

CHILD AND SPOUSAL SUPPORT

[REVISED 2012]



**ADMINISTRATIVE OFFICE
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CONTRIBUTING AUTHOR/EDITOR

Patricia Knighten, Esq.

CJER PROJECT STAFF

Kimberly DaSilva
Attorney

Iris Okura
Senior Editor

CFCC PROJECT STAFF

Ann Gilmour
Attorney

BENCHGUIDE CONSULTANTS

Hon. Joyce M. Cram
Superior Court of California
County of Contra Costa

Hon. Lorna Alksne
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CHILD AND SPOUSAL SUPPORT

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APPENDIX A: SAMPLE PARENT/CHILD TIME-SHARING PERCENTAGES**APPENDIX B: SPOUSAL SUPPORT WORKSHEET****TABLE OF STATUTES****TABLE OF CASES****I. [§201.1] SCOPE OF BENCHGUIDE**

This benchguide covers the subject of child support and the application of the Statewide Uniform Guideline. It includes a discussion on determining income available for child support. In addition, the benchguide covers spousal support, both temporary and permanent support. A discussion of Title IV-D (42 USC §§651 et seq) child support cases filed by local child support agencies is beyond the scope of this benchguide.

II. [§201.2] APPLICATION TO REGISTERED DOMESTIC PARTNERSHIPS

The California Domestic Partner Rights and Responsibilities Act of 2003 extends to registered domestic partners the same rights, protections, benefits, and obligations that apply to spouses under California law both during and on termination of the union. Fam C §297.5. The laws governing the dissolution, nullity, or legal separation of marriage apply to the dissolution, nullity, or legal separation of a domestic partnership. Fam C §299(d).

As used in this benchguide and for purposes of family law rules, the terms “spouse(s),” “husband,” and “wife” encompass “domestic partner(s);” “father” and “mother” encompass “parent;” “marriage” and “marital status” encompass “domestic partnership” and “domestic partnership status.” Cal Rules of Ct 5.28; Fam C §297.5.

III. PROCEDURAL CHECKLISTS

Note: As of July 1, 2012, orders to show cause must be filed on a Request for Order form. See Judicial Council form FL-300. An attached declaration must provide facts sufficient to notify the other party of the declarant’s contentions in support of the relief requested. Cal Rules of Ct 5.92, 5.118.

Because the California Rules of Court and the Family Code continue to use the term orders to show cause, this benchguide will do so as well.

A. [§201.3] Child Support

(1) *Determine each parent's gross income.* Review each parent's Income and Expense Declaration (JC form FL-150) or Financial Statement (Simplified) (JC Form FL-155). Verify the income with pay stubs and federal tax returns. See Fam C §3552(a) (parent must submit copies of his or her state and federal income tax returns on request of the court). On what constitutes gross income, see §§201.6–201.14. On what constitutes evidence of income, see §201.17.

☛ **JUDICIAL TIP:** Parties should exchange copies of tax returns submitted with their Income and Expense Declaration forms. See Fam C §3552(b) (returns may be examined and are discoverable by other party). The returns, however, should not be retained and filed with the court unless the court determines that the returns are relevant to the disposition of the case. Fam C §3552(c).

(2) *Exclude income of either parent's new spouse or nonmarital partner, unless this is an "extraordinary case" in which excluding this income would lead to extreme and severe hardship to the children.* See §201.16. The court may consider this income, however, when determining a parent's actual tax liability under Fam C §4059(a) for purposes of computing the parent's net disposable income. See §201.26.

(3) *Determine whether parent's earning capacity should be considered instead of parent's actual income.* By statute, the court has discretion to consider earning capacity instead of actual income consistent with the children's best interests. Fam C §4058(b); *e.g.*, court may consider the earning capacity of a parent who is unemployed or allegedly underemployed if it is shown that this parent has both the ability and an opportunity to work. *Marriage of Regnery* (1989) 214 CA3d 1367, 1372–1373, 263 CR 243. On considering earning capacity, see §§201.18–201.24.

(4) *Determine whether to impute income to parent from his or her assets.* See §201.25.

(5) *Determine each parent's net disposable income available for child support by deducting amounts listed in Fam C §4059 from parent's gross income.* See §201.27.

(6) *Rule on parent's request for hardship deduction from his or her net disposable income for health expenses or uninsured losses, or for support of other children residing with parent.* See §§201.28–201.30. If a deduction is allowed, state the reasons supporting the deduction in writing or on the record. See §201.30.

(7) *After computing each parent's net disposable income, divide this income by 12 to arrive at each parent's net monthly disposable income. Use these income amounts in computing amount of child support using the State Uniform Guideline formula, taking into consideration the percentage*

of time children will be living with each parent. See §§201.31–201.38. On computing amount of child support when one parent defaults or fails to appear, see §201.36. On using computer software to calculate amount of support, see §201.44.

☛ **JUDICIAL TIP:** Given the complexity of the State Uniform Guideline formula, almost all family law judges, attorneys, and parties rely on computer software programs to calculate the guideline. The judge should not try to manually calculate the guideline, but rather use the software employed by his or her court.

(8) *If there is more than one child, multiply child support amount by appropriate figure specified in Fam C §4055(b)(4).* See §201.39. Typically, the computer software program performs this multiplication and allocation between the children. In your order, state the amount of support per child.

(9) *If child support amount is a positive number, order the higher earner to pay this amount to the lower earner; if child support amount is a negative number, order the lower earner to pay the absolute value of this amount to the higher earner.* Fam C §4055(b)(5).

(10) *Determine whether parent ordered to pay support is entitled to a low-income adjustment reducing the child support amount.* See §201.42.

(11) *On party's request, state in writing or on record the information specified in Fam C §4056(b) used to determine guideline amount of child support.* See §201.43.

(12) *Determine whether to depart from guideline formula amount of support based on one or more of the factors set forth in Fam C §4057(b).* See §§201.45–201.52. The guideline formula amount, computed under Fam C §4055, is presumed to be the correct amount of support in all cases. This presumption may be rebutted only by admissible evidence showing that the application of the formula would be unjust or inappropriate. See Fam C §4057(b).

(13) *If the amount of child support ordered differs from the guideline formula amount, make the mandatory findings specified in Fam C §4056(a).* See §201.53.

(14) *Order one or both parents to maintain health insurance coverage for the supported child.* See §201.57.

(15) *Order as additional child support child care, costs related to employment or education, and children's reasonable uninsured health care costs.* Fam C §4062(a). See §§201.54, 201.56.

(16) *Determine whether to order as additional child support, costs related to the children's educational or other special needs, or travel expenses for visitation.* Fam C §4062(b). See §§201.55–201.56.

(17) *If parties have stipulated to child support amount, confirm that they have made the declarations required by Fam C §4065(a). See §201.58.*

(18) *Determine any request for the support of an adult child who is incapacitated and without sufficient means. See §201.62.*

(19) *Provide the parties with a document describing the procedures for modifying a child support order. Fam C §4010. See JC form FL-192.*

(20) *In proceeding for modification of support, determine whether there are changed circumstances warranting a different support order. A modified child support order must be calculated under the guideline formula. See §201.63.*

B. [§201.4] Spousal Support

(1) *Determine whether to award temporary spousal support. The purpose of temporary spousal support is to maintain the living standards of the parties as close to the status quo as possible pending trial. Marriage of Burlini (1983) 143 CA3d 65, 68, 191 CR 541. The court may order temporary spousal support in any amount after considering the moving party's needs and the other party's ability to pay. Marriage of Murray (2002) 101 CA4th 581, 594, 124 CR2d 342. See §§201.65–201.68.*

(2) *Determine whether to award permanent spousal support after considering all of the applicable factors listed in Fam C §4320(a). See §§201.71–201.85. Do not use the amount of temporary support in determining the amount of permanent support because the considerations in awarding the two types of support are different. See §201.70.*

(3) *Make specific factual findings regarding the parties' standard of living during marriage. Fam C §4332. See §201.87.*

(4) *Make other factual determinations with respect to other circumstances on party's request. Fam C §4332. See §201.88.*

(5) *Advise supported spouse that he or she should make reasonable efforts to assist in providing for his or her support needs (Gavron warning). Fam C §4330(b). See §201.90.*

(6) *Make your support order. For a discussion of common types of orders, see §§201.93–201.97.*

(7) *Determine whether to retain jurisdiction over spousal support after considering length of marriage and supported spouse's ability to provide for own support. See §201.92.*

(8) *Determine whether step-down order providing for automatic reductions in amount of support is appropriate. See §201.95.*

(9) *Determine whether issuance of "Richmond" termination order is appropriate. See §201.97.*

(10) *In proceeding for modification or termination of support, determine whether there are changed circumstances warranting a different support order. See §201.99. The court must consider the*

circumstances listed in Fam C §4320(a) in determining whether modification or termination should be ordered. *Marriage of Terry* (2000) 80 CA4th 921, 928, 95 CR2d 760. The court may be precluded from modifying or terminating spousal support when the parties have executed a written agreement or entered in open court an oral agreement that specifically provides that the spousal support is not subject to modification or termination. Fam C §§3591(c), 3651(d).

(11) *If supported spouse is cohabiting with a person of the opposite sex (or supported domestic partner cohabiting with a person of the same sex), consider whether this constitutes a change of circumstances warranting modification or termination of support.* See §201.101. The court may not consider the income of the *supporting* spouse's subsequent spouse or nonmarital partner when determining or modifying spousal support. See §201.103.

(12) *Consider whether supporting party's retirement constitutes a change in circumstances warranting a reduction in or termination of support.* See §201.102.

(13) *Determine whether party seeking support has waived right to support under a premarital agreement.* See §201.108.

IV. DETERMINING INCOME AVAILABLE FOR CHILD SUPPORT

A. [§201.5] Net Disposable Income

Annual net disposable income is annual gross income minus allowable deductions. Fam C §4059. Net disposable income is the key financial factor in calculating child support. *Marriage of Destein* (2001) 91 CA4th 1385, 1391, 111 CR2d 487. The Statewide Uniform Guideline for determining child support is based on an algebraic formula (see Fam C §4055(a)), the central element of which is each parent's net monthly disposable income. *Johnson v Superior Court* (1998) 66 CA4th 68, 75, 77 CR2d 624. See Fam C §§4058-4060.

B. [§201.6] Gross Income

Family Code §4058(a) broadly defines "gross income" as "income from whatever source derived, except for income that is legally exempt from the child support calculation." Annual gross income includes both mandatory items (see §§201.7-201.13) and discretionary items (see §201.14).

- **JUDICIAL TIP:** The parties should submit Income and Expense Declarations, or I&Es (form FL-150) that document each parent's income and provide the information you need to determine gross income. The court should demand these forms if not submitted;

the court should not rely on oral statements. Once submitted, the court should verify income with independent records, such as a pay stub.

1. [§201.7] Mandatory Income

Income that the court must consider includes, but is not limited to, the following (Fam C §4058(a)(1), (2)):

- Salaries and wages.
- Bonuses and commissions. See §201.9.
- Business income. See §201.8.
- Royalties.
- Rents. See *County of Orange v Smith* (2005) 132 CA4th 1434, 1446–1448, 34 CR3d 383 (sublease rental payments constitute income to sublessor)
- Dividends and interest.
- Pensions and annuities.
- Workers' compensation benefits.
- Unemployment insurance benefits.
- Disability insurance benefits. See *Stewart v Gomez* (1996) 47 CA4th 1748, 1752–1754, 55 CR2d 531 (parent's earning capacity may be added to his or her disability benefits in computing parent's gross income).
- Social security benefits. Supplemental Security Income (SSI) benefits are not included. See §201.26.
- Military allowances, including housing and food allowances. See *Marriage of Stanton* (2011) 190 CA4th 547, 551, 118 CR3d 249 (the federal preemption doctrine does not prohibit the inclusion of military allowances for housing and food in a party's gross income for purposes of support).
- Spousal support received from a person who is not a party to the child support proceeding. See *Marriage of Corman* (1997) 59 CA4th 1492, 1499–1500, 69 CR2d 880 (spousal support received from party to child support proceeding is *not* gross income for purposes of determining child support).
- Trust income.

➤ JUDICIAL TIP: Restrictions Concerning Indian Parties and/or Property

Federal statutes and federal and state case law place significant restrictions on the state court's jurisdiction when dealing with Indian parties or Indian property located in Indian country in California. For example, 28 USC §1360(b) of Pub L 280 prohibits the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States. In the context of support, difficult situations arise regarding whether a state court may order a support obligation if the spouse's sole income is from a trust asset (see *Marriage of Purnel* (1997) 52 CA 4th 527, 60 CR2d 667).

The best practice concerning support orders in this situation is for any order of support or maintenance, or similar order, to avoid requiring that the financial obligation imposed be specifically paid out of, or derived from, Indian trust assets. Although the state court may impose a support obligation, it may lack jurisdiction to order use of trust assets to satisfy the obligation. Such an order would effectually impose a lien on trust property in violation of 28 USC §1360(b). But the Bureau of Indian Affairs may encumber an Individual Indian Money (IIM) account if it receives an order from a court of competent jurisdiction awarding child support from an IIM account (25 CFR §115.601(b)(1)). In this situation, a California court may be a court of competent jurisdiction if no other federal or tribal court has jurisdiction (25 CFR §115.002).

It is important to be aware that tribal courts may also exercise jurisdiction over child and spousal support issues. Tribal courts have very broad authority to hear civil disputes, which arise in Indian country, involve tribal members, or otherwise fall within the jurisdiction of the court, particularly when the dispute involves some area of domestic relations matter such as marriage, adoption, or child custody (see Canby, William C. Jr., *American Indian Law in a Nut Shell* 5th ed (West; St. Paul Minnesota, 2009)).

The federal Full Faith and Credit for Child Support Act (28 USC §1738B) requires state courts to respect child support orders issued by tribal courts. Similarly, the Uniform Interstate Family Support Act (Fam C §§4900 et seq) mandates full faith and credit for tribal court spousal support orders by defining "state" (at Fam C §4901(u)(1)) to include "an Indian tribe."

a. [§201.8] Business Income

The court must consider a parent's business income, that is gross receipts from the business reduced by expenditures required for the operation of the business. Fam C §4058(a)(2). If the business is a sole

proprietorship, the parent's form 1040, Schedule C, shows the business income. However, the court is not bound to accept all of the entries on a Schedule C as appropriate deductions from income available for support. For example, depreciation may be an appropriate deduction for tax purposes, but the court might not deduct it to reduce the amount of income available for support.

- **JUDICIAL TIP:** In a sole proprietorship, there exists the possibility of deducting personal expenses to reduce net income. If the parent has applied for a loan, many judges review that application, in which income is typically maximized, together with the Schedule C, and question any disparity between the incomes claimed in the two documents.

In a case with a wealthy support obligor who voluntarily deferred most of his salary from his employer, the court should have considered the deferred salary as actual earnings. *Marriage of Berger* (2009) 170 CA4th 1070, 88 CR3d 766.

b. [§201.9] Bonuses and Commissions

Bonuses and sales commissions ordinarily must be included in the calculation of a party's gross income. However, the court must determine whether the bonus or commission income is predictable or speculative (*County of Placer v Andrade* (1997) 55 CA4th 1393, 1396-1397, 64 CR2d 739; *M.S. v O.S.* (2009) 176 CA4th 548, 554, 97 CR3d 812):

- *Predictable.* When a parent receives a routine bonus of a certain percentage of salary or has a predictable pattern of commissions; it is appropriate for the court to average the bonus or commissions income over 12 months and include it in the parent's annual gross income.
- *Speculative.* If the bonus or commission income is not predictable, the court may consider (a) excluding it from the calculation of gross income, but ordering the parent who may receive the income to notify the other parent on receipt so the other parent may attempt to modify the support payments, or (b) ordering that when bonus or commission income is received, a certain percentage must be paid as additional support. The latter is the better practice. See *Marriage of Ostler & Smith* (1990) 223 CA3d 33, 272 CR 560.

The court may properly include regular twice-yearly bonuses that a parent receives from his Indian tribe in income unless it determines that the parent is unlikely to receive similar bonuses in the future. *M.S. v O.S.* (2009) 176 CA 4th 548, 97 CR3d 812. When the parent's income includes a regular salary and may include a discretionary end-of-year bonus, the court should make the support award calculated on the basis of the regular

salary alone, with a percentage allocation applied to the bonus, if and when actually paid. *Marriage of Mosley* (2008) 165 CA4th 1375, 82 CR3d 497.

c. [§201.10] Overtime

Overtime earnings must ordinarily be included in the calculation of a parent's gross income. *County of Placer v Andrade* (1997) 55 CA4th 1393, 1396–1397, 64 CR2d 739. But these earnings may be excluded if:

- There is admissible evidence that it is unlikely that the overtime income will continue, for example, when there has been a change in employment conditions or the parent is no longer willing to accept voluntary overtime (55 CA4th at 1397); or
- Imputing overtime in the calculation would lock a parent into an “excessively onerous work schedule” (*Marriage of Simpson* (1992) 4 C4th 225, 228, 234–235, 14 CR2d 411).

When a parent ceases to work overtime, *Simpson* requires the parent's income to be tied to an “objectively reasonable work regimen,” defined by “established employment norms.” Depending on the parent's occupation, that norm may include more than 40 hours per week. A reasonable work regimen is dependent on all relevant circumstances, including the choice of jobs available within a particular occupation, working hours, and working conditions. 4 C4th at 235–236.

- **JUDICIAL TIP:** When a parent takes a second job to make up for the impact of support payments on his or her lifestyle, that income is subject to child support liability. Under *Andrade*, if the parent earns it, the court must include it. If he or she voluntarily stops working overtime, the court may consider imputing overtime under earning capacity. If the court does so, it must follow the *Simpson* limitation on an excessive work regimen.

d. [§201.11] Employee Stock Options

Employee stock options are part of a parent's employee compensation package and must be included in income for determining child support when the option is exercised, *i.e.*, the stock is acquired and then sold. *Marriage of Cheriton* (2001) 92 CA4th 269, 286, 111 CR2d 755. Under both the California child support statutes and federal tax law, the employee-parent may recognize income when stock options are exercised. At the very least, however, income is recognized when the underlying stock is sold at a gain. 92 CA4th at 288.

Given the sporadic nature of stock options, the court may adjust the child support order under Fam C §4060 (adjustment when monthly net

disposable income figure does not accurately reflect actual or prospective earnings) or Fam C §4064 (order adjusted to accommodate seasonal or fluctuating income). See 92 CA4th at 289 n11 (may be appropriate to allocate some of the proceeds to periods other than the year of receipt); §201.15.

There are apparently no reported California cases on whether unexercised stock options, at least if vested, can be considered income for determining support. But an Ohio case has held that vested options that have not been exercised may be considered income on the theory that it would be income if the parent simply exercised the option. *Murray v Murray* (Oh App 1999) 716 NE2d 288, 293–295.

- **JUDICIAL TIP:** The court should be careful not to “double dip.” If splitting options between spouses, the court must not also include the same asset in income for support purposes.

e. [§201.12] Income From Gifts or Inheritances

Although proceeds from inheritances and gifts are generally not considered income for child support purposes (see §201.26), interest, rents, dividends, or other forms of income actually earned from gifts and inheritances are considered income in calculating child support. *County of Kern v Castle* (1999) 75 CA4th 1442, 1453–1454, 89 CR2d 874.

However, gifts may be considered income for child support purposes if the gifts bear a reasonable relationship to the traditional meaning of income as a recurrent monetary benefit. *Marriage of Alter* (2009) 171 CA4th 718, 737, 89 CR3d 849 (trial court may treat recurring gifts of cash to child support obligor as income to be used in calculating obligor’s child support obligation).

In addition, the court has discretion to impute income based on an inheritance corpus or gift corpus or on interest that could have been earned if the sum was invested, and include that income in calculating child support. *Kern v Castle, supra*.

f. [§201.13] Lottery Winnings

Lottery winnings may be considered as income in determining child support. *County of Contra Costa v Lemon* (1988) 205 CA3d 683, 689, 252 CR 455. In *County of Contra Costa v Lemon*, the child was receiving public assistance, and the parent’s income would have yielded a support order below the public assistance minimum had the winnings been excluded from income. Dicta in two subsequent cases have indicated that lottery winnings in determining support should be limited to public assistance cases. See *County of Kern v Castle* (1999) 75 CA4th 1442, 1450–1451, 89 CR2d 874 (*Lemon* distinguished; public assistance

circumstances “played a major role, perhaps the pivotal role in the court’s decision”); *Marriage of Scheppers* (2001) 86 CA4th 646, 651, 103 CR2d 529.

2. [§201.14] Discretionary Income

The court may, in its discretion, include employee benefits or self-employment benefits in a party’s gross income, after considering the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts. Fam C §4058(a)(3).

Such benefits may include, but are not limited to, the following:

- Car allowance or company car. See *Marriage of Schulze* (1997) 60 CA4th 519, 528–530, 70 CR2d 488.
- Expense accounts, such as for meals and entertainment. See *Stewart v Gomez* (1996) 47 CA4th 1748, 1756, 55 CR2d 531 (reimbursed meal expenses).
- Employee rent-free housing. See *Marriage of Schulze, supra* (rent subsidy received from parents who were also husband’s employers).
- Uniform allowance.
- Company credit cards.
- Unused vacation.
- Unused sick leave.
- Health and fitness or country club memberships.
- Education.
- Medical reimbursement plan.
- Personal expenses paid.
- Stock options or ESOPs.
- Day care.

Some California cases have held that trial courts have discretion under Fam C §4058(a)(3) to treat *any* benefits as income to the extent they reduce the recipient party’s living expenses. See *County of Kern v Castle* (1999) 75 CA4th 1442, 1445, 1451, 89 CR2d 874 (proceeds from an inheritance used to pay off mortgage); *Stewart v Gomez* (1996) 47 CA4th 1748, 1754–1755, 55 CR2d 531 (free housing that party received on Indian reservation). But this expansive reading of Fam C §4058(a)(3) was sharply criticized in *Marriage of Loh* (2001) 93 CA4th 325, 334–336, 112 CR2d 893. In *Loh*, the court held that apart from the fact that Fam C §4058(a)(3) clearly confines itself to employment benefits, a blanket “anything that reduces living expenses” approach to Fam C §4058(a)(3)

would encompass new mate income, which the Legislature has specifically forbidden in determining child support (see §201.16), and would generally “bog down” the computerized process of child support in problems of where to draw the line between things that “reduce living expenses and things that merely make life better.” 93 CA4th at 334–336 n8. Following the *Loh* approach, the court in *Marriage of Schlafly* (2007) 149 CA4th 747, 759–760, 57 CR3d 274, held that mortgage-free housing unrelated to employment is not includable as income. Rather, it is a special circumstance that may justify an upward deviation from the guideline amount.

- **JUDICIAL TIP:** Most judges avoid taking a blanket approach that includes anything that reduce living expenses as income. First compute net disposable income; then, if there are circumstances making application of the statewide uniform guideline formula (see §201.31) unjust or inappropriate, the “special circumstance” rebuttal revision of Fam C §4057(b)(5) provides an escape valve. *Marriage of Loh, supra*, 93 CA4th at 335; see §201.52.

C. [§201.15] Fluctuating Income

To determine a parent’s monthly net disposable income, the annual net disposable income figure is normally divided by 12. Fam C §4060. If that calculation does not accurately reflect the actual or prospective earnings at the time of the support determination, the court may make appropriate adjustments to the disposable income figure. Fam C §4060.

An adjustment may be necessary when a parent has seasonal or fluctuating income, and the parent’s most immediate past monthly earnings do not reflect the inherent “ups and downs” in the earnings cycle. See Fam C §4064 (court may adjust child support order to accommodate parents’ seasonal or fluctuating income). In such cases, the court must determine a representative time sample from which to calculate an average monthly income that is a reasonable predictor of the parents’ likely income for the immediate future. *Marriage of Riddle* (2005) 125 CA4th 1075, 1081–1084, 23 CR3d 273 (court erred in calculating support based on only latest 2 months of commissioned investment salesperson’s earnings).

The court may allow for a time sample longer than the 12-month benchmark period of Fam C §4060 if it is more representative of a party’s income. For instance, a two- or three-year average might be necessary to obtain a representative picture of an author’s royalty income; royalties are likely to be highest with a book’s initial release. 125 CA4th at 1084. A longer period, however, may be unrealistic for a commissioned salesperson because the resulting income figure may only reflect the past overall economy and may not be an indicator of the salesperson’s

immediate future income. 125 CA4th at 1084. On the other hand, consideration of a too short time period may distort the income calculation, as when a large one-time commission was paid or sales were unusually slow during the period. 125 CA4th at 1084.

D. [§201.16] Income of Parent's New Spouse or Nonmarital Partner

The income of either parent's new spouse or nonmarital partner may not be considered in determining or modifying child support, except in an extraordinary case in which excluding that income would lead to extreme and severe hardship to the child subject to the child support award. In such a case, the court must also consider whether including this income would lead to extreme and severe hardship to any child supported by the parent or by the parent's new spouse or nonmarital partner. Fam C §4057.5(a).

- **JUDICIAL TIP:** Family Code §4057.5(a) effectively precludes modification of support based on an increase in the custodial parent's standard of living due to remarriage, because new-spouse income may only be taken into account if a child will suffer by not considering such income. See *Marriage of Wood* (1995) 37 CA4th 1059, 1067-1068, 1071, 44 CR2d 236 (disapproved of on other grounds in 39 C4th 179, 187; *Marriage of Knowles* (2009) 178 CA4th 35, 41, 100 CR3d 199). So although the statute appears to be evenhanded, it effectively applies only to the noncustodial parent.

An "extraordinary case" in which the court should consider the income of the new spouse or nonmarital partner may include when one parent has (i) voluntarily or intentionally quit work or reduced his or her income, or (ii) intentionally remains unemployed or underemployed and relies on the income of the new spouse or nonmarital partner. Fam C §4057.5(b).

If the court considers any portion of the new spouse's or nonmarital partner's income under the "extraordinary case" exception, discovery for the purposes of determining this income must be based on W2 and 1099 income tax forms, unless the court determines that this would be unjust or inappropriate. Fam C §4057.5(c). The court must also allow a hardship deduction based on the minimum living expenses for any stepchildren of the parent subject to the order. Fam C §4057.5(d). See §201.29.

- **JUDICIAL TIP:** It is sometimes hard to distinguish between a "new spouse or partner" income case and an "earning capacity" case. See §201.18. How the court treats it will depend on a number of factors. If the moving parent does not raise the issue of new spouse or partner income, but raises the issue of voluntary

reduction in income, then the court may want to treat it as an earning capacity case and impute income to the nonmoving spouse based on earning capacity. If the moving parent raises the issue of new spouse or partner income, then the court will need to make appropriate findings after discovery and determine how to treat it.

The court is not precluded by Fam C §4057.5 from considering a new spouse's income when determining the supporting parent's actual tax liability under Fam C §4059(a), for purposes of computing the supporting parent's net disposable income. When a parent has married a wage-earning spouse with whom he or she files a joint tax return, accurate calculation of the parent's actual tax liability is not possible unless the couple's combined gross income is considered. *County of Tulare v Campbell* (1996) 50 CA4th 847, 854, 57 CR2d 902; *Marriage of Carlsen* (1996) 50 CA4th 212, 218-219, 57 CR2d 630. But see *Marriage of Carlton* (2001) 91 CA4th 1213, 1218-1219, 111 CR2d 329 (this rule does not apply when new spouse and parent file separate returns).

E. [§201.17] Evidence of Income

A child support award must be based on admissible evidence of the parents' income. A parent's gross income, as stated under penalty of perjury, on recent tax returns, is presumed to be a correct statement of the parent's income. *Marriage of Loh* (2001) 93 CA4th 325, 332, 112 CR2d 893. The court may also consider the parents' income and expense declarations and pay stubs, as well as the testimony of experts and the parents themselves. *Marriage of Rosen* (2002) 105 CA4th 808, 824, 130 CR2d 1; *Marriage of Loh, supra*, 93 CA4th at 335. A child support award may not be based, however, on so-called lifestyle evidence of a parent's income, e.g., evidence that a parent has purchased a new home or drives an expensive automobile. 93 CA4th at 327.

When a parent owns a business, the presumption that the parent's income as stated on recent tax returns is correct may be rebutted by a statement of income on a loan application. *Marriage of Calcaterra and Badakhsh* (2005) 132 CA4th 28, 34-36, 33 CR3d 246 (loan application of father who owned a small business and several rental properties listed much higher income and assets than the figures shown on his recent tax returns).

A parent who admits to being an extraordinarily high earner and to an ability to pay any amount of child support may not refuse to reveal his or her actual income when the appropriate amount of support is in dispute. *Marriage of Hubner* (2001) 94 CA4th 175, 183-187, 114 CR2d 646. Unless the parents stipulate to the appropriate amount of support, both the court and the other parent are entitled to know the high earner's actual

income, regardless of his or her admission of an ability to pay any reasonable child support ordered. 94 CA4th at 184. See *Estevez v Superior Court* (1994) 22 CA4th 423, 426–431, 27 CR2d 470 (high earner is not required to provide detailed information and documentation of his or her income, expenses, and assets when high earner stipulates that he or she will pay any reasonable amount of support ordered, and other party does not dispute amount of support but only manner of its disbursement). If the parents dispute the amount of the high earner’s income and cannot agree on the amount of support, the court must make the least beneficial income assumptions against the high earner. *Marriage of Hubner, supra*, 94 CA4th at 186; *Johnson v Superior Court* (1998) 66 CA4th 68, 74–75, 77 CR2d 624. The court can make these assumptions only after it obtains adequate information about the high earner’s actual income. *Marriage of Hubner, supra*, 94 CA4th at 186–187 (court cannot base support order on fictional gross income assumptions); *McGinley v Herman* (1996) 50 CA4th 936, 946, 57 CR2d 921 (at a minimum, an approximation of high earner’s net disposable monthly income is required). In permitting discovery directed at obtaining reliable information to enable the court to determine the appropriate amount of support, the court may take appropriate measures to protect the high earner’s legitimate privacy concerns regarding his or her finances. *Marriage of Hubner, supra*, 94 CA4th at 187.

F. Considering Parent’s “Earning Capacity” Instead of Actual Income

1. [§201.18] Statutory Rule

In determining child support, the court has discretion to consider a parent’s earning capacity instead of the parent’s actual income, consistent with the best interests of the supported children. Fam C §4058(b). The strong public policy in favor of providing adequate child support has led to an expansive use of earning capacity in setting the level of support when consistent with the needs of the child. *Marriage of Destein* (2001) 91 CA4th 1385, 1391, 111 CR2d 487. Courts have the discretion to impute income to both the payor and the payee parent based on earning capacity. *Marriage of Cheriton* (2001) 92 CA4th 269, 301, 111 CR2d 755. See also *Mendoza v Ramos* (2010) 182 CA4th 680, 105 CR3d 853 (court properly declined to attribute income to mother who was recipient of CalWORKS and in compliance with terms of that program).

When the court considers earning capacity instead of actual income, it is only the actual earned income that is replaced by earning capacity. The court may consider both earning capacity and actual unearned income (e.g., disability benefits, royalties, or a trust), and add the two items. *Stewart v Gomez* (1996) 47 CA4th 1748, 1752–1754, 55 CR2d 531.

2. Ability and Opportunity To Work

a. [§201.19] Bad Faith Not Required; *Regnery* Rule

A court is not limited to considering earning capacity only on a showing of bad faith or that the parent is deliberately avoiding his or her financial responsibilities to the family by refusing to accept or seek gainful employment. *Marriage of Smith* (2001) 90 CA4th 74, 81, 108 CR2d 537; *Marriage of Hinman* (1997) 55 CA4th 988, 994–995, 998–999, 64 CR2d 383. Rather, as set out in *Marriage of Regnery* (1989) 214 CA3d 1367, 1372–1373, 263 CR 243, the court should consider the “earning capacity” of an unemployed or allegedly underemployed parent when it is shown that the parent has:

- The *ability* to work, considering factors such as the parent’s age, occupation, skills, education, health, background, work experience, and qualifications; *and*
- An *opportunity* to work. *Marriage of Regnery* (1989) 214 CA3d 1367, 1372–1373, 263 CR 243. A parent has an opportunity to work if there is a reasonable likelihood that the party could, with reasonable effort, apply his or her education, skills, and training to produce income. *Marriage of Smith, supra*, 90 CA4th at 82. “Opportunity” is not limited to working for someone else; the court may also consider the parent’s “opportunity” for self-employment. *Marriage of Cohn* (1998) 65 CA4th 923, 930, 76 CR2d 866 (this is particularly a relevant consideration in case of professionals or tradespeople who are self-employable).

If either the ability or opportunity to work is absent, a parent’s earning capacity may not be considered. But if a parent is unwilling to work, despite having the ability and opportunity to do so, earning capacity may be imputed. *Marriage of Regnery, supra*, 214 CA3d at 1373; *Marriage of LaBass & Munsee* (1997) 56 CA4th 1331, 1338, 66 CR2d 393. See also *Marriage of Mosley* (2008) 165 CA4th 1375, 1386–1387, 82 CR3d 497 (earning capacity imputed to parent who had attorney position at large law firm but quit to raise her children, when her returning to work was in best interests of children).

b. [§201.20] Issue of Motivation

A parent’s motivation for reducing available income is not per se irrelevant when the ability and opportunity to adequately and reasonably provide for the child are present; the court may consider it in exercising its discretion in considering a parent’s earning capacity. *Marriage of Bardzik* (2008) 165 CA4th 1291, 83 CR3d 72. Furthermore, sometimes the children’s best interests may be promoted when a parent leaves a stressful, high-paying job to spend more time with the children. See *Marriage of*

Bardzik, supra. However, earning capacity may be imputed when a parent gives up full-time employment for part-time employment in order to pursue an advanced degree. *Marriage of LaBass & Munsee* (1997) 56 CA4th 1331, 1338, 66 CR2d 393. See also *Marriage of Ilas* (1993) 12 CA4th 1630, 1639, 16 CR2d 345 (earning capacity imputed to parent who quit job as pharmacist to attend medical school).

When a parent loses a job because of misconduct, the court may not impliedly find that the termination was voluntary for purposes of determining a parent's earning capacity. *Marriage of Eggers* (2005) 131 CA4th 695, 699–701, 32 CR3d 292. In *Eggers*, a parent was fired for using extremely poor judgment in sending multiple e-mails that were sexual in nature to a co-worker. The trial court erred in construing the termination as voluntary and wrongly imputed income to the parent without addressing the parent's ability and opportunity to work.

c. [§201.21] Burden of Proof and Evidence of Earning Capacity

The party urging the court to consider earning capacity has the burden of showing the other party's ability and opportunity to be employed. Once this burden is met, the other party must prove that, despite reasonable efforts, he or she could not secure employment. *Marriage of LaBass & Munsee* (1997) 56 CA4th 1331, 1338–1339, 66 CR2d 393 (help-wanted ads from newspaper are admissible for purpose of showing employment opportunities). See *Marriage of Regnery* (1989) 214 CA3d 1367, 1373–1376, 263 CR 243 (court may consider party's employment history and failure to comply with support orders in evaluating credibility of party's claim to be unable to find gainful employment).

The figures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation. *Marriage of Cohn* (1998) 65 CA4th 923, 931, 76 CR2d 866. See *Marriage of Graham* (2003) 109 CA4th 1321, 1327–1328, 135 CR2d 685 (evidence did not support hourly rate court used to impute income). A court may not calculate support based on a party's hypothetical procurement of a job that the evidence shows was *not* available to the party. For example, the court may not impute income to a party based on the salary offered for a job for which the party applied, but was not hired. *Marriage of Cohn, supra*, 65 CA4th at 930–931. See also *Mendoza v Ramos* (2010) 182 CA4th 680, 685–686, 105 CR3d 853 (income was not imputed to mother who applied for public assistance after being laid off from her previous job and who was unable to find employment thereafter).

When the evidence demonstrates that a reduction in a party's income is attributable to circumstances beyond the party's control, the court should look solely to the party's actual income, rather than to the party's

earning capacity. *Marriage of Simpson* (1992) 4 C4th 225, 232, 14 CR2d 411; *Marriage of Serna* (2000) 85 CA4th 482, 486, 102 CR2d 188 (court must consider economic realities of job market).

It is against public policy to impute income to a parent on the CalWorks program (often described as “welfare-to-work”) that provides benefits to families with minor children when the parents are unable to provide their support and that requires the recipient to either seek employment or to prepare for employment through, for example, educational programming in lieu of full-time work. *Mendoza v Ramos, supra*, 182 CA4th at 685. The goal of CalWorks is for the recipient parent to achieve the ability to provide support for his or her children. Thus, recipients are, in effect, in the process of seeking employment. 182 CA4th at 686.

d. [§201.22] Incarcerated Parent

A court cannot impute earning capacity to a parent who is incarcerated, absent evidence that the parent has both the ability and the opportunity to work in prison, or that the parent has other assets that could be used to pay child support. *Marriage of Smith* (2001) 90 CA4th 74, 82–83, 85, 108 CR2d 537. A court may, however, impose a suspended child support obligation and potential future insurance obligation on an incarcerated parent if those obligations are imposed in the abstract only, with no determination or imposition of any monthly obligation as long as the parent remains incarcerated and has no opportunity to work. *El Dorado County Dep’t of Child Support Servs. v Nutt* (2008) 167 CA4th 990, 993, 84 CR3d 523. A court may also base an incarcerated parent’s support obligation on interest imputed to assets he or she liquidated to pay for a defense after his or her arrest. *Brothers v Kern* (2007) 154 CA4th 126, 136, 64 CR3d 239.

The determination of earning capacity must be based on the parent’s current circumstances, and not on the fact that the parent was employed before incarceration or is likely to become employed on release. *Marriage of Smith, supra*, 90 CA4th at 83; *State of Oregon v Vargas* (1999) 70 CA4th 1123, 1127, 83 CR2d 229. The reason the parent is incarcerated, however, is not relevant to the determination of earning capacity. *Marriage of Smith, supra*, 90 CA4th at 85.

3. [§201.23] Objectively Reasonable Work Regimen

Earning capacity should normally be based on an objectively reasonable work regimen, not on an extraordinary work regimen. The fact that the parent may have worked overtime or followed an “onerous” work schedule before becoming unemployed or allegedly underemployed does not mean that his or her earning capacity should be based on this schedule.

Marriage of Simpson (1992) 4 C4th 225, 233–235, 14 CR2d 411; *Marriage of Serna* (2000) 85 CA4th 482, 486, 102 CR2d 188 (parent is not required to work extraordinary hours so as to approximate marital standard of living). The only exception is when the parent is in an occupation in which a normal work week necessarily requires overtime work; in such a case, overtime may be considered to be part of the parent’s “reasonable” work regimen and thus part of his or her earning capacity. *Marriage of Simpson, supra*, 4 C4th at 236.

4. [§201.24] Considering Children’s Best Interests

The statutory guidelines governing child support do not limit the circumstances under which a court may consider a parent’s earning capacity, with the exception that reliance on earning capacity must be “consistent with the best interests of the children.” *Marriage of Simpson* (1992) 4 C4th 225, 233, 14 CR2d 411; *Marriage of Smith* (2001) 90 CA4th 74, 81, 108 CR2d 537. Stated differently, a court may not impute earning capacity to a parent unless doing so is in the children’s best interest. *Marriage of Cheriton* (2001) 92 CA4th 269, 301, 111 CR2d 755; *Marriage of Mosley* (2008) 165 CA4th 1375, 1386–1387, 82 CR3d 497 (earning capacity was imputed to parent who had attorney position at large law firm but quit to raise her children, when her returning to work was in the best interests of children); *Marriage of Berger* (2009) 170 CA4th 1070, 1082, 88 CR3d 766 (earning capacity was imputed to parent who elected to defer his salary as investment in company but continued to live extravagantly off of his sizeable assets, precluding his children from sharing benefits of his current standard of living); see also *Marriage of Sorge* (2012) 202 CA4th 626, 134 CR3d 751.

Generally, the “best interests” issue arises when there are young children, and one parent stops working to stay home with the children. In determining whether to impute earning capacity to the stay-at-home parent, the court must balance the state policy that both parents are obligated to support their children and that without imputing income the employed parent carries the entire burden against the interest of the children in having a stay-at-home parent. See *Marriage of LaBass & Munsee* (1997) 56 CA4th 1331, 1339, 66 CR2d 393. In cases of very young children, the issue may become moot when the cost of day care is considered, *e.g.*, to impute earnings of \$2,000/month to the stay-at-home parent who, if working, would incur \$1,000/month in day-care expenses may not be in the child’s best interest. A different result might be warranted, however, when the parent decides to stop working after marriage to a new spouse with significant income, in order to stay home with the children. See *Marriage of Paulin* (1996) 46 CA4th 1378, 1384 n5, 54 CR2d 314. The courts have declined, however, to adopt a rule prohibiting the imputation of income in all cases in which parents refrain

from employment in order to care for young children. *Marriage of LaBass & Munsee, supra*, 56 CA4th at 1340; *Marriage of Hinman* (1997) 55 CA4th 988, 999, 64 CR2d 383.

The “best interests” the court must consider are those of the children for whom support is being ordered, not the interests of children from a parent’s subsequent marriage or relationship. 55 CA4th at 1001.

5. [§201.25] Imputing Income From Assets

A court’s discretion to impute earning capacity to a parent is not limited to income from work. A court may also consider a parent’s ability to receive income from assets. *Marriage of Dacumos* (1999) 76 CA4th 150, 154–155, 90 CR2d 159. Just as a parent cannot shirk his or her parental obligations by reducing his or her earning capacity through unemployment or underemployment, a parent cannot also shirk the obligation to support his or her children by underutilizing income-producing assets. 76 CA4th at 155. See *Mejia v Reed* (2003) 31 C4th 657, 671, 3 CR3d 390 (court may take earnings from invested assets into account when computing child support).

In addition, a court has the discretion to impute income to a parent’s non-income-producing assets. *Marriage of Destein* (2001) 91 CA4th 1385, 1388, 1393–1397, 111 CR2d 487 (rate of return imputed to non-income-producing real estate assets that were parent’s separate property). A court’s discretion to charge a reasonable rate of return to an investment asset does *not* depend on an income-producing history for the asset. 91 CA4th at 1394. This rate of return must, of course, be established, generally by expert testimony. See 91 CA4th at 1397–1398.

A court may consider a parent’s “substantial” wealth under the principles that a parent must support his or her children according to his or her circumstances and station in life and according to his or her ability, and that children should share in their parents’ standard of living. Fam C §4053(a), (d), (f); *Marriage of Cheriton* (2001) 92 CA4th 269, 292, 111 CR2d 755; *Marriage of Berger* (2009) 170 CA4th 1070, 1084–1085, 88 CR3d 766.

G. [§201.26] Exclusions From Income

“Gross income” does not include the following:

- Child support payments, including any child support received for children from another relationship. Fam C §4058(c).
- Public assistance, when eligibility is based on need. Fam C §§4058(c), 17516. See *Elsenheimer v Elsenheimer* (2004) 124 CA4th 1532, 22 CR3d 447 (Supplemental Security Income (SSI) benefits constitute income derived from a need-based public assistance program).

- ☛ JUDICIAL TIP: Although SSI is need based, basic social security retirement benefits are not, and thus are included in gross income.
 - Social security disability insurance benefits, under the explicit language of Fam C §17450(c)(2). *Marriage of Hopkins* (2009) 173 CA4th 281, 290, 92 CR3d 570.
 - Student loan proceeds. *Marriage of Rocha* (1998) 68 CA4th 514, 516–517, 80 CR2d 376 (proceeds are not income because of expectation of repayment).
 - Life insurance proceeds. *Marriage of Scheppers* (2001) 86 CA4th 646, 649–651, 103 CR2d 529.
- ☛ JUDICIAL TIP: Interest income from life insurance proceeds, calculated at a reasonable rate of return, may be included in gross income.
 - Gifts. *Marriage of Schulze* (1997) 60 CA4th 519, 529, 70 CR2d 488. However, the court has discretion to consider recurring gifts of money as income. *Marriage of Alter* (2009) 171 CA4th 718, 735, 89 CR3d 849.
 - Entirety of undifferentiated personal injury awards. *Marriage of Heiner* (2006) 136 CA4th 1514, 1522, 39 CR3d 730 (the entirety of an undifferentiated lump sum personal injury award is not income for purposes of calculating child support, but the determination as to whether some portion of the award should be allocated as parental income is left to the discretion of the trial court).
 - Payments from personal injury settlement annuities when the settlement states that all sums paid constitute “damages on account of personal injuries or sickness.” *Marriage of Rothrock* (2008) 159 CA4th 223, 232–233, 70 CR3d 881. However, a settlement agreement may spell out expressly or impliedly the different components of future payments by, for example, labeling a portion as reimbursement for lost past or future wages. Also, events leading up to the settlement, including litigation proceedings, may demonstrate that parts of a settlement were allocated to various components. The party challenging what appears to be an undifferentiated settlement bears the burden of proving it otherwise. 159 CA4th at 235.
 - Inheritances. *County of Kern v Castle* (1999) 75 CA4th 1442, 1445, 1451, 89 CR2d 874 (parent’s inheritance is not income for purposes of calculating his or her annual gross income under Fam C §4058(a)(1), but may be considered under Fam C §4058(a)(3) to extent it has reduced parent’s living expenses).

- ☛ JUDICIAL TIP: As with life insurance proceeds, the court may calculate a reasonable rate of return for interest income on the principle of a gift or inheritance and may include that in gross income. See §201.12.
- Spousal support received from a party to the child support proceeding. *Marriage of Corman* (1997) 59 CA4th 1492, 1499–1500, 69 CR2d 880.
- Noncustodial parent’s share of increased equity value of his or her family home. *Marriage of Henry* (2005) 126 CA4th 111, 116–119, 23 CR3d 707; *Marriage of Williams* (2007) 150 CA4th 1221, 1244–1246, 58 CR3d 877. However, a showing of special circumstances may justify a departure from guideline child support under Fam C §4057(b). 150 CA4th at 1245–1246.
- Noncustodial parent’s unliquidated stock received in connection with the sale of business in which he or she was majority stockholder. *Marriage of Pearlstein* (2006) 137 CA4th 1361, 1375, 40 CR3d 910.

H. [§201.27] Deductions From Income

The court must compute each parent’s annual net disposable income by deducting from the parent’s annual gross income the actual amounts attributable to the following:

- Federal and state income taxes. Fam C §4059(a).
 - Amounts deducted must be taxes “actually payable” after considering appropriate filing status, and all available exclusions, deductions, and credits. That number may differ significantly from the taxes withheld on a party’s pay stub because people often underwithhold or overwithhold taxes. Taxes must bear “an accurate relationship to the tax status of the parties (that is, single, married, married filing separately, or head of household) and number of dependents.”
- ☛ JUDICIAL TIP: The certified child support software packages are programmed to calculate a party’s actual withholding responsibility.
 - Unless the parties stipulate otherwise, the tax effects of spousal support may not be considered in determining the net disposable income of the parties for determining child support but must be considered in determining spousal support.
 - Although the court is generally precluded from considering income of a subsequent spouse or nonmarital partner in

determining child support under Fam C §4057.5, it may consider such income when determining the supporting parent’s actual tax liability. See §201.16.

- FICA contributions. A party not subject to FICA may deduct actual contributions to secure retirement or disability benefits to the extent the contributions do not exceed the amount that would be otherwise deducted under FICA. Fam C §4059(b).
- Mandatory union dues and retirement benefits required as a condition of employment. Fam C §4059(c).
- Health insurance premiums for both the parent and any child the parent has an obligation to support. Fam C §4059(d).
- State disability insurance premiums. Fam C §4059(d).
- Child and spousal support “actually being paid” under an existing court order, to or for the benefit of, anyone whose support is not a subject of the present case. Child support paid without a court order may be deducted, to the extent it does not exceed the amount established by the statewide guideline, if:
 - The support is for natural or adopted child of the parent not residing in that parent’s home,
 - The child is not a subject of the order to be established by the court, and
 - The parent has a duty to support the child. Fam C §4059(e).
- Job-related expenses, if allowed by the court after considering whether they are necessary, the benefit to the employee, and other relevant facts. Fam C §4059(f). Job-related expenses clearly include costs directly incurred for employment purposes (*e.g.*, tools, uniforms) and any other unreimbursed costs that would not be incurred but for employment (*e.g.*, on-the-job parking expenses and transportation and mileage for commuting to and from work). *Stewart v Gomez* (1996) 47 CA4th 1748, 1755, 55 CR2d 531. However, depreciation of rental properties is not properly deductible from income. *Asfaw v Woldberhan* (2007) 147 CA4th 1407, 1412–1413, 55 CR3d 323.
- A deduction for hardship, as defined by Fam C §§4070–4073, and applicable published appellate decisions. Fam C §4059(g). See §§201.28–201.30.

Each parent’s net monthly disposable income is then computed by dividing the annual net disposable income by 12. Fam C §4060. This figure is then used in computing the amount of child support under the guideline formula. Fam C §4055(b)(2). See §201.31.

I. Hardship Deduction

1. [§201.28] Health Expenses or Uninsured Losses

If a parent is experiencing extreme financial hardship because of extraordinary health expenses for which the parent is financially responsible or because of uninsured catastrophic losses, the court may allow a hardship deduction for these expenses from the parent's net disposable income. Fam C §§4059(g), 4070, 4071(a)(1).

2. [§201.29] Support of Other Children Residing With Parent

If a parent is experiencing extreme financial hardship due to his or her obligation to support children from other marriages or relationships who reside with the parent, the court may allow a hardship deduction for these support expenses from the parent's net disposable income after making any hardship deduction for extraordinary health expenses or uninsured catastrophic losses. Fam C §§4059(g), 4070, 4071(a)(2). The maximum hardship deduction for each child who resides with the parent may equal, but not exceed, the support allocated to each child subject to the order. For purposes of calculating this deduction, the amount of support per child established by the Statewide Uniform Guideline is the total amount ordered divided by the number of children and not the amount established under Fam C §4055(b)(8). Fam C §4071(b). See *Marriage of Paulin* (1996) 46 CA4th 1378, 1382, 54 CR2d 314 (court may reduce child's support payment, if necessary, to alleviate parent's extreme financial hardship occasioned by birth or adoption of other children). See also *Marriage of Whealon* (1997) 53 CA4th 132, 145, 61 CR2d 559 (court has discretion in computing amount of hardship deduction to allow for child of parent's subsequent marriage, taking into account new spouse's income).

This deduction for hardship is not available as a matter of course when the parent is responsible for the support of other children but is limited to the unusual situation, or the reasonable minimum living expenses are unusually high in the context of the family's income. *Marriage of Carlsen* (1996) 50 CA4th 212, 217 n5, 57 CR2d 630.

3. [§201.30] Considerations for Court

The court must be guided by the goals set forth in Fam C §§4050–4076 when considering whether to allow a financial hardship deduction and when determining the amount of the deduction. Fam C §4073. If the court allows a deduction for hardship expenses, it must state the reasons supporting the deduction in writing or on the record and must document the amount of the deduction and the underlying facts and circumstances. Fam C §4072(a). The court must also specify the duration of the deduction

whenever possible. Fam C §4072(b). See *Marriage of Carlsen* (1996) 50 CA4th 212, 217, 57 CR2d 630 (statutory requirement of findings is not satisfied by incorporating DissoMaster printout into support order; court must articulate its reasoning).

A court does not have authority to allow a hardship deduction for expenses other than those specified in Fam C §4071. *Marriage of Butler & Gill* (1997) 53 CA4th 462, 465–466, 61 CR2d 781 (no hardship deduction for father’s support of his mother).

V. CHILD SUPPORT

A. [§201.31] Statewide Uniform Guideline

California has a strong public policy in favor of adequate child support, which is expressed in the Statewide Uniform Guideline for determining child support set forth in Fam C §§4050–4076. *Marriage of Cheriton* (2001) 92 CA4th 269, 283, 111 CR2d 755. Under the guideline, courts are required to calculate child support according to an algebraic formula based on the parents’ incomes and custodial time with the child. See Fam C §4055; 92 CA4th at 284; *Marriage of Smith* (2001) 90 CA4th 74, 80, 108 CR2d 537. The amount of child support established by the formula is presumed to be the correct amount of child support to be ordered. Fam C §4057(a). Under the guideline, courts no longer have the broad discretion in ordering child support that they had before its adoption in 1992. Now the determination of a child support obligation is a highly regulated area of the law, and the only discretion a court has is the discretion provided by statute or rule. *Marriage of Cheriton, supra*, 92 CA4th at 283; *Marriage of Smith, supra*, 90 CA4th at 81.

The guideline applies whether the court is ordering

- Permanent child support;
- Temporary child support (see §201.59);
- Expedited child support (see §201.60);
- Modification of an existing order for child support. See *Marriage of Wittgrove* (2004) 120 CA4th 1317, 1326, 16 CR3d 489; *Marriage of Laudeman* (2001) 92 CA4th 1009, 1013, 112 CR2d 378 (see §201.63); or
- “Family support” (*i.e.*, combined child and spousal support) (see §201.61).

B. [§201.32] Principles in Implementing Guideline

Courts are specifically directed to adhere to the following principles in implementing the guideline:

- A parent’s first and principal obligation is to support his or her minor children according to the parent’s circumstances and station in life. Fam C §4053(a).
- Parents are mutually responsible for their children’s support. Fam C §4053(b).
- The guideline takes into account each parent’s actual income and level of responsibility for the children. Fam C §4053(c).
- Each parent should pay for the children’s support according to that parent’s ability. Fam C §4053(d).
- The guideline places children’s interests as the state’s top priority. Fam C §4053(e).
- Children should share in both parents’ standard of living, and child support may appropriately improve the standard of living of the custodial household to improve the children’s lives. Fam C §4053(f). See *Marriage of Cheriton* (2001) 92 CA4th 269, 292 n13, 111 CR2d 755 (children have right to share in lifestyle of high-earning parent even if parent chooses to live modestly).
 - When a parent is wealthy, the children’s needs are measured by the parent’s current station in life, not by the children’s historic expenses or by their basic needs. 92 CA4th at 293, 297–298.
 - Unlike spousal support awards that require a consideration of the parents’ standard of living during marriage, child support awards must reflect a minor child’s right to be maintained in a lifestyle and condition consonant with his or her parents’ position in society after dissolution of the marriage. *Marriage of Kerr* (1999) 77 CA4th 87, 95–96, 91 CR2d 374.
- Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children’s living standards in the two homes. Fam C §4053(g).
- Children’s financial needs should be met through private financial resources as much as possible. Fam C §4053(h).
- A parent who has primary physical responsibility for the children is presumed to contribute a significant portion of available resources for the children’s support. Fam C §4053(i).
- The guideline is intended to encourage fair and efficient settlements of conflicts between parents and to minimize litigation. Fam C §4053(j).

- The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the amount of support mandated by the guideline formula. Fam C §4053(k).
- Child support orders must ensure that children actually receive fair, timely, and sufficient support that reflects the state's high standard of living and high costs of raising children compared to other states. Fam C §4053(l).

C. Guideline Formula

1. [§201.33] General Parameters

The Statewide Uniform Guideline algebraic formula for determining child support is as follows (Fam C §4055(a), (b)(1)):

$$CS = K [HN - (H\%) (TN)].$$

In which:

CS = the child support amount.

K = the amount of both parents' income that is to be allocated for child support.

HN = the high earner's net monthly disposable income.

H% = an approximate percentage of the time the high earner has or will have primary physical responsibility for the children compared to the other parent.

TN = the total net monthly disposable income of both parents.

- **JUDICIAL TIP:** The judge should have an understanding of the formula and the relationship of each of the factors. However, given the complexity of the formula, almost all family law judges, attorneys, and parties rely on computer software programs to calculate the guideline. The judge should not try to manually calculate the guideline, but rather, use the software employed by his or her court.

2. Guideline Components

a. [§201.34] Time-Share With Children (H%)

The time-share component (**H%**) represents the approximate percentage of time that the high earner has or will have primary physical responsibility for the child compared to the other parent. Fam C §4055(b)(1)(D). See *Marriage of Katzberg* (2001) 88 CA4th 974, 981,

106 CR2d 157 (time-share percentage is based on the parents' respective periods of primary physical "responsibility" for the children rather than physical "custody"; the uniform guideline does not alter the current custody law in any manner). Some local court rules include time-sharing tables that assist the trial court in approximating the percentage of time the high earner parent has primary physical responsibility for his or her children. For a sample of a time-share table, see Appendix A.

- **JUDICIAL TIP:** Many judges try not to use the terms "custodial" and "noncustodial" in favor of "parenting or coparenting schedules," "parenting plans," or "custody timeshares." In emotionally charged disputes, "noncustodial parent" may appear to diminish the child-rearing contributions of the parent with less than an equal time-share.

In cases in which parents have different time-sharing arrangements for different children, **H%** equals the average of the approximate percentages of time the higher earner parent spends with each child. Fam C §4055(b)(1)(D).

(1) [§201.35] Imputed Time-Sharing

Time-sharing may be properly imputed to a parent (or between parents) when the child is not in either parent's physical custody. *DaSilva v DaSilva* (2004) 119 CA4th 1030, 1033, 15 CR3d 59. Imputed time-sharing most commonly arises in situations in which a child is attending day care or school, and a parent desires credit for the time the child is not physically with him or her. Most courts will credit the time a child spends in day care or school to the custodial parent, unless the noncustodial parent raises the issue and produces evidence that he or she is primarily responsible for the child during the challenged times. 119 CA4th at 1034. When determining time-share credits, the courts should consider the following (119 CA4th at 1034–1035):

- Who pays for transportation or who transports the child.
- Who is designated to respond to medical or other emergencies.
- Who is responsible for paying tuition or incidental school expenses.
- Who participates in school activities, fundraisers, or other school-related functions.

For an application of these factors, see *Marriage of Whealon* (1997) 53 CA4th 132, 145, 61 CR2d 559 (court rejected father's argument that he should be given credit for time his son spends in day care because he pays half the tuition; mother has day-to-day responsibility of the child, *i.e.*, burden to find, arrange, and front the money for day care, deliver and pick

up the child, and interrupt work days for medical or other emergencies). See also *Marriage of Katzberg, supra*, 88 CA4th at 982-983 (time spent by child in boarding school imputed to father having primary custody of child; father paid for cost of transportation to and from school and incidental expenses; education trust that was being used to pay school-related expenses represented majority share of father's personal inheritance; mother refused to sign school contract; and it could be inferred that father would be responsible to respond to any emergency).

In addition to imputing time-share credits for time spent by a child in day care or school, credits may be imputed in the following situations:

- *Care of disabled child in out-of-home care.* Time-sharing may be credited to a parent having full responsibility for the physical situation and care of a disabled adult child even though the child does not reside with the parent. *Marriage of Drake* (1997) 53 CA4th 1139, 1160, 62 CR2d 466.
- *Grandparent visitation.* When a court orders grandparent visitation under Fam C §3103 or §3104, the court may allocate a percentage of such visitation between the parents for purposes of calculating child support under the uniform guideline. Fam C §§3103(g)(1), 3104(i)(1).

(2) [§201.36] Time-Share Adjustment When One Parent Defaults or Fails To Appear

In any default proceeding when proof is by affidavit under Fam C §2336, or in any child support proceeding when a party fails to appear at a noticed hearing, and there is no evidence presented demonstrating the percentage of time that the noncustodial parent has primary physical responsibility for the child, the time-share adjustment must be set as follows (Fam C §4055(b)(6)):

- Zero if the noncustodial parent is the higher earner; or
- 100 if the custodial parent is the higher earner.

Exception: The time-share adjustment may not be set if the moving party in a default proceeding is the noncustodial parent or if the party that fails to appear is the custodial parent. Fam C §4055(b)(6). A statement by the nondefaulting party as to the percentage of time the noncustodial parent has primary physical responsibility for the children shall be deemed sufficient evidence of time-share. Fam C §4055(b)(6).

b. [§201.37] Net Monthly Disposable Income (TN)

The guideline requires that the court calculate the parents' total net monthly disposable income. Fam C §4055(b)(2). Under Fam C §§4058-

4059, the court must first determine gross income of each parent, and then subtract the allowable deductions to arrive at the net disposable income of each parent. See §§201.5–201.30 for a comprehensive discussion of determining income available for child support.

c. [§201.38] Amount of Income Allocated for Child Support (“K”)

The amount of both parents’ income allocated for child support (**K**) equals 1 plus **H%** (if **H%** is less than or equal to 50%) or 2 minus **H%** (if **H%** is greater than 50%), multiplied by the following fraction:

- $0.20 + \text{TN}/16,000$ if the total net disposable monthly income is \$800 or less.
- 0.25 if the total net disposable monthly income is \$801–\$6,666.
- $0.10 + 1,000/\text{TN}$ if the total net disposable monthly income is \$6,667–\$10,000.
- $0.12 + 800/\text{TN}$ if the total net disposable monthly income is more than \$10,000. Fam C §4055(b)(3).

For example, if **H%** equals 20%, and the parents’ total monthly net disposable income is \$1,000, then **K** = $(1 + 0.20) \times 0.25$, or 0.30. If **H%** equals 80%, and the parents’ total monthly net disposable income is \$1,000, then **K** = $(2 - 0.80) \times 0.25$, or 0.30. Fam C §4055(b)(3).

3. [§201.39] Child Support Amount for More Than One Child

If there is more than one child, **CS** (the child support amount) is multiplied by (Fam C §4055(b)(4)):

- 1.6 for 2 children
- 2 for 3 children
- 2.3 for 4 children
- 2.5 for 5 children
- 2.625 for 6 children
- 2.75 for 7 children
- 2.813 for 8 children
- 2.844 for 9 children
- 2.86 for 10 children

4. [§201.40] Allocation of Child Support Among Children

Unless the court orders otherwise, the child support order must allocate the support amount so that the amount of support for the youngest

child is the amount of support for one child, and the amount for the next youngest child is the difference between that amount and the amount for two children, with similar allocations for additional children. Fam C §4055(b)(8).

Exceptions. This provision does not apply if there are different time-sharing arrangements for different children or if the court determines that the allocation is inappropriate. Fam C §4055(b)(8). Nor does it apply for purposes of calculating a hardship deduction under Fam C §4071. For purposes of calculating the hardship deduction, the amount of support per child is the total amount ordered divided by the number of children. Fam C §4071(b). Hardship deductions are discussed in §§201.28–201.30.

5. [§201.41] Determining Who Is Payor

The guideline formula calculates a single sum owed by one parent to the other. If the amount calculated under the formula results in a positive number, the higher earning parent must pay that amount to the lower earner parent. If the amount calculated under the formula results in a negative number, the lower earner must pay the absolute value of that amount to the higher earner. Fam C §4055(b)(5).

6. [§201.42] Low-Income Adjustment

When the monthly net disposable income of the parent paying child support is less than \$1,000, there is a rebuttable presumption that the parent is entitled to a low-income adjustment. Fam C §4055(b)(7).

If the presumption is not rebutted, the court must reduce the presumed child support by an amount that is no greater than the low-income adjustment, calculated as follows (Fam C §4057(b)(7)):

- $[1000 - \text{Payor's Net Monthly Disposable Income}] / 1000 = \text{Adjustment Fraction}$
- $\text{Presumed Support Amount} \times \text{Adjustment Fraction} = \text{Low-Income Adjustment}$

☛ **JUDICIAL TIP:** The low-income adjustment figure calculated under the formula is the maximum amount by which the court can reduce child support. Depending on the facts, the court may reduce the support by a lesser amount.

The presumption for a low-income adjustment may be rebutted if the parent receiving child support presents evidence showing that the application of the adjustment would be unjust and inappropriate. Fam C §4057(b)(7). To determine whether the presumption is rebutted, the court must consider the principles provided in Fam C §4053 (see §201.32) and the impact of the contemplated adjustment on the net incomes of both parents. Fam C §4055(b)(7).

If the court uses a computer program to calculate the child support order, that program may not automatically default, either affirmatively or negatively, on whether a low-income adjustment applies. If the adjustment *does* apply, the computer program may not provide the amount of the adjustment but must ask the user whether to apply the adjustment; if answered affirmatively, the program may provide the allowable range of the adjustment. Fam C §4055(c).

7. [§201.43] Mandatory Findings on Request of Parties

At the request of any party, the court must state, in writing or on the record, the following information it used to determine the guideline amount of child support (Fam C §§4005, 4056(b)):

- Each parent's net monthly disposable income.
- Each parent's actual federal income tax filing status (*e.g.*, single, married, married filing separately, or head of household, and number of exemptions).
- Each parent's deductions from gross income.
- The approximate percentage of time each parent has primary physical responsibility for the children compared to the other parent.

8. [§201.44] Using Computer Software To Calculate Support Amount

Virtually every family court uses a computer software program to assist in determining the appropriate amount of child support (or temporary spousal support). Trial courts may only use child support software that has been certified by the Judicial Council as meeting its standards. See Fam C §3830; Cal Rules of Ct 5.275.

There are five software programs certified by the Judicial Council for use by the courts to determine child and/or spousal support. They include:

- CalSupport™ and CalSupport PRO™ (Nolo Press).
- DissoMaster™ (CFLR, Inc. now part of Thomson West).
- SupporTax™ (Thomson West).
- Xspouse™ (Tolapa, Inc.).
- California Guideline Child Support Calculator (California Department of Child Support Services).

In all nontitle IV-D proceedings, the court may use and must permit parties or attorneys to use any software certified by the Judicial Council under Cal Rules of Ct 5.275. Cal Rules of Ct 5.275(j)(2).

In all title IV-D proceedings, the court and parties and attorneys must use the Department of Child Support Services' California Guideline Child Support Calculator software program. Cal Rules of Ct 5.275(j)(1).

D. Departing From Guideline Formula

1. [§201.45] Bases for Departing From Formula

Courts are required to adhere to the guideline formula and may depart from it only in the special circumstances specified in the guideline. Fam C § 4052; *Marriage of LaBass & Munsee* (1997) 56 CA4th 1331, 1336, 66 CR2d 393. The presumption that the guideline formula amount, computed under Fam C §4055, is the correct amount of child support may only be rebutted by admissible evidence showing that the application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Fam C §4053, because one or more of five specified factors (discussed below in sections §§201.46–201.52) is found to be applicable by a preponderance of the evidence. Fam C §4057(b).

a. [§201.46] Stipulated Support

The court may approve a stipulation by the parties for an amount of child support that differs from the presumed guideline amount. Fam C §4057(b)(1). See §201.58 for discussion of the required contents of a stipulated agreement for child support below the guideline formula.

b. [§201.47] Deferred Sale of Home Order

The court may adjust a presumed child support figure if sale of the family home in which the children reside has been deferred by court order and its rental value exceeds the mortgage payments, homeowner's insurance, and property taxes. The amount of any adjustment that you make, however, cannot exceed the difference between the rental value and the mortgage, insurance, and taxes. Fam C §4057(b)(2). See *Marriage of Braud* (1996) 45 CA4th 797, 818–819, 53 CR2d 179.

- **JUDICIAL TIP:** Award of the family home is known as a “*Duke*” award from the leading case of *Marriage of Duke* (1980) 101 CA3d 152, 161 CR 444, and is considered a child support award because it is made to the custodial parent to minimize the adverse impact of dissolution or legal separation on the child's welfare. On a practical note, some judges observe that *Duke* orders have become more rare.

c. [§201.48] Extraordinarily High Income Payor

The court may adjust a presumed child support figure if the parent being ordered to pay child support has an extraordinarily high income and the formula amount would exceed the children’s needs. Fam C §4057(b)(3).

What constitutes reasonable needs for a child will vary with the parties’ circumstances, but the duty to support a child covers more than the mere necessities of life if the parent can afford to pay more. *Johnson v Superior Court* (1998) 66 CA4th 68, 71, 77 CR2d 624; *Marriage of Chandler* (1997) 60 CA4th 124, 129, 70 CR2d 109. If the supporting parent enjoys a lifestyle that far exceeds that of the custodial parent, child support must reflect, to some degree, the supporting parent’s more opulent lifestyle, even though this may, as a practical matter, produce a benefit for the custodial parent. *Johnson v Superior Court, supra*, 66 CA4th at 71.

On an extraordinarily high earner’s obligation to disclose evidence of his or her income, see §201.17.

(1) [§201.49] “Extraordinarily High Income” Not Defined

Family Code §4057(b)(3) provides no guidance for determining what is “extraordinarily high income.” Many courts take into account the wealth of the high-earner parent in relation to the community at large, and the relative wealth of their counties in making their determination. See *Marriage of Cheriton* (2001) 92 CA4th 269, 297, 111 CR2d 755. In some cases, a parent’s income may be so high as to be considered “extraordinarily high” by any objective standard.

(2) [§201.50] High Earner’s Burden of Proof in Rebutting Formula Amount

The parent who invokes the high-income exception must prove that (*Marriage of Hubner* (2001) 94 CA4th 175, 183, 114 CR2d 646):

- Application of the formula would be unjust or inappropriate, and
- A lower award would be consistent with the child’s best interest.

d. [§201.51] Disparity Between Support and Custodial Time

The court may adjust a presumed child support figure when a parent is not contributing to the children’s needs at a level commensurate with his or her custodial time. Fam C §4057(b)(4). The effect of this subsection is to allow the payor parent to claim that the custodial parent is not appropriately spending the support money on the children.

- **JUDICIAL TIP:** This is a “slippery slope” ripe for abuse. The payor parent with a smaller time-share sometimes wants to pay the children directly or provide “in-kind” payments of support such as clothing. “In-kind” payments are not allowed without a court order. If the court orders such payments, the order must be very specific about what “in-kind” payments are allowed.

e. [§201.52] Special Circumstances Render Formula Unjust or Inappropriate

The court may adjust a presumed child support figure in a case in which application of the formula would be unjust or inappropriate due to special circumstances. Fam C §4057(b)(5). These special circumstances may include cases where (Fam C §4057(b)(5)(A)–(C)):

- The parents have different time-sharing arrangements for different children.
- Both parents have substantially equal time-sharing of the children but one parent has a much lower or higher percentage of income used for housing than the other parent.
- The children have special medical or other needs that could require child support that would be greater than the formula amount.

Because Fam C §4057(b)(5) uses the words “include, but are not limited to” instead of listing all of the special circumstances in which the guideline amount would be inappropriate, the courts have very broad discretion in determining when special circumstances might justify a departure from the formula. *Marriage of de Guigne* (2002) 97 CA4th 1353, 1361, 119 CR2d 430. The following have been found to be special circumstances:

- *Substantial wealth.* 97 CA4th at 1361–1366 (trial court did not abuse discretion in setting support amount that was three times the guideline amount; inappropriate to base support on husband’s relatively meager investment income alone, given his extensive property holdings). See also *Mejia v Reed* (2003) 31 C4th 657, 671, 3 CR3d 390 (court may deem assets to be a “special circumstance”).
- *Low income.* *City & County of San Francisco v Miller* (1996) 49 CA4th 866, 869, 56 CR2d 887 (trial court did not abuse discretion in reducing father’s child support amount to zero; even after low-income adjustment provided in Fam C §4055(b)(7), father would be left with \$14 a month to live on after paying guideline support and rent); See also *Marriage of Butler & Gill* (1997) 53 CA4th

462, 467–469, 61 CR2d 781 (parent must have “acute difficulty” in providing full guideline level of support);.

- *High consumer debt. County of Lake v Antoni* (1993) 18 CA4th 1102, 1105–1106, 22 CR2d 804 (trial court did not abuse discretion in lowering support amount when father had accumulated high amount of consumer debt incurred in supporting another son and a stepdaughter over a nine-year period). See also *County of Stanislaus v Gibbs* (1997) 59 CA4th 1417, 1425–1427, 69 CR2d 819 (trial court erred in reducing support based on father’s high consumer debt when father failed to provide evidence that the debt was incurred for the purpose of “living needs,” such as clothing and household items, and when, after considering household income including income of his new wife, it was clear that the husband was not in a “financial bind”).
- *Support of stepchildren. County of Lake v Antoni, supra* (trial court did not abuse its discretion in considering the support of a stepchild as one factor in ordering a reduced level of support. But see *Haggard v Haggard* (1995) 38 CA4th 1566, 1571–1572, 45 CR2d 638 (court held that under the particular facts, support of nonadopted stepchildren improperly considered as basis for reduced support, but noted that the provisions in *Antoni* appear to allow a variance from the guideline in recognition of a parent’s support of children of a new marriage who otherwise would be without support; court also stated that in absence of adoption, the parent’s principal obligation must be to the children of his or her former marriage).
- *Adult child attending college. Edwards v Edwards* (2008) 162 CA4th 136, 138, 75 CR3d 458 (the guideline formula is inapplicable to an adult child attending college. When neither parent retains “primary physical responsibility” (under Fam C §4055(b)(1)(D)) for the adult child for any percentage of the time, application of the guideline formula “would be unjust or inappropriate” (under Fam C §4057(b)(5)) because physical responsibility for the child is a component of the guideline formula.

A court may consider a new spouse’s income as a “special circumstance” only when *not* considering it will result in extreme hardship to the child. *Marriage of Wood* (1995) 37 CA4th 1059, 1069, 44 CR2d 236, disapproved on other grounds in 39 C4th 179, 187 (general discretion afforded by Fam C §4057(b) cannot entirely circumvent statutory prohibition on consideration of new spouse’s income under Fam C §4057.5).

The following have not been found to be special circumstances that warrant deviation from support guideline amounts:

- The fact that the supporting parent would need to curtail his or her discretionary expenses in order to pay the guideline. *Marriage of C.* (1997) 57 CA4th 1100, 1106–1107, 67 CR2d 508 (“modest” reduction in supporting parent’s standard of living is not “special circumstance” warranting departure from guideline).
- Income that the Legislature has excluded from consideration in determining child support, *e.g.*, spousal support paid by one parent to the other. *Marriage of Corman* (1997) 59 CA4th 1492, 1501, 69 CR2d 880.

In a “move-away” situation, the court has discretion to facilitate visitation by allowing the noncustodial parent to deduct an amount from the statutory guideline and to set that amount aside for the creation of a travel fund. *Wilson v Shea* (2001) 87 CA4th 887, 893–898, 104 CR2d 880. See *Marriage of Burgess* (1996) 13 C4th 25, 40, 51 CR2d 444 (in “move-away” situation, court has broad discretion to allocate transportation expenses to custodial parent or to require that parent to provide for the transportation of the children to the noncustodial parent’s home). See §201.55 (travel expenses for visitation as discretionary “add-on”).

2. [§201.53] Mandatory Findings When Support Order Varies From Guidelines

When a court orders an amount for child support that differs from the guideline formula amount, the court must state the following information in writing or on the record (Fam C §§4056(a), 4057(b)):

- The amount of support that would have been ordered under the guideline formula.
- The reasons the amount of support ordered differs from the guideline formula amount.
- The reasons the amount of support ordered is consistent with the children’s best interests.

This information must be included as part of the order or judgment. *Marriage of Hall* (2000) 81 CA4th 313, 316, 96 CR2d 772.

Failure to make the mandatory findings precludes effective appellate review and may constitute reversible error if the missing information cannot otherwise be discerned from the record. *Marriage of Hubner* (2001) 94 CA4th 175, 184, 114 CR2d 646; *Marriage of Hall, supra*, 81 CA4th at 315 (statute is clear that court cannot exercise its discretion in making child support order that departs from guideline formula without saying why, either in writing or on the record); *Rojas v Mitchell* (1996) 50

CA4th 1445, 1450 n4, 58 CR2d 354 (term “information,” as used in Fam C §4056(a), requires both findings and a statement of reasons for the ultimate decision). The findings must be made whether the amount is higher or lower than the guideline amount. *Marriage of Laudeman* (2001) 92 CA4th 1009, 1014, 112 CR2d 378.

Before a court may depart from the guideline amount, the court must calculate this amount. *Marriage of Hall* (2000) 81 CA4th 313, 316–317, 96 CR2d 772. A deviation from the guideline amount cannot be justified merely by making an estimate of the guideline amount. Instead, the court must make an accurate computation of that amount and then state the reasons for departing from that amount. *Marriage of Whealon* (1997) 53 CA4th 132, 144–145, 61 CR2d 559.

E. Additional Child Support

1. [§201.54] Mandatory Add-Ons

A court *must* order the following as additional child support (Fam C §4062(a)):

- Child care costs related to employment or to reasonably necessary education or training for employment skills.
- Reasonable uninsured health care costs for the children as provided by Fam C §4063.

When making an order for reasonable uninsured health care costs, the court must (Fam C §4063(a)):

- Advise each parent, in writing or on the record, of the parent’s rights and liabilities, including financial responsibilities. Judicial Council form FL-192, Notice of Rights and Responsibilities—Health Care Costs and Reimbursement Procedures, may be used to give this advisement.
- Include in the order the time period a parent has to reimburse the other parent for the first parent’s share of the uninsured health care costs.

A parent who incurs or pays uninsured health care costs under Fam C §4063 must provide the other parent with an itemized statement of these costs within a reasonable time, not to exceed 30 days after incurring the costs. Fam C §4063(b). A parent who has already paid all of the costs must provide proof of payment and a request to the other parent for reimbursement of his or her court-ordered share. Fam C §4063(b)(1). A parent who has paid only his or her court-ordered share of the costs must provide proof of payment and a request to the other parent to pay the remainder of the costs directly to the provider. Fam C §4063(b)(2). The other parent must make reimbursement or pay the remaining costs within

the time period specified by the court, within a reasonable time not to exceed 30 days from notification of the amount due if no period is specified, or according to any payment schedule set by the provider unless the parties agree in writing to another schedule or the court finds good cause for setting another schedule. Fam C §4063(b)(3).

A reimbursing parent who disputes a request for payment must pay the requested amount but may then seek judicial relief under Fam C §§290 and 4063. Conversely, the other parent may seek judicial relief under these sections if the reimbursing parent fails to make the requested payment. Fam C §4063(b)(4).

Either parent may file a noticed motion to enforce an order issued under Fam C §4063. Fam C §4063(c). The court may exercise its broad enforcement powers under Fam C §290 (including execution, appointment of a receiver, or contempt), and may award filing costs and reasonable attorneys' fees if it finds that either parent acted without reasonable cause regarding that parent's obligations to pay health care costs. Fam C §4063(c).

There is a rebuttable presumption that the costs actually paid for a child's uninsured health care needs are reasonable. Fam C §4063(d). However, the health care insurance coverage provided by a parent under court order is the coverage that must be used at all times unless the other parent shows that this coverage is inadequate to meet the child's needs. Fam C §4063(e)(1). A parent who obtains additional health care insurance coverage bears sole financial responsibility for the costs of this additional coverage and the costs of any care or treatment obtained under this coverage that exceed the costs that would have been incurred under the coverage provided for in the court order. Fam C §4063(e)(2). Similar provisions apply with respect to preferred provider plans. See Fam C §4063(f).

When ruling on a motion under Fam C §4063, the court must consider all relevant facts, including (Fam C §4063(g)):

- The geographic access and reasonable availability of necessary health care for the child that complies with the terms of the health care insurance coverage paid for by either parent under the order. Health insurance is rebuttably presumed to be accessible if services to be provided are within 50 miles of the child's residence. If the court determines that health insurance is not accessible, the court must state the reason on the record.
- The necessity of any emergency medical treatment that may have precluded the use of the health care insurance, or the preferred health care provider required under the insurance, provided by either parent under the order.
- The child's special medical needs.

- A parent's reasonable inability to pay the full amount of reimbursement within a 30-day period and the resulting necessity for a court-ordered payment schedule.

2. [§201.55] Discretionary Add-Ons

A court *may* order the following as additional child support (Fam C §4062(b)):

- Costs related to the children's educational or other special needs.
- Travel expenses for visitation. See *Marriage of Gigliotti* (1995) 33 CA4th 518, 527-529, 39 CR2d 367.

The provisions of Fam C §4062 for additional child support are exclusive, and the court has no authority to order other "add-ons." *Boutte v Nears* (1996) 50 CA4th 162, 165-167, 57 CR2d 655 (court may not order attorneys' fees as "add-on").

A court does not have authority to order a parent to deposit into a trust or savings account a specified amount as additional child support to provide for the child's potential expenses or future needs. A court's authority to determine the amount of child support is limited to the conditions and circumstances existing at the time the order is made; it may not anticipate what may possibly happen thereafter and provide for future contingencies. *Marriage of Chandler* (1997) 60 CA4th 124, 129-131, 70 CR2d 109.

3. [§201.56] Apportioning Add-Ons Between Parents

If the court determines that these add-on expenses should be apportioned, it must order each parent to pay one-half of the expenses, unless a parent requests a different apportionment and presents documentation demonstrating that this apportionment would be more appropriate. Fam C §4061(a); *Marriage of Fini* (1994) 26 CA4th 1033, 1039-1040, 1 CR2d 749. If the court determines that a different apportionment is appropriate, it must apportion the expenses as follows (Fam C §4061(b)):

- The court must calculate the basic child support obligation using the guideline formula set forth in Fam C §4055(a), as adjusted for any appropriate rebuttal factors in Fam C §4057(b).
- The court must then order that any additional child support required for expenses under Fam C §4062 be paid by the parents in proportion to their net disposable as adjusted for the following (Fam C §4061(c)-(d)):
 - If the court has ordered one parent to pay spousal support, the court must (i) decrease the paying parent's gross income by

the amount of the spousal support and (ii) increase the receiving parent's gross income by the amount of the spousal support.

- The court must reduce the net disposable income of the parent paying child support by the amount of the child support. The court may not, however, increase the net disposable income of the parent receiving the child support.

➤ **JUDICIAL TIP:** In determining add-on allocations, the court can be assisted by referencing the child support computer program calculation page and comparing the relevant net incomes of the parties after support and taxes.

4. [§201.57] Health Insurance Coverage

In any child support proceeding, the court must consider the parties' health insurance coverage, if any. Fam C §4006. In setting support, the court must require either or both parents to maintain health insurance coverage for the supported child if that insurance is available at no or a reasonable cost to the parent. Fam C §3751(a)(2). Health insurance coverage is rebuttably presumed to be reasonable if the cost to the responsible parent providing medical support does not exceed 5 percent of his or her gross income; in applying the 5 percent for the cost of health insurance, the cost is the difference between self-only and family coverage. Fam C §3751(a)(2). If the support obligor is entitled to a low-income adjustment under Fam C §4055(b), medical support must be deemed not reasonable unless the court determines that not requiring medical support would be unjust and inappropriate in the particular case; if the court determines that not requiring medical support in such a case would be unjust and inappropriate, the court must state its reasons on the record. Fam C §3751(a)(2). The court must state its reasons on the record for determining that the cost of health insurance coverage is *not* reasonable. Fam C §3751(a)(2). If the court determines that health insurance coverage is not available at no or a reasonable cost, the support order must contain a provision specifying that the parties must obtain health insurance coverage if it becomes available at no or a reasonable cost. Fam C §3751(b).

When a child who has reached the age of adulthood is incapable of self-sustaining employment due to a physical or mental disability, the court must order the providing parent to seek continuation of health insurance coverage for the child if he or she is chiefly dependent upon the providing parent. Fam C §3751(c).

The cost of health insurance is in addition to the child support amount, but is deductible from the payor's gross income in determining the amount of income available for support. Fam C §§3753, 4059(d).

The child support order must contain a provision requiring the parties to keep each other informed about their group health insurance coverage. Fam C §3752.5. The order must include a provision requiring the parties to keep each other informed about their coverage when the child has reached the age of adulthood but is incapable of self-sustaining employment due to a physical or mental disability and is chiefly dependent upon the providing parent. Fam C §3751(c).

F. [§201.58] Parties' Stipulation to Child Support Amount

The parties may stipulate to a child support amount, subject to the court's approval. Fam C §4065(a). The court may not approve a stipulated agreement for child support below the guideline formula amount unless the parties declare that (Fam C §4065(a)):

- They are fully informed of their rights concerning child support;
- They agree to the order without coercion or duress;
- The agreement is in the children's best interests;
- The children's needs will be adequately met by the stipulated amount; and
- The right to support has not been assigned to the county under Welf & I C §11477, and no application for public assistance is pending.

The stipulated agreement is not valid unless signed by the local child support agency when the agency is providing child support enforcement services. The child support agency cannot sign a stipulated agreement ordering an amount below the guideline amount if the children are receiving CalWORKS benefits, if there is a pending application for public assistance, or if the parent receiving support has not consented to the order. Fam C §4065(c).

If the stipulated amount is below the amount established by the guideline formula, no change in circumstances need be shown to obtain a modification of the child support order to the guideline amount or above. Fam C §4065(d). When a court approves such a stipulation, it must include, on the record, the information required by Fam C §4056(a) (see §201.53). *Marriage of Laudeman* (2001) 92 CA4th 1009, 1014, 112 CR2d 378.

Parents cannot waive or limit the right to child support, or divest the court of jurisdiction over child support. *Marriage of Lambe & Meehan* (1995) 37 CA4th 388, 392-394, 44 CR2d 641.

G. [§201.59] Temporary Support

During the pendency of a proceeding for dissolution or legal separation, or any other proceeding in which support of a child is at issue, the court may order either or both parents to pay any amount necessary for the support of the child. Fam C §3600; *County of Santa Clara v Perry* (1998) 18 C4th 435, 445, 75 CR2d 738. The Statewide Uniform Guideline applies to orders for temporary, as well as permanent, support. See *Marriage of Wittgrove* (2004) 120 CA4th 1317, 1326, 16 CR3d 489. Although temporary and permanent awards of *spousal* support are computed using different criteria, awards of *child* support are computed using the same criteria no matter when the award is made. The amount of the permanent award may vary from the amount of the temporary award, however, based on changes in the parties' circumstances during the pendency of the proceedings, *e.g.*, changes in the parties' incomes or "time-sharing" arrangements.

The order for temporary support may be made retroactive to the date the petition or other initial pleading was filed. Fam C §4009. If the parent ordered to pay support was not served with the petition or other initial pleading within 90 days after filing and the court finds the parent was not intentionally evading service, then the earliest date on which the order can be effective is the date of service. Fam C §4009.

- **JUDICIAL TIP:** The court should credit the parent ordered to pay support with any payments that the parent has made since the effective date of the support order.

A temporary support order remains in effect until a permanent support order is made, or the order is otherwise terminated by the court or by operation of law. See Fam C §3601(a); *Marriage of Hammer* (2000) 81 CA4th 712, 717, 97 CR2d 195 (superseded by statute on other issue). See *Marriage of Fellows* (2006) 39 C4th 179, 203, 138 P3d 200 (temporary child support order is superseded by permanent support order in dissolution judgment). The court may modify or terminate a temporary support order at any time, except as to amounts that have accrued before the date the notice of motion or order to show cause to modify or terminate was filed. Fam C §3603. Temporary support orders are made without prejudice to the rights of the parties or the child with respect to any subsequent support orders that may be made. Fam C §3604.

A temporary support order is not enforceable during any period in which the parties have reconciled and are living together, unless the order specifies otherwise. Fam C §3602.

H. [§201.60] Expedited Support

In any child support action that has been filed and served, the court may issue an ex parte, expedited support order requiring either or both parents to pay support for their minor children during the pendency of the action. Fam C §3621. The amount of support ordered must be the guideline amount as required by Fam C §4055, unless the income of the obligated parent is unknown to the applicant; in such a case, the amount of support ordered must be the minimum amount provided in Welf & I C §11452. The procedures by which an expedited support order may be obtained are set forth in Fam C §§3620–3634.

An expedited support order is not effective until 30 days after the obligated parent is served with the proposed order and accompanying papers. Fam C §3624. The order becomes effective without further action by the court at the end of the 30-day period, unless the obligated parent files a response to the application and an income and expense declaration before the end of this period. Fam C §§3624(c), 3625(a), (c). The response must state the obligated parent's objections to the proposed expedited support order. Fam C §3625(b). The response and income and expense declaration must be served on the applicant by any method by which a response to a notice of motion may be served. Fam C §3625(a). The obligated parent must have the clerk set the matter for hearing not less than 20 nor more than 30 days after the response is filed (Fam C §3626), and must give notice of the hearing to the other parties or their attorneys by first-class mail at least 15 days before the hearing (Fam C §3627). If this notice is not given, the expedited support order becomes effective at the end of the 30-day period, subject to the relief available to the responding party under CCP §473 or any other available relief in law or equity. Fam C §3628.

An application for an expedited support order confers jurisdiction on the court to hear only the issue of child support. Fam C §3623(a). Either parent may, however, bring before the court at the hearing other separately noticed issues that are otherwise relevant and proper to the action. Fam C §3623(b). At the hearing, the parents must produce copies of their most recently filed federal and state income tax returns, and each parent may be examined as to the contents of these returns. Fam C §3629(a), (b). A parent who fails to submit his or her tax returns (or any other required documents) may not be granted the relief he or she has requested; the court may, however, grant the requested relief if the parent submits a declaration under penalty of perjury that the document does not exist or the tax return cannot be produced but a copy has been requested from the Internal Revenue Service or the Franchise Tax Board. Fam C §3629(c), (d).

At the conclusion of the hearing, the court must order an amount of support in accordance with Fam C §§4050 et seq, *i.e.*, the guideline amount as adjusted by other factors that the court may consider in ordering support. See Fam C §3630(b). Thus, the amount of support ordered after hearing will not necessarily be the minimum guideline amount set forth in the application. The order after hearing must become effective not more than 30 days after the response was filed and may be made retroactive to the date the application was filed. Fam C §3632. This order may be modified or terminated at any time on the same basis as any other child support order. Fam C §3633.

I. [§201.61] Family Support

When the court orders both child and spousal support, it may designate as “family support” an unallocated total amount for the support of a spouse and children, without specifically labeling all or any portion of that amount as “child support,” as long as the amount is adjusted to reflect the effect of additional deductibility. Fam C §4066. Family support is deductible in full by the payor and taxable to the recipient. The court must adjust the amount of the order to maximize the tax benefits for both parents. Fam C §4066. The Statewide Uniform Guideline applies to awards designated as “family support.” Fam C §4074. A family support order is enforceable in the same manner and to the same extent as a child support order. Fam C §4501.

J. [§201.62] Duration of Obligation To Pay Child Support

A parent’s duty to pay child support normally terminates when the child reaches age 18. However, as to any unmarried 18-year-old child who is a full-time high school student and not self-supporting, the parent’s obligation to pay support continues until the time the child completes the 12th grade or reaches 19 years of age, whichever occurs first. Fam C §3901(a). See *Marriage of Everett* (1990) 220 CA3d 846, 852, 269 CR 917 (court should not have terminated support for child after she turned 18 in February, but rather should have terminated child support at end of her senior year because she continued to live with custodial parent and to attend high school until graduation in June). See also *Marriage of Schopfer* (2010) 186 CA4th 524, 535, 112 CR3d 512 (daughter’s attainment of age 18 and attendance at boarding school were not changed circumstances to support termination of father’s child support obligation to stepfather). Thus, child support ends, at the latest, when the child reaches age 19, unless:

- A parent agrees to provide support beyond this time (Fam C §§3587, 3901(b)), or

- The child (of whatever age) is incapacitated from earning a living and is without sufficient means (Fam C §3910(a); *Marriage of Serna* (2000) 85 CA4th 482, 483–484, 102 CR2d 188; *Marriage of Drake* (1997) 53 CA4th 1139, 1154, 62 CR2d 466 (question of “sufficient means” should be resolved in terms of likelihood that child will become a public charge)).

The court may use the Statewide Uniform Guideline to compute support for an adult child who is incapacitated and without sufficient means. It may adapt or depart from the guideline formula as warranted by the circumstances, *e.g.*, if a disabled adult child has independent income or assets, the court may reduce the presumed amount of support. 53 CA4th at 1157–1158. However, the guideline formula is inapplicable to a competent adult child who has moved away to college when neither parent retains “primary physical responsibility” for the adult child for any percentage of time. *Edwards v Edwards* (2008) 162 CA4th 136, 75 CR3d 458.

K. [§201.63] Modification of Child Support Order

A court may modify or terminate a child support order as the court determines to be necessary. Fam C §3651(a); *Marriage of Brinkman* (2003) 111 CA4th 1281, 1288, 4 CR2d 722. The court has the power to modify a child support order, upward or downward, regardless of the parents’ agreement to the contrary. *Marriage of Alter* (2009) 171 CA4th 718, 726, 89 CR3d 849.

As a general rule, a material change of circumstances must be shown before a child support order may be modified either upward or downward. 111 CA4th at 1288; *Marriage of Laudeman* (2001) 92 CA4th 1009, 1015, 112 CR2d 378. Examples of changed circumstances include a significant change in one of the parent’s net income, a significant change in the parenting schedule, or the birth of a child. See JC Form FL-192 (Information Sheet on Changing a Child Support Order). The court must apply the Statewide Uniform Guideline when determining a motion to modify a child support order. 92 CA4th at 1013. If the amount of support differs from the guideline amount, the court must include the information specified in Fam C §4056(a) in the order. 111 CA4th at 1292–1293. See §201.53.

If the parties to a stipulated agreement stipulate to a child support order below the guideline amount, no change of circumstances need be shown to obtain a modification of the order to the guideline amount or to an amount above the guideline. Fam C §4065(d). When the parties have stipulated to a child support order *above* the guideline amount, however, a change in circumstances must be shown to obtain a downward modification of that order to the applicable guideline amount or to an

amount below the guideline. *Marriage of Laudeman, supra*, 92 CA4th at 1015-1016.

Retroactive modification. The court may make an order modifying or terminating a child support order retroactive to the date on which the notice of motion or order to show cause was filed, or to any subsequent date. Fam C §3653(a); *Marriage of Cheriton* (2001) 92 CA4th 269, 300, 111 C2d 755 (date notice of motion or order to show cause was filed is earliest date for retroactive modification). In exercising its discretion concerning retroactivity, the court must consider the child's current needs, as measured by the parents' ability to provide support. *Marriage of Cheriton, supra*.

If the order is made due to either party's unemployment, the court must make the order retroactive to the date on which the notice of motion or order to show cause was served or the date of unemployment, whichever is later, unless the court finds good cause not to make the order retroactive and states its reasons on the record. Fam C §3653(b). "Good cause" for denying retroactivity requires the court to make a good faith finding that nonretroactivity is justified by real circumstances, substantial reasons, and objective conditions. *Marriage of Leonard* (2004) 119 CA4th 546, 559, 14 CR3d 482. The court must balance the children's current needs against the interests of the supporting parent not to be faced with an unjust and unreasonable financial burden resulting from a nonretroactive order. 119 CA4th at 560. Because the children's needs are of paramount concern, when retroactivity would result in demonstrable hardship to them, good cause may exist to deny a retroactive support reduction or termination if the supporting parent has the ability to bear the financial burden, *e.g.*, by using other assets or severance pay. 119 CA4th at 561-562.

If the court enters a retroactive order decreasing or terminating support, it may order the support obligee to repay any amounts the support obligor paid under the prior order that exceed the amounts due under the retroactive order. Fam C §3653(c). The court may require repayment over any period of time and in any manner it deems just and reasonable, including by an offset against future support payments or a wage assignment. Fam C §3653(c). In determining whether to order repayment, and in establishing the terms of repayment, the court must consider all of the following factors (Fam C §3653(c)):

- The amount to be repaid.
- The duration of the support order before modification or termination.
- The financial impact of the method of repayment on the support obligee.
- Any other facts or circumstances the court deems relevant.

L. [§201.64] Setting Aside Support Order

The court may relieve a party from all or any part of a support order, on any terms that may be just, after the six-month time limit of CCP §473 has run. Fam C §3690(a). The grounds for relief are actual fraud, perjury, or lack of notice. See Fam C §3691. See also Judicial Council form FL-360, Request for Hearing and Application to Set Aside Support Order Under Fam C §3691, adopted for mandatory use. The motion for relief must be brought within six months after the date on which the party discovered or reasonably should have discovered the ground for relief. See Fam C §3691.

Before granting relief, the court must find that the facts alleged as the grounds for relief materially affected the support order and that the moving party would materially benefit from the granting of relief. Fam C §3690(b). The court may not set aside a support order merely because it finds the order was inequitable when made, or subsequent circumstances caused the amount of support ordered to become excessive or inadequate. Fam C §3692. Generally, the court is restricted to setting aside only those provisions of the support order that are materially affected by the circumstances leading to the court's decision to grant relief, but the court may set aside the entire order based on equitable considerations. Fam C §3693.

VI. SPOUSAL SUPPORT

A. [§201.65] Temporary Support

During the pendency of a proceeding for dissolution of marriage or legal separation, the court may order the husband or wife to pay any amount that is necessary for the support of the other party. Fam C §3600. Temporary spousal support, sometimes called “pendente lite” support, is typically ordered to maintain the living conditions and standards of the parties as close to the status quo as possible pending trial and the division of the parties' assets and obligations. *Marriage of Burlini* (1983) 143 CA3d 65, 68, 191 CR 541. A court may order temporary spousal support in any amount after considering the moving party's needs and the other party's ability to pay. *Marriage of Murray* (2002) 101 CA4th 581, 594, 124 CR2d 342. See *Marriage of Jacobson* (2004) 121 CA4th 1187, 1191–1193, 18 CR3d 162 (in dissolution proceeding filed by Indian spouse against non-Indian spouse, court had jurisdiction to order petitioner to pay temporary spousal support to respondent from her tribal gaming distributions notwithstanding tribal resolution prohibiting former spouses who are not tribal members from receiving these distributions; resolution is inconsistent with California law). The court may look to the parties' accustomed marital lifestyle as the main basis for a temporary support

order. *Marriage of Wittgrove* (2004) 120 CA4th 1317, 1327, 16 CR3d 489.

➡ JUDICIAL TIPS:

- In reality, the cost of supporting two households is higher than supporting one, so it is often not possible to maintain the status quo. All the court can do is equitably allocate the family income to maintain the parties in as close to their pre-separation condition as possible. See *Marriage of Burlini*, *supra*, 143 CA3d at 69.
- The court may find it beneficial to review the factors in Fam C §4320 (mandatory considerations for awarding permanent or long-term spousal support) when setting temporary support.

If a spouse has been convicted of domestic violence against the other spouse within five years of the family law proceeding, there is a rebuttable presumption against awarding temporary spousal support to the abusive spouse. Fam C §4325. In addition, the court must consider any documented history of domestic violence between the parties when setting temporary spousal support. See Fam C §3600 (temporary order must be consistent with requirements of Fam C §§4320(i), 4320(m), and 4325). Temporary spousal support may not be awarded to a spouse convicted of attempting to murder the other spouse or of soliciting the murder of the other spouse. Fam C §4324. See discussion in §201.84. See also *Marriage of MacManus* (2010) 182 CA4th 330, 105 CR3d 785 (court did not abuse its discretion in reallocating distribution of back child support to back spousal support in light of support obligor's history of domestic violence).

The court has jurisdiction to award temporary spousal support to a party even after that party's default. Such an award is based on need, and the merits and procedural posture of the case are irrelevant. *Marriage of Askmo* (2000) 85 CA4th 1032, 1036–1040, 102 CR2d 662.

1. [§201.66] Use of Court Schedules or Formulas

Many courts have adopted schedules or formulas for determining temporary spousal support that divide the family income proportionately based either on the net income of the party being asked to pay support or on the net incomes of both parties. These guidelines promote consistency in temporary support orders and may reduce the need for hearings; however, they are not mandatory and should not be used in cases with unusual facts or circumstances. *Marriage of Burlini* (1983) 143 CA3d 65, 70, 191 CR 541. Some special circumstances that might justify a deviation from the guideline amount include the following (*Marriage of Burlini, supra*):

- Tax consequences contemplated by the guideline, *e.g.*, temporary spousal support not to be taxable to the recipient, are incorrect.
- Party is paying spousal or child support from a prior relationship.
- Party is encumbered with unusually large mortgage payments or other monthly payments.
- Party has special expenses or special needs.

For examples of local court spousal support guidelines, see Alameda County rule 5.70, Santa Clara County rule 3(B).

- ☛ **JUDICIAL TIP:** Some certified child support programs incorporate local formulas for calculating temporary spousal support. The judge should check the software and local court rules.

2. [§201.67] Duration of Temporary Spousal Support Order

The court can order temporary spousal support from the time of the filing of a petition for dissolution of marriage. Fam C §§3600, 2330. The order will remain in effect until:

- Judgment is issued (*Wilson v Superior Court* (1948) 31 C2d 458, 463, 189 P2d 266). But note, the court retains the power to order temporary support during pendency of any appeal (*Bain v Superior Court* (1974) 36 CA3d 804, 808–810, 111 CR 848);
- The case is dismissed (*Moore v Superior Court* (1970) 8 CA3d 804, 810, 87 CR 620); or
- The order expires on its own terms (a “sunset” provision, *e.g.*, for some marriages of short duration).

If there is no termination of the order of support, payment obligation continues to accrue even if the action is not being actively litigated, and payments that accrue before termination remain enforceable after termination. *Moore v Superior Court, supra*. But the order is not enforceable during any period when the parties have reconciled and are living together. Fam C §3602.

3. [§201.68] Modification of Temporary Spousal Support

A court may modify or terminate a temporary spousal support order at any time. The court’s power to modify or terminate is limited, however, in two respects:

- The court may not modify or terminate the payor’s liability for payments that accrued before the date of filing the notice of motion

or order to show cause to modify or terminate the order. Fam C §3603.

- The court may not retroactively modify a temporary support order. Family Code §3603 establishes the filing date of the modification motion or OSC to modify as the outermost limit of retroactivity. *Marriage of Gruen* (2011) 191 CA4th 627, 637, 120 CR3d 184; *Marriage of Murray* (2002) 101 CA4th 581, 595–596, 124 CR2d 342; *Marriage of Goodman* (2011) 191 CA4th 627, 638–639, 120 CR3d 184.

Temporary spousal support may be modified without a showing of changed circumstances. See *Sande v Sande* (1969) 276 CA2d 324, 329, 80 CR 826; *Zinke v Zinke* (1963) 212 CA2d 379, 382–385, 28 CR 7. But see *Marriage of Murray, supra*, 101 CA4th at 581, 597 n11 (dicta).

- JUDICIAL TIP: Many judges deny modification of temporary spousal support when no change of circumstances is shown, if only to prevent parties returning to the trial court in the hope of a more favorable ruling.

B. Permanent Support

1. [§201.69] What Constitutes Permanent Support

Permanent spousal support may be awarded in a judgment of dissolution or legal separation in an amount and for a period of time the court determines is just and reasonable, based on the parties' standard of living established during the marriage, and taking into consideration the factors in Fam C §4320. Fam C §4330(a). See §§201.71–201.85. Although spousal support awarded in a final judgment is generally referred to as “permanent,” the actual duration of support is within the court's discretion and subject to modification.

“Spousal support” is broadly defined to include a wide variety of financial assistance designed to cover everyday living expenses, including housing, food, clothing, health, recreation, vacation, and travel expenses. See *Marriage of Benjamins* (1994) 26 CA4th 423, 429, 31 CR2d 313. For example, the court may order the supporting spouse to (Fam C §4360(a); see 26 CA4th at 430–431):

- Maintain health insurance for the other spouse.
- Make mortgage payments to the supported spouse or directly to the mortgagor.
- Pay overdue community debts or the supported spouse's future debts.

- Take out a life insurance policy with the other spouse as beneficiary.
- Purchase an annuity or establish a trust to support the other spouse after the supporting spouse's death.
- Pay the supported spouse's attorneys' fees based on need.

2. [§201.70] Effect of Temporary Support on Permanent Support

Unlike temporary spousal support, the purpose of permanent spousal support is not to preserve the status quo, but to provide financial assistance, if appropriate, as determined by the parties' financial circumstances after dissolution and the division of their community property. *Marriage of Burlini* (1983) 143 CA3d 65, 69, 191 CR 541. In determining permanent spousal support, the court must consider a complex variety of statutory factors (Fam C §4320; see §§201.71–201.85), including several factors that tend to favor reduced support, such as the “goal” that the supported spouse should become self-supporting within a reasonable period of time (Fam C §4320(l)).

Because the considerations in awarding the two types of support are different and because of the reality that temporary support tends to be higher than permanent support, the court should not use the amount of temporary support in determining the amount of permanent support. *Marriage of Schulze* (1997) 60 CA4th 519, 524–527, 70 CR2d 488 (Fam C §4320 clearly contemplates a “ground-up” examination of need for and appropriate level of permanent support, rather than beginning with figure based on temporary support order). See *Marriage of Zywiciel* (2000) 83 CA4th 1078, 1081–1082, 100 CR2d 242 (in determining permanent spousal support, judge may not abdicate responsibility by turning to DissoMaster temporary support guideline, even if used only as a reference point); *Marriage of Burlini, supra*, 143 CA3d at 68 (court may not use local guidelines for temporary spousal support to compute permanent spousal support).

C. [§201.71] Factors Court Must Consider in Awarding Permanent Support

Unlike child support, spousal support is *not* a mandatory requirement in dissolution proceedings. *Marriage of Meegan* (1992) 11 CA4th 156, 161, 13 CR2d 799. Computer programs cannot be used to calculate permanent support. In determining whether to award permanent support, and the amount and duration of that support, the court *must* consider and weigh *all* of the 14 factors listed in Fam C §4320, to the extent they are relevant. *Marriage of Cheriton* (2001) 92 CA4th 269, 302, 111 CR2d 755.

The court may determine the appropriate weight to be given to each factor, with the goal of accomplishing substantial justice for the parties. *Marriage of Smith* (1990) 225 CA3d 469, 481–482, 274 CR 911. However, the court may not act arbitrarily but must exercise its discretion along legal lines, taking into consideration the applicable circumstances of the parties set forth in Fam C §4320, particularly the parties' reasonable needs and financial abilities. A failure to do so is reversible error. *Marriage of Cheriton, supra*, 92 CA4th at 304.

The Fam C §4320 factors are described in detail in §§201.72–201.85.

1. [§201.72] Sufficiency of Earning Capacities To Maintain Marital Standard of Living

The court must consider the extent to which each party's earning capacity is sufficient to maintain the standard of living established during the marriage, taking into account all of the following factors (Fam C §4320(a)):

- The supported party's marketable skills.
- The job market for those skills.
- The time and expenses required for the supported party to acquire the appropriate education or training to develop those skills.
- The possible need for retraining or education to acquire more marketable skills or employment. See *Marriage of Watt* (1989) 214 CA3d 340, 347–348, 262 CR 783 (wife did not demonstrate present need for retraining or education to attain more marketable skills, notwithstanding her intention to begin a specified training program, when her income before training was higher than the amount she would earn on completing the training program).
- The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment incurred during the marriage to permit the supported party to devote time to domestic duties. See *Marriage of Cheriton* (2001) 92 CA4th 269, 306, 111 CR2d 755 (insufficient evidence that wife's domestic duties hampered her career); *Marriage of Kerr* (1999) 77 CA4th 87, 94, 91 CR2d 374 (in setting support, court considered wife's impaired earning ability caused by her 20-year absence from workforce to care for husband and children, which allowed husband to develop and maintain lucrative career).

2. [§201.73] Contributions to Supporting Party's Education and Training

The court must consider the extent to which the supported party contributed to the supporting party's attainment of an education, training,

career position, or license. Fam C §4320(b). This provision must be interpreted broadly and requires the court to consider *all* of the supported party's efforts to assist the supporting party in acquiring an education and enhanced earning capacity, *i.e.*, the court must consider living expenses contributed by the supported party, as well as education expenses. *Marriage of Watt* (1989) 214 CA3d 340, 350-351, 262 CR 783 (court should give "weighty" consideration to supported party's contributions in deciding propriety and extent of spousal support award). This provision is, however, limited to contributions the supported spouse made to the other spouse's "attainment" of an education or career position and does not apply with respect to domestic contributions the supported spouse made that allegedly aided the other spouse in carrying out a career position he or she had already attained before the marriage. *Marriage of Cheriton* (2001) 92 CA4th 269, 306, 111 CR2d 755.

3. [§201.74] Supporting Party's Ability To Pay

The court must consider the supporting party's ability to pay spousal support, taking into account his or her earning capacity, earned and unearned income, assets, and standard of living. Fam C §4320(c).

The statutory guidelines governing spousal and child support do not limit the circumstances under which a court may consider the supporting spouse's earning capacity. *Marriage of Simpson* (1992) 4 C4th 225, 232-233, 14 CR2d 411. For example, it need not be shown that the supporting spouse has willfully avoided fulfilling family support obligations through deliberate misconduct. *Marriage of Stephenson* (1995) 39 CA4th 71, 78-80, 46 CR2d 8. Evidence must be presented, however, showing that the supporting party has both the ability and opportunity to obtain employment that would generate a higher income. *Marriage of Reynolds* (1998) 63 CA4th 1373, 1378, 74 CR2d 636; *Marriage of Stephenson, supra*, 39 CA4th at 80. The court may not order spousal support, however, based on a finding that a spouse's present earnings from long-term employment can be increased by requiring that person to take a retirement and then requiring that person to take an available, but different, position adding the new retirement income to the new position income. *Marriage of Kochan* (2011) 193 CA4th 420, 427, 122 CR3d 61. See §201.102. On considering earning capacity in setting child support, see §§201.18-201.25.

A party's ability to pay encompasses his or her assets as well as income. Therefore, the court may look to the assets controlled by the supporting party, other than income, as a basis for awarding spousal support. *Marriage of Cheriton* (2001) 92 CA4th 269, 305, 111 CR2d 755 (court should have considered husband's "substantial assets" in awarding spousal support). See Fam C §4338 (spousal support is payable from party's earnings and income, community property, quasi-community

property, and separate property). The court has discretion to exclude funds that a husband used to capitalize and vertically integrate his business from his income for purposes of calculating his spousal support obligation. *Marriage of Blazer* (2009) 176 CA4th 1438, 1447, 99 CR3d 42.

Support may consist of a percentage of the supporting party's future income from the exercise of stock options (*Marriage of Kerr* (1999) 77 CA4th 87, 95, 91 CR2d 374) or from the receipt of bonuses (*Marriage of Ostler & Smith* (1990) 223 CA3d 33, 272 CR 560).

4. [§201.75] Parties' Needs

The court must consider each party's needs based on the standard of living established during the marriage. Fam C §4320(d). For discussion of marital standard of living, see §201.86.

5. [§201.76] Parties' Obligations and Assets

The court must consider each party's obligations and assets, including separate property. Fam C §4320(e).

A court may consider a party's separate property when determining his or her ability to pay support. See Fam C §4338(d) (separate property may be used to pay spousal support); *Marriage of de Guigne* (2002) 97 CA4th 1353, 1365, 119 CR2d 430 (fact that marriage generated little or no community property does not relieve party of support obligation).

A court may also consider a party's separate property when determining his or her need for support. In an original or modification proceeding, when there are no children and a party has or acquires a separate estate, including income from employment, sufficient for his or her proper support, no support may be ordered or continued for this party. Fam C §4322. Denial of support is mandatory if the sufficiency threshold is met, irrespective of the circumstances the court would otherwise consider under Fam C §4320. *Marriage of Terry* (2000) 80 CA4th 921, 928, 95 CR2d 760. The court must determine whether the party's separate estate, including assets acquired through the final division of community property, is, or is not, capable of providing for that party's proper support. The court is not limited to considering the income actually and presently produced by the estate. It may look to the estate as a whole, including the actual and reasonable income potential from investment assets, as well as their total value, in resolving the issue of the estate's sufficiency for proper support. 80 CA4th at 929–931.

6. [§201.77] Length of Marriage

The court must consider the duration of the marriage. Fam C §4320(f). This factor is generally more relevant to the *duration* of spousal support than to the *amount* of support to be ordered. It is of primary

concern in determining whether jurisdiction over spousal support should be retained indefinitely, or whether spousal support should be ordered for a limited term. See §201.92.

7. [§201.78] Employment of Supported Party and Its Impact on Children

The court must consider the supported party's ability to engage in gainful employment without unduly interfering with the interests of dependent children in that party's custody. Fam C §4320(g).

- **JUDICIAL TIP:** It may be appropriate for a supported spouse to defer employment or training to care for dependent children, *e.g.*, when caring for a child with special needs. See *Marriage of Rosan* (1972) 24 CA3d 885, 893–894, 101 CR 295.

8. [§201.79] Age and Health of Parties

The court must consider the age and health of the parties. Fam C §4320(h). An older, less healthy supported spouse is obviously more likely to receive a favorable long-term support order than is a younger, more healthy spouse. However, support may not be ordered on the basis of the age and health of the parties alone. See *Marriage of Wilson* (1988) 201 CA3d 913, 917–920, 247 CR 522 (following childless five-year marriage, no abuse of discretion in terminating support for permanently disabled spouse 58 months after dissolution; trial court relied primarily on the fact that the marriage was not lengthy, but properly weighed all eight factors of former CC §4801(a), predecessor of Fam C §4320). Compare *Marriage of Heistermann* (1991) 234 CA3d 1195, 1200–1203, 286 CR 127 (following marriage of almost nine years, trial court erred in terminating support for physically disabled spouse after passage of one year when there was no evidence that the spouse could be self-supporting).

9. [§201.80] History of Domestic Violence

The court must consider any documented evidence of any history of domestic violence, as defined in Fam C §6211, between the parties, including, but not limited to (Fam C §4320(i)):

- Supported party's emotional distress resulting from domestic violence committed by the supporting party.
- Any history of violence against the supporting party by the supported party.

See *Marriage of MacManus* (2010) 182 CA4th 330, 337–338, 105 CR3d 785 (trial court did not abuse its discretion by considering parties'

history of domestic violence when it reallocated trust account distributions to past temporary spousal support).

See also Fam C §§4320(m), 4325 (rebuttable presumption that spouse *convicted* of domestic violence is not entitled to support).

10. [§201.81] Tax Consequences

The court must consider the immediate and specific tax consequences of spousal support to each party. Fam C §4320(j).

Spousal support payments are included in the payee's gross income and are deductible by the payor. See IRC §§71, 215; Rev & T C §§17081, 17201.

Because federal law does not recognize domestic partnerships, it appears that any domestic partner support (see Fam C §§297.5(a), 299(d)) will not be taxable to the recipient or deductible by the payor.

11. [§201.82] Relative Hardships

The court must consider the balance of the hardships to each party. Fam C §4320(k).

12. [§201.83] Goal of Self-Support

When ordering spousal support, the court must consider the goal that the supported party will be self-supporting within a reasonable period of time. Except in a marriage of long duration (generally 10 years or longer), a "reasonable period of time" is one-half of the length of the marriage. The court may, however, order support for a greater or lesser length of time based on the parties' circumstances. Fam C §4320(l). The Supreme Court has noted that this provision reflects that the law has progressed from a rule that entitled some women to lifelong support as a condition of the marital contract of support to a rule that entitles either spouse to postdissolution support for only as long as necessary to become self-supporting. *Marriage of Pendleton & Fireman* (2000) 24 C4th 39, 53, 99 CR2d 278.

A "displaced homemaker" from a lengthy marriage may find it impossible to enter the job market, and it may be appropriate to order spousal support for an extended duration. *Marriage of Heistermann* (1991) 234 CA3d 1195, 1204, 286 CR 127.

If the party seeking support has unreasonably delayed or refused to seek employment consistent with his or her ability, the court may consider this factor in fixing the amount and duration of support in the first instance, as well as in a subsequent modification proceeding. 234 CA3d at 1204.

13. [§201.84] Conviction for Domestic Violence or Attempted Murder or Solicitation of Murder

If one spouse has been convicted of domestic violence against the other spouse within five years of the filing of the dissolution proceeding, or at any time thereafter, there is a rebuttable presumption against awarding temporary or permanent spousal support to the abusive spouse. Fam C §§4320(m), 4325(a). This presumption may be rebutted by a preponderance of the evidence. Fam C §4325(c). The court may consider documented evidence of a convicted spouse's history as a victim of domestic violence perpetrated by the other spouse, or any other factors the court finds just and equitable, as conditions for rebutting the presumption. Fam C §4325(b).

If one spouse has been convicted of attempting to murder the other spouse or of soliciting the murder of the other spouse, the convicted spouse is prohibited from receiving any temporary or permanent spousal support, or any medical, life, or other insurance benefits or payments from the injured spouse. Fam C §4324.

14. [§201.85] Other “Just and Equitable” Factors

The court must consider any other factors the court determines are just and equitable. Fam C §4320(n).

For example, in *Marriage of Shaughnessy* (2006) 139 CA4th 1225, 1244, 43 CR3d 642, the court held that it is within the trial court's discretion to consider evidence of monetary gifts from the obligee's parents as one factor in determining an appropriate spousal support award.

D. [§201.86] Marital Standard of Living

In awarding permanent spousal support, the court must base its decision on the standard of living established during the marriage. Fam C §4330(a). There is no set formula for determining the marital standard of living. The court must weigh the marital standard along with all the other factors in Fam C §4320 in fixing an amount of support that is just and reasonable. Fam C §4330(a).

The marital standard of living means the general station in life the parties enjoyed during their marriage. *Marriage of Smith* (1990) 225 CA3d 469, 475, 274 CR 911. It is a general description that is not intended to specifically spell out or narrowly define a mathematical standard. 225 CA3d at 491. It may be determined from the parties' average income over a period of time or from their expenditures. *Marriage of Weinstein* (1991) 4 CA4th 555, 565-566, 5 CR2d 558.

The marital standard of living is a reference point against which the court may weigh the other statutory considerations. Whether to fix spousal support at an amount greater than, equal to, or less than what the

supported spouse may require to maintain the marital standard of living is within the court's discretion after weighing the statutory factors. *Marriage of Cheriton* (2001) 92 CA4th 269, 308, 111 CR2d 755.

A spouse's high income may be considered with respect to his or her ability to pay support. But the fact that a high income enables this spouse to maintain a standard of living that is higher than the marital standard of living does not mean that the supported spouse is entitled to an amount of support that will allow the supported spouse to also maintain a higher standard of living. 92 CA4th at 307-308; *Marriage of Weinstein, supra*, 4 CA4th at 568.

If there is evidence that the family's standard of living was low when compared with available income during marriage, the court may be justified in setting spousal support at a level above the parties' actual standard of living during marriage. *Marriage of Cheriton, supra*, 92 CA4th at 307-308. See *Marriage of Drapeau* (2001) 93 CA4th 1086, 1096, 114 CR2d 6 (court may consider parties' history of saving significant portions of their income). Likewise, if the parties intentionally maintained a low standard of living so that one of them could obtain an advanced degree with the expectation that this party's increased earnings would enable the parties to enjoy a higher standard of living, the court should take into account the impact this party's absence from the full-time work force had on the parties' standard of living during the marriage. *Marriage of Watt* (1989) 214 CA3d 340, 351-352, 262 CR 783.

E. Findings

1. [§201.87] Mandatory Findings on the Marital Standard of Living

A court must make specific factual findings with respect to the parties' standard of living during the marriage. Fam C §4332. Equally important, the court should make a specific finding that the amount of the support order is or is not sufficient to meet the reasonable needs of the supported spouse, considering the parties' marital standard of living at the time of separation and the other Fam C §4320 factors. *Marriage of Smith* (1990) 225 CA3d 469, 491-493, 274 CR 911.

Ideally, the findings should be specific enough to be helpful in subsequent modification or appellate proceedings. In cases in which the parties are represented by counsel, courts are encouraged, with counsel's assistance, to make specific findings. However, in cases in which the parties represent themselves, it is unrealistic to expect them to use anything other than the everyday understanding of the term in its ordinary sense; therefore, in these cases, referring to the standard of living as upper, middle, or lower income, is sufficient. 225 CA3d at 491.

- **JUDICIAL TIP:** Although the court may use the common “upper,” “middle,” and “lower” income descriptors, it should make more specific findings about the marital standard of living (*e.g.*, how many homes and how large, how many cars, travel habits, savings and investments) because greater specificity is helpful when responding to a modification motion.

2. [§201.88] Findings of Other Circumstances on Request

Factual findings on all other circumstances on which the support order is based are required only on the request of either party. Fam C §4332. A party may request, for example, findings on the underlying assumptions regarding future circumstances, the needs of the supported spouse, and whether the amount awarded is sufficient to meet those needs.

F. [§201.89] Statement of Decision

On the request of either party, an order modifying, terminating, or setting aside a support order must include a statement of decision. Fam C §3654.

G. [§201.90] Gavron Warning

When ordering permanent spousal support, the court may advise the supported party that he or she should make reasonable efforts to assist in providing for his or her support needs. The court may decide that this warning is inadvisable if the case involves a marriage of long duration (generally 10 years or longer). Fam C §4330(b). In giving the advisement, the court must take into account the Fam C §4320 factors considered by the court in ordering spousal support. Fam C §4330(b); See §§201.71–201.85. This advisement is often called a “Gavron” warning after the leading case, *Marriage of Gavron* (1988) 203 CA3d 705, 250 CR 148.

Inherent in the concept that the supported spouse’s failure to make good-faith efforts to become self-supporting can constitute a change in circumstances that could warrant a modification in spousal support is the premise that the supported spouse is made aware of the obligation to become self-supporting. *Marriage of Gavron, supra*, 203 CA3d at 712. See *Marriage of Schmir* (2005) 134 CA4th 43, 53–58, 35 CR3d 716 (order reducing spousal support reversed because no warning given to recipient spouse).

Although the statute is couched in discretionary language, actual practice is to advise the spouse receiving support of the need to become self-supporting within a reasonable time. One factor appellate courts consider in deciding whether a modification or termination of spousal support was proper is whether a Gavron warning was given. *Marriage of Gavron, supra*, 203 CA3d at 711–712.

☛ JUDICIAL TIPS:

- The court should put its expectations about the plan for the supported spouse to become self-supporting on the record. That puts the spouses on notice and makes the plan available for review or for any motion to modify, terminate, extend, or enforce support.
- To help assess a party's ability to obtain employment, the court may order the party to submit to an examination by a vocational training counselor under Fam C §4331.

H. [§201.91] Duration of Support Order

The duration of permanent spousal support is necessarily dependent on the parties and the facts and circumstances of the case. *Marriage of Smith* (1990) 225 CA3d 469, 480, 274 CR 911. In some cases, very short-term support is appropriate for the purpose of financially assisting one spouse in the transition to single status or until the proceeds from an ordered property division or sale can be received. 225 CA3d at 480-481. At the other end of the spectrum are cases in which the purpose of spousal support is to provide financial assistance to the supported spouse until the death of one of the spouses, because the supported spouse is unable to generate income from employment or assets or, in any event, an amount of income sufficient to provide for his or her own reasonable living expenses. Somewhere within this spectrum is the myriad of factual circumstances that the trial court must consider in making its order. For example, it may be appropriate to order support for a specific period of time for the purpose of enabling the supported spouse to obtain or complete an education, to refrain from employment in order to remain home to care for young children until they reach an age at which a return to employment would be appropriate, or to become self-supporting within a reasonable time. 225 CA3d at 481.

I. [§201.92] Retention of Jurisdiction

There are different rules for marriages of short to mid-duration than there are for marriages of long duration.

In marriages of short to mid-duration, absent a reservation of jurisdiction, a court cannot reinstate, extend, or modify a spousal support order after the expiration of the underlying order. Fam C §4335; *Marriage of Beck* (1997) 57 CA4th 341, 344, 67 CR2d 79.

However, when a marriage is of long duration, the court retains jurisdiction indefinitely over spousal support, in the absence of the parties' written agreement to the contrary or a court order terminating spousal support. Fam C §4336(a). In such a case, an express reservation of jurisdiction over spousal support is not required. *Marriage of Ostrander*

(1997) 53 CA4th 63, 65-66, 61 CR2d 348. There is a rebuttable presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration. Fam C §4336(b). There is no limitation, however, on the court's discretion to terminate spousal support in a later proceeding on a showing of changed circumstances. Fam C §4336(c); *Marriage of Christie* (1994) 28 CA4th 849, 858, 864, 34 CR2d 135. Family Code §4336 was enacted in response to decisions of the California Supreme Court holding that it is an abuse of discretion for a court to terminate jurisdiction over spousal support in a case involving a lengthy marriage, unless the evidence clearly indicates that the supported spouse will be able to adequately meet his or her financial needs by the termination date. *Marriage of Vomacka* (1984) 36 C3d 459, 467-468, 204 CR 568; *Marriage of Morrison* (1978) 20 C3d 437, 453-454, 143 CR 139.

In other cases, a court has broad discretion in determining whether to divest itself of jurisdiction over spousal support on a certain date. *Marriage of Baker* (1992) 3 CA4th 491, 498, 4 CR2d 553. As a general rule, a court should retain jurisdiction, except in the case of a short marriage, unless it can reasonably infer that the supported spouse will be self-supporting by the termination date; unknown future developments are better left to modification proceedings. 3 CA4th at 498-499; *Marriage of Heistermann* (1991) 234 CA3d 1195, 1201-1202, 286 CR 127 (court should retain jurisdiction in medium-length marriage when supported spouse may be unable to become self-supporting because of age or poor health). An order setting a termination date, but retaining jurisdiction, puts the supported spouse on notice that he or she is expected to become self-supporting; it also shifts the burden to the supported spouse at a modification proceeding to show the changed circumstance of a continued need for support notwithstanding good faith efforts to become self-supporting. 234 CA3d at 1201. See *Marriage of Huntington* (1992) 10 CA4th 1513, 1520-1521, 14 CR2d 1 (termination of support after six months was appropriate in case involving three-year marriage, when supported spouse had marketable skill she could make use of with little retraining); *Marriage of Hebbring* (1989) 207 CA3d 1260, 1266-1267, 255 CR 488 (abuse of discretion to retain jurisdiction in case involving short-term marriage when spouse seeking support is in good health and has employment that provides sufficient income for self-support).

J. Types of Orders

1. [§201.93] Order of Indeterminate Duration

A support order may provide for support until the death of either spouse or the remarriage of the recipient spouse. This type of order is often appropriate when the marriage was of long duration or the supported

spouse does not possess the capacity to become self-sufficient. See Fam C §§4336(a), 4337. This support order may be modified or terminated on a showing of changed circumstances. See Fam C §4336(c); *Marriage of Christie* (1994) 28 CA4th 849, 852, 34 CR2d 135 (settlement agreement provided for termination of support on death of either party, wife's remarriage, or "further order of the Court").

2. [§201.94] Fixed-Term Order

A support order may provide that support will be paid for a fixed period of time. In such a case, the order terminates at the end of the period provided in the order and may not be extended unless the court retains jurisdiction. Fam C §4335. This form of order is most common when the marriage was of short duration but generally is not appropriate if the marriage was of long duration.

3. [§201.95] Step-Down Order

A step-down order automatically decreases the support amount at specified intervals. A nominal \$1 final step-down is often tacked on to the order as a mere formality, so that the court can retain jurisdiction to modify the amount of support payments. *Marriage of Forcum* (1983) 145 CA3d 599, 605, 193 CR 596. These orders are fashioned to encourage self-support and rest on the assumption that the supported spouse will have an increased ability to provide his or her own support at the time of each step-down. *Marriage of Anninger* (1990) 220 CA3d 230, 240, 269 CR 388.

A step-down order cannot be based on mere supposition as to what the supported spouse's future circumstances might be. The evidence in the record must support a reasonable inference that the supported spouse's need for support will be less with each step-down and that he or she can realistically be self-supporting at the time nominal payments are set to begin. *Marriage of Gavron* (1988) 203 CA3d 705, 712-713, 250 CR 148.

A step-down provision may also be based on the supported spouse's earnings, *e.g.*, the order might provide for a reduction of spousal support by \$1 for every \$2 the supported spouse receives in earnings over a specified amount. See *Marriage of Cheriton* (2001) 92 CA4th 269, 309, 111 CR2d 755; *Marriage of Paul* (1985) 173 CA3d 913, 916, 219 CR 318. When the supporting spouse seeks a step-down order that is not limited to amounts the supported spouse receives in earnings, but is instead based on amounts the supported spouse receives regardless of the source (including proceeds from the sale of assets received on dissolution), the court must balance the supported spouse's right to full enjoyment of his or her share of the community property against the

supporting spouse's right not to be burdened with an open-ended support obligation. See *Marriage of Cheriton*, *supra*, 92 CA4th at 309-311.

If a court finds a present change of circumstances that would justify an immediate decrease in spousal support, *e.g.*, a decrease in the obligor spouse's ability to pay, it has the discretion to implement a step-down to ease the impact on the supported spouse. As long as the record clearly indicates that this is what the court is doing, this type of order does not require evidence of decreased need for each future step-down. *Marriage of Rising* (1999) 76 CA4th 472, 477-479, 90 CR2d 380.

4. [§201.96] Contingent Order

A court may order spousal support for a contingent period of time. In such a case, the supporting party's obligation to pay support terminates when the contingency occurs. Fam C §4334. See *Marriage of Iberti* (1997) 55 CA4th 1434, 1438-1441, 64 CR2d 766 (support contingent on recipient spouse attending accredited college or university, successfully completing 10 units each semester or quarter, and "actively pursuing a Bachelors degree"; support terminated when spouse dropped out of school).

5. [§201.97] Richmond Order

A spousal support order may provide that support will terminate on a specified date unless, prior to the fixed termination date, the supported spouse files a motion showing good cause to modify the amount and /or duration of the order. Contingent termination orders of this type are known as *Richmond* orders or "sudden death" termination. When the court can reasonably infer from the evidence that the supported spouse is capable of self-support, such an order is appropriate, even on the dissolution of a lengthy marriage. *Richmond* orders serve the policy goal expressed in Fam C §§4320(l) and 4330(b) that both spouses can develop their own lives, free from obligations to each other. *Marriage of Cheriton* (2001) 92 CA4th 269, 311, 111 CR2d 755; *Marriage of Richmond* (1980) 105 CA3d 352, 356, 164 CR 381. See *Marriage of Drapeau* (2001) 93 CA4th 1086, 1098-1099, 114 CR2d 6 (issuance of *Richmond* order in case involving 21-year marriage).

Richmond orders are appropriate when the court feels the evidence justifies an order terminating jurisdiction at a future date but is concerned about unforeseeable circumstances that might arise before that date. *Marriage of Prietsch & Calhoun* (1987) 190 CA3d 645, 665, 235 CR 587.

The effect of a *Richmond* order is to tell each spouse that the supported spouse has a specified period of time to become self-supporting, after which the obligation of the supporting spouse will cease. A *Richmond* order psychologically prepares the supported spouse for the

time when he or she must be self-supporting. It also places the burden of showing good cause for a change in the order upon the one who is most able to exercise the control necessary to meet the expectations the trial judge had in making the order. 190 CA3d at 665–666.

The appellate court in *Prietsch* takes the position that a *Richmond* order is the most appropriate form of order for spousal support in *all* cases except (1) when spousal support is either not ordered or is ordered for a fixed term of short duration, (2) in the most lengthy marriages when the circumstances justify truly “permanent” spousal support, or (3) when the supported spouse does not possess the capacity to become self-sufficient. 190 CA3d at 666.

The supported spouse must be made aware of the self-support expectations if the court is to terminate or reduce support on that basis at a specified future date; he or she may not be penalized for a failure to meet the court’s unrevealed expectation of self-sufficiency. *Marriage of Gavron* (1988) 203 CA3d 705, 711–712, 250 CR 148. A *Gavron* warning (see §201.90) should accompany the issuance of a *Richmond* support order.

K. [§201.98] Modifying or Terminating Spousal Support

A court may modify or terminate a spousal support order as the court determines to be necessary. Fam C §3651(a).

1. [§201.99] Change of Circumstances Requirement

The court may grant a motion for modification or termination of spousal support order only when there has been a material change of circumstances since the order was initially made. *Marriage of Gavron* (1988) 203 CA3d 705, 710, 250 CR 148.

A material change of circumstances means a reduction or increase in the supporting spouse’s ability to pay and/or an increase or decrease in the supported spouse’s needs. It includes all factors affecting need and ability to pay. *Marriage of McCann* (1996) 41 CA4th 978, 982, 48 CR2d 864. See, e.g., *Marriage of Lynn* (2002) 101 CA4th 120, 126, 123 CR2d 611 (court may consider discharge in bankruptcy of one spouse’s property settlement debt to other spouse as factor in determining whether to modify bankrupt spouse’s support obligation). See also *Marriage of Dietz* (2009) 176 CA4th 387, 97 CR3d 616 (court erred in concluding that now penalty-free accessibility and increased value of retirement accounts awarded to former wife constituted material change in circumstances that justified reduction in husband’s spousal support obligation).

The court must consider the circumstances listed in Fam C §4320 (see §§201.71–201.85) not only when making an initial spousal support order but also when making any subsequent modification order. *Marriage of Terry* (2000) 80 CA4th 921, 928, 95 CR2d 760.

Although the passage of time may be related to a change in circumstances, it is not, by itself, a sufficient basis for modification. *Marriage of Heistermann* (1991) 234 CA3d 1195, 1202, 286 CR 127; *Marriage of Gavron* (1988) 203 CA3d 705, 710, 250 CR 148.

A change of circumstances may be in the form of “unrealized expectations” in the ability of the supported spouse to become self-supporting within a certain period of time despite making reasonable efforts to secure employment. *Marriage of Beust* (1994) 23 CA4th 24, 29, 28 CR2d 201. See *Marriage of Schaffer* (1999) 69 CA4th 801, 811–812, 81 CR2d 797 (court may consider whether supported spouse has made unwise decisions that have had the effect of preventing him or her from becoming self-supporting).

Showing a material change in circumstances necessitates comparing financial information on which the original support order was based with the most recent financial information relevant to a new order, *e.g.*, the parties’ current income and expense declarations. *Marriage of Tydlaska* (2003) 114 CA4th 572, 575–576, 7 CR3d 594 (when husband failed to present “evidentiary yardstick” with which court could determine appropriateness of modification order, his request to modify support was properly denied).

In a proceeding in which a spousal support order exists or in which the court has retained jurisdiction over a spousal support order and there is a companion child support order in effect, the termination of child support under Fam C §3901(a) (see §201.62), with the exceptions specified below, constitutes a change of circumstances that may be the basis for a request by either party for modification of spousal support. Fam C §4326(a). The termination of child support does not constitute a change of circumstances in the following situations under Fam C §4326(d):

- The child and spousal support orders are the result of a marital settlement agreement or judgment that contains a provision regarding what is to occur when the child support order terminates;
- The child and spousal support orders are the result of a marital settlement agreement or judgment that provides that the spousal support order is nonmodifiable or that spousal support is waived, and the court’s jurisdiction over spousal support has been terminated; and
- The court’s jurisdiction over spousal support was otherwise previously terminated.

A motion to modify spousal support based on changed circumstances under Fam C §4326(a) must be filed by either party no later than six months from the date the child support order terminates. Fam C §4326(b). See also *Marriage of Kacik* (2009) 179 CA4th 410, 425–426, 101 CR3d 745 (termination of child support must be reasonably contemporaneous

with the request for modification of spousal support in order to constitute change of circumstance under Fam C §4326).

If a motion to modify spousal support under this provision is filed, either party may request the appointment of a vocational training counselor under Fam C §4331. Fam C §4326(c). This statute remains in effect until January 1, 2014. Fam C §4326(e).

a. [§201.100] Increased Ability To Pay and Original Order Inadequate To Meet