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WHEN "GUIDELINE" CHILD SUPPORT IS TOO MUCH: EXTRAORDINARY HIGH EARNERS AND "THE DICK WOLF EXCEPTION"

By Gregory W. Herring; 2010

Child support in California is routinely calculated under the algebraic equation stated in the Family Code and commonly computed through software programs such as "Dissomaster"™.¹ This "Guideline" calculation is intended to be presumptively correct in all cases. But in special circumstances child support orders can fall below the Guideline. One of those is when the payor spouse has "extraordinary high income."

Recognizing that there can be limits to kids' needs, most states cap child support in these cases. California lacks a cap, but it does provide for judicial discretion. Because a judge, in exercising this, must also make certain findings, this can lead to extraordinary levels of investigation and discovery into a high earner's income. Conversely, it can also lead to opportunities for high earners to escape having to pay support under the rules that apply to everyone else.

¹ The guideline calculations have come in for even more colorful judicial criticism recently. As one court put it, "the algebraically based computation method has been likened to something out of Alice in Wonderland. Actually, it is worse than that. The system is a kind of hybrid of quantum physics and Zen philosophy. Support is calculated on after-tax income, but after-tax income may be itself affected by the support order! Thus, in a manner reminiscent of an attempt to pin down an electron or the image of a snake eating its own tail, the nooks and crannies of the computer program involved in this case contain sophisticated feedback loops which seek, in essence, to continually adjust for the tax effects of a given order, but at the same time formulate an order in light of those same tax effects. . . . For a judge trying to manually apply the law, it would be like taking an algebra exam after doing somebody else's tax returns." (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 523, fn. 2.) Other courts also have joined the chorus of criticism. (See *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 144 ["For better or worse, California child support law now resembles determinate sentencing in the criminal law [¶] . . . [¶] . . . Certain sections of the Family Code are now redolent of the flavor of the Internal Revenue Code"]; and see *In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 316, 317, 319 ["California's child support statutes are a legal world unto themselves." "The statute virtually beckons the eyes to glaze over." An "aura of occult wizardry surround[s] the algebraic formula").)



The Family Code's Foundation:

"I'm a rich guy who doesn't want to disclose my income – cut to the chase and I'll pay a reasonable amount to meet the kid's needs."

Although the Dissomaster,TM and other programs ensure that virtually no one actually has to know it, the "Guideline" child support equation is no mystery. Family Code section 4055 states it as: $CS = K [HN - (H\%)(TN)]$. Of course, the Code also defines the variables. California adopted the equation to ensure compliance with federal law, which requires that states establish uniform guidelines to be eligible for ADFC funds. (See, *In re Marriage of Fini* (1994) 26 Cal. App. 4th 1033, 1040 (citing U.S.C. §667).)

Section 4053 provides that, in implementing the Guideline, a court must take into account each parent's actual income and level of responsibility for the children. It also states that the Guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below its levels.

Under section 4057, the presumption can be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in a particular case. This includes where (1) the payor has an extraordinarily high income *and* (2) the amount determined under the formula would exceed the needs of the children.

Keeping the courts honest is section 4056, which *always* requires a judge who intends to deviate from the Guideline to make a written finding of the amount of support that would have been ordered under the formula. *At the request of either party*, it also requires the court to state the net monthly disposable income of each parent.

Thus, the Code requires *without exception*: (1) Full disclosure of income and expense information, and (2) Calculation of Guideline Support *before* a court may even *consider* potentially deviating from it.

Accordingly, the recent line of published appellate cases has required support obligors to "show their cards."

In *In re Marriage of Hall* (2000), the Court of Appeal recognized that "no trial judge making a child support order can escape making a formula calculation pursuant to section 4055." It further articulated that "[t]he formula is always predicated on knowing what *both* parents' income is in nominal static dollars at the time the order is made." (Emphasis added.)

