expense
19 needs when the parties’ marital standard of living included savings and investments.
20 *Marriage of Wittgrove, supra*, at 1329, 498, citing *In re Marriage of Cheriton* (2001) 92
21 CA4th 269, 111 CR2d 755, and *In re Marriage of Winter* (1992) 7 CA4th 1926, 1932, 10
22 CR2d 225.

23 Absent “unusual facts or circumstances,” temporary spousal support may
24 properly be set in reliance on guidelines and through computer programs that
25 mechanically calculate temporary spousal support in accordance with applicable local
26 rules. *Marriage of Winter* (1992) 7 CA4th 1926, 1933, 10 CR2d 225, 228.

27 Here and during the parties’ RDP, it appears about one-half of Respondent’s
28

1 \$500,000+/year gross income was used for savings or to acquire investment assets
2 (\$200,000 to \$300,000 per year, just as with the parties in *Wittgrove*). In light of the
3 *status quo* purposes of temporary spousal support, Petitioner is entitled to continue with
4 this established savings behavior during the course of these proceedings.

5 Exclusive of \$1,000/month for savings as originally stated on Petitioner's I&E
6 Declaration as proposed need expenses, now increased in the amended FL-150 in light
7 of review of Respondent's discovery responses, Petitioner's estimated needs are about
8 \$4,400/month. His historical income is about \$1,850/month (and his present income is
9 \$0/month). Guideline, computer generated temporary spousal support is estimated to
10 be between \$10,000 and \$11,000 from Respondent to Petitioner. This amount is
11 absolutely necessary to maintain the status quo, to allow Petitioner to establish his own
12 household, and save at a level approximating the past. It is irrelevant that Respondent
13 chose to control the parties' finances during the RDP. If Petitioner were to save his
14 estimated support surplus over his minimum living expense needs, he would be saving
15 a mere \$73,200/year (i.e. [\$10,500/month guideline support - \$4,400 minimal proposed
16 living expenses] x 12 months = \$73,200), a figure much less than one-half of what the
17 parties' historically saved, but at least on par with the kind of savings Respondent will
18 continue to enjoy in this post-separation period.

19 **II. THE PARTIES DATE OF SEPARATION IS PRESENTLY A**
20 **CONTESTED, UNADJUDICATED MATTER; PROVISIONS OF FAM. C.**
21 **§ 4320(L) RELATING TO DURATION OF 'PERMANENT' SPOUSAL**
22 **SUPPORT HAVE NO BEARING ON TEMPORARY SPOUSAL**
23 **SUPPORT AS RECOGNIZED BY CASE LAW**

24 Respondent's Responsive Declaration repeatedly states, without independent
25 corroboration, that the parties separated in January, 2013 as if this were an already
26 judicially-found fact, and then argues throughout those papers that Respondent has
27 received support from him in a two-year period equal to all Petitioner is entitled under
28 the law. As shown below, his argument is premised on Respondent's apparent incorrect
understanding and statements of the law relating to the intersection of temporary vis-a-

1 vis 'permanent' spousal support, as well as the procedural history of this case.

2 As a general rule, for so long as husband and wife or registered domestic
3 partners are living together, they owe each other a mutual duty of support. Fam.C. §
4 4300. As such, Respondent's alleged voluntary support of Petitioner between January,
5 2013 to some other point in time is irrelevant on the issues before the Court unless it
6 finds, as a matter of fact, that the parties' separated in January, 2013. It has not done
7 so at the present time; nor will it ever be expected to.

8 Date of separation is a factual issue to be determined by a preponderance of the
9 evidence. *In re Marriage of Peters* (1997) 52 CA4th 1487, 1493–1494, 61 CR2d 493.

10 "Separation" requires more than a rift in the spouses' relationship. The date of
11 "separation" occurs only when the parties have come to a parting of the ways with no
12 present intent to resume their marriage and their conduct evidences a complete and
13 final break in the marital relationship. *Marriage of Hardin* (1995) 38 CA4th 448, 451, 45
14 CR2d 308, 310. The court is bound to consider all relevant evidence in resolving
15 separation date contests. Consequently, recitals in the pleadings or a marital settlement
16 agreement are probative but not conclusive on the issue. *Marriage of Umphrey* (1990)
17 218 CA3d 647, 656–657, 267 CR 218, 221–222 & fn. 2.

18 Unless earlier modified or terminated, a temporary spousal support order
19 continues in effect until entry of judgment (at which point it is superseded by the
20 "permanent" support order contained in the judgment). *Marriage of Left* (2012) 208
21 CA4th 1137, 1145–1148, 146 CR3d 181, 187–189.

22 A temporary support order may be modified or terminated at any time except as
23 to amounts accrued before the date of filing the motion or OSC re modification. Fam.C.
24 § 3603; see also Fam.C. § 3604, essentially stating that temporary spousal support
25 order is without prejudice to parties' rights with respect to permanent spousal support
26 award.

27 In contrast to the *status-quo*-maintaining policy purpose of temporary spousal
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1 support under Fam. C. § 3600 (discussed above), "permanent" spousal support under
2 Fam. C. § 4320 is intended to provide financial assistance, if appropriate, for a
3 reasonable period as determined by the parties' circumstances after dissolution and
4 division of their community estate and a weighing of the § 4320 spousal support factors.
5 *Marriage of Murray* (2002) 101 CA4th 581, 594, 124 CR2d 342, 351. Because
6 temporary spousal support serves an entirely different purpose than "permanent"
7 spousal support awarded by judgment after trial, the Fam.C. § 4320 factors generally
8 are not controlling on the question of temporary spousal support awards, but may be
9 considered. *Marriage of Cheriton* (2001) 92 CA4th 269, 312, 111 CR2d 755, 788.

