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### **When “Guideline” Child Support is Too Much: *Extraordinarily High Earners and “The Dick Wolf Exception”***

*by Gregory W. Herring*

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.”™ 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 “extraordinarily high income.”

#### **The Family Code’s Foundation**

Although the Dissomaster,™ 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.4th1033, 1040 (citing 42 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.” The Court of Appeal, in 2001’s *In re Marriage of Hubner* 94Cal.App 4th175 (“*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...”

### **Who Qualifies?**

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 extraordinarily 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.

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](http://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 extraordinarily 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:

- 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 payees’s discovery was ultimately unnecessary and wasteful.
- Insist on a protective (confidentiality) order. Perhaps even push for “attorneys eyes only” provisions.
- Have your own “child’s needs” analysis ready for the opposition papers.



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.
- 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.

### **“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 “extraordinarily 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 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.

### **Conclusion**

By definition, “extraordinarily high earners” are rare. 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.