The Court, in 2001's *In re Marriage of Hubner* ("*Hubner II*"), expressed that "absent a stipulation between the parties as to the appropriate amount of support, [the wife] and the court are entitled to know [the husband's] actual income, regardless of his admission he can pay any reasonable child support order." This is because the parent who invokes the high income exception has the burden of proving that "application of the formula would be unjust or inappropriate"



In *In re Marriage of Wittgrove* (2004), the Court expressly followed *Hubner II* and again explained that guideline child support based on the parties' actual income must first be ascertained before a parent can request that the Court deviate from the formula based on the high income earner exception.

What about The Defenses Previously Allowed in *White, Estevez And Johnson*?

Gone are the days when an extraordinarily high earner could reasonably argue that the law provided him with the ability to hide behind the "shield" of the "high income earner" exception to avoid production of his financial information or calculations of guideline amounts.

In 1987's *White v. Marciano*, the Court of Appeal held that a payor's admission of having the ability to pay any reasonable amount of child support properly protects him from detailed discovery of lifestyle. But *White* was decided well before California Rules of Court, Rule 1274, the predecessor to section 4055.

The Court, in 1994's *Estevez v. Superior Court*, ignored section 4056 and allowed Emilio Estevez some discovery protections. But *the amount of support was undisputed*. As *Hubner III* later clarified, *Estevez* never stood for the proposition that an extraordinarily high earner could escape providing income information and documentation when the amount of support was in dispute.

1998's *Johnson v. Superior Court* saw the Court of Appeal preclude discovery against basketball star Larry Johnson's lifestyle beyond that needed to make "least favorable assumptions" with respect thereto. But, as Garrett Dailey points out: "[i]f the parent's income seems low in comparison to perceived lifestyle, then discovery of lifestyle may be required. As any IRS agent will tell you, when trying to prove what people earn, it is often helpful to know what they spend. Likewise, discovery of assets may be necessary when income seems low, as the parent may be living off of principal rather than income."

Who Qualifies?

"OK, OK, I've disclosed my income and the court has run Guideline calculations showing I owe \$75,000 a month for the kid – that's ridiculous and I want the "extraordinary high earner" exception."

None of the statutes or reported cases provides a bright line definition of who qualifies for the exception. But, it is an exclusive club – for instance, the reported cases start at annual income of about \$1,400,000. One Southern California judge who was interviewed for this article made a "SWAG" (Scientifically Wild Ass Guess) that, in Los Angeles County, it might start at approximately \$3,000,000 a year. Another estimated that consideration of the exception might be triggered for someone earning \$1,200,000 in Ventura County or \$1,800,000 in Santa Barbara County.



But even then, it would depend on how the money gets spent. For instance, a deviation might be unwarranted if the extraordinary earner otherwise spends more than he earns. Contrarily, the exception could arguably be triggered in a lower income case, where the payor has high savings and does not otherwise pay spousal support. Either way, discovery remains just as important on relevant expenses.

The judges interviewed thought that the most common scenario for deviating from the Guideline likely involves small children under 5. But they emphasized that, if they were to deviate, they would strongly consider “add-ons” like travel, education and equestrian expenses (“horse support,” as one of my prior clients unhappily put it!).

In advocating for or against “high earner” status, look to resources like the U.S. Department of Labor, Bureau of Labor Statistics: www.bls.gov. If your client is in the top half percentile of all earners in the county, argue “how *couldn't* he be an extraordinary high earner?”