10 Here, Respondent argues that the provisions of Fam. C. § 4320(l) regarding
11 'permanent' spousal support apply to the duration of temporary spousal support. He
12 cites no on-point case to support this proposition (indeed, because none exist). This
13 argument fails in light of the above-described distinctly different policies served by each
14 form of spousal support, as well as by the fact that one policy is found in Fam. C. §
15 3600, *et seq.* and the other is in a completely different section of the code. This
16 argument also fails in light of the comparative income power of the parties in light of the
17 marital standard of living which, inclusive of savings/investments, was anything but
18 "modest" as Respondent puts it.

19 *In arguendo*, Fam. C. § 4320(l) provides a statement that a reasonable period of
20 time for a supported party to become self-supporting in the 'permanent' spousal support
21 context is generally one-half the length of the marriage in marriages of less than ten
22 years. Some cases loosely refer to the "one-half the length of the marriage" standard as
23 establishing a presumptively reasonable period to become self-supporting (see
24 *Marriage of Rising* (1999) 76 CA4th 472, 478, 90 CR2d 380, 385, fn. 9). But that is not
25 what the statute says and, indeed, is contradicted by the statute's express provision
26 that nothing in § 4320(l) is intended to limit the court's discretion to order "permanent"
27 spousal support for a greater or lesser period of time based on other § 4320 factors,
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1 Fam.C. § 4336 (indefinite reservation of spousal support jurisdiction in lengthy
2 marriage), and the parties' circumstances. Fam.C. § 4320(l); see also *Marriage of Left*
3 (2012) 208 CA4th 1137, 1151, 146 CR3d 181, 191 [holding there was no abuse of
4 discretion in refusing to terminate spousal support after 3 ½ years following 4 1/2-year
5 marriage where the obligee not self-supporting and the obligor was slow in paying
6 obligee her share of community property over which obligor retained control].

7 Thus, more accurately and continuing *in arguendo*, one-half the length of the
8 marriage operates as nothing more than a baseline measurement for duration. This
9 point is cogently made in a case predating the enactment of § 4320(l): “[T]here is
10 nothing talismanic about the ‘one-half of the married life’ concept. It is not an eternal
11 verity or an immutable principle carved in legal stone or etched in judicial steel. It fits
12 some cases, it doesn't fit others. In some cases the wife is not entitled to a dime. In
13 other cases she must be supported for life. Each and every case must be judged on its
14 own merits. A judicial policy cannot be tolerated which affords blind obedience to the
15 idea that the support order be for a period equal to ‘one-half of the married life.’ In each
16 case the trial court must make a careful and measured judgment reflecting a sound
17 exercise of discretion in the award of spousal support and its duration.” *Marriage of*
18 *Brantner* (1977) 67 CA3d 416, 423, 136 CR 635, 639.

19 **III. COURT-ORDERED SPOUSAL SUPPORT BETWEEN SAME-SEX**
20 **DOMESTIC PARTNERS IS TAXABLE INCOME TO RECIPIENT UNDER**
21 **STATE TAX LAW AND MAY BE NON-TAXABLE INCOME UNDER**
22 **FEDERAL TAX LAW**

23 The Internal Revenue Code provisions making spousal support payments under
24 a “divorce or separation instrument” ordinarily deductible by the payor and taxable to
25 the payee (IRC §§ 71, 215) only apply to “spouses.” Domestic partners are not the
26 equivalent of married persons under federal law, such that partner support payments
27 after dissolution of a registered domestic partnership are not deductible to the payor.

28 In contrast, California income tax law conforms to federal law regarding spousal

1 and child support payments for married couples (i.e., spousal support payments are
2 taxable to recipients and deductible by payors, while child support payments are neither
3 taxable nor deductible). Rev. & Tax.C. §§ 17071, 17072(a). Since registered domestic
4 partners are recognized as married under California law, former registered domestic
5 partners may take advantage of the federal provisions relating to spousal and child
6 support. Rev. & Tax.C. § 17021.7(b)(1). As such, for state income tax purposes,
7 spousal support payments in connection with the dissolution of a registered domestic
8 partnership (or same-sex marriage) should be deductible to the payor and taxable to
9 the payee; see Rev. & Tax.C. § 17021.7

10 "Whether partner support will be taxable income [under federal law] to the
11 recipient is a difficult, unsettled issue that awaits IRS guidance." *Cal. Prac. Guide*
12 *Family L. Ch. 20-C: Nonmarital Cohabitation And Domestic Partnerships, Tax*
13 *Considerations*, at 20:396.

14 As such, the Court should be mindful of seemingly opposite federal and state tax
15 law consequences of court-ordered temporary spousal as Petitioner requests here; as
16 between the two government entities and in aggregate, it will likely neither be totally tax-
17 free to Petitioner, but simultaneously it will likely not be completely taxable to Petitioner.
18 The Xspouse calculator allows its settings to be changed for inconsistent tax treatment
19 of temporary spousal support as between state and federal taxing agencies, and the
20 Court is respectfully suggested to utilize these functions in calculation temporary
21 spousal support.

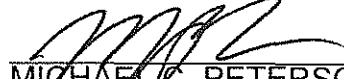
22 **////**

1 **CONCLUSION**

2 For the foregoing reasons, the Court should award guideline temporary spousal
3 support as requested by Petitioner, and should grant attorney's fees and costs as
4 requested.

5 Dated: January 14, 2015

RESPECTFULLY SUBMITTED,

6 
7 MICHAEL C. PETERSON
8 Law Firm of Thurman W. Arnold
9 Attorneys for Petitioner
10 KENNETH G. [REDACTED]