Strategies if The Payor Asserts or is Expected to Assert the Exception:

Litigating the issues on behalf of either party is technical and full of strategic possibilities, and potential pitfalls. For **payors**, considerations include:

- Under the above Code sections, argue that, by a preponderance of the evidence: (1) The presumption for application of the Guideline would be unjust or inappropriate; (2) The Guideline amount would exceed the child’s reasonable needs, and (3) A lower amount would be in the child’s best interests (payors always have to be creative as to that last factor!)
- In an effort to avoid the intrusion and hassle of discovery, offer a stipulation as to income for the sole purpose of the Guideline calculation. Later, this could also come in handy regarding fees arguments: The payor could potentially argue that the payee’s discovery was ultimately unnecessary and wasteful.
- Or, maybe the strategy would be to refrain from offering such a stipulation, so as to try to gain from a discovery battle of economic attrition.
- Insist on a protective (confidentiality) order. Perhaps even push for “attorney’s eyes only” provisions.
- Have your own “child’s needs” analysis ready for the opposition papers.
- *Forget* about arguing that high support orders would be unfair because they would benefit the payee, too. This is because section 4053(f) provides that “[c]hild support may . . . appropriately improve the standard of living of the custodial household to improve the lives of the children.”



On the other hand, **payees'** considerations include:

- In an effort to avoid the fees and costs of discovery, offer the same kind of income stipulation as suggested above for payors. For the payee, this could also come in handy regarding eventual fees arguments.
- Or, maybe the strategy would be to refrain from offering such a stipulation, so as to try to gain leverage through intruding into the payor's income, expenses and lifestyle through discovery.
- While still primarily arguing for Guideline support, establish, as part of the alternative case-in-chief, the facts and an analysis of the child's reasonable needs. This will generate costs, as it should be done through a forensic accountant. But it must be done in the moving papers to prevent being precluded from establishing "needs" should the payor refrain from arguing the point in his opposition papers. Under section 4053, the needs analysis would ordinarily include documentation and consideration of the payor's lifestyle.
- Expressly request the Court to:
 - Follow the child support calculation process required under the Family Code:
 - The Court is to *first* determine payor's actual current income to be able to calculate "[t]he amount of support that would have been ordered under the guideline formula," *then* determine "[t]he amount of support that would have been ordered under the guideline formula." (See §4056(a)(1).)
 - If, after the Court *first* completes the above steps *and* payor might then attempt to assert the "extraordinarily high earner" exception to guideline support, the Court is to determine the child's needs and whether "the amount determined under the formula would exceed [them]" before potentially deviating from the guideline amount. (See §4057(b)(3).)
 - Hold an evidentiary hearing.
 - Issue a Statement of Decision. (See §4056.)
 - Order payor to pay all payee's related attorney's fees and costs (See §2030.)



"The Dick Wolf Exception"

I recently represented the ex-wife of Dick Wolf, the creator of the "Law and Order" television franchise, in child support modification litigation. In defiance of the above authorities, he, an undisputed "extraordinary high earner," refused to produce any income or expense documentation, except on "attorneys eyes only" terms that were unacceptable to my client. He then limited his "disclosures" to a stipulation that his annual income "vastly exceeds" \$25,000,000. After unsuccessfully demanding the information under section 3664, my client filed a motion to compel.

The Santa Barbara trial court joined Mr. Wolf in defying the above authorities, and denied the motion. In then refusing to generate a Guideline calculation on its way to analyzing the child's needs, it unilaterally created "The Dick Wolf Exception" to the Family Code, *Hall*, *Hubner II* and *Wittgrove*. Its express rationale was that Dick Wolf's income is so stratospheric – over twice that at issue in *Hubner II*, for example -- that the law simply should not apply to him.

Arguments for and against the approach can be made: On one hand, the Ruling used Dick Wolf's riches to place him above the law; on the other, it avoided wasting scarce judicial resources by cutting to the chase.

Ultimately, the court "appeal-proofed" its approach. In tripling the prior support level and awarding my client 100% of her fees and costs, it made the result attractive enough to avoid risking through further litigation.

Conclusion:

By definition, "extraordinary high earners" are rare. One Los Angeles family law judge, interviewed for this article, estimates that he only encounters approximately one per year. But when encountered, counsel on both sides must be prepared to creatively argue issues of children's needs and parental lifestyles in addition to "the income numbers" for the usual Guideline calculation. "Dick Wolf Exception" or not, this is a risky and high stakes area of family law practice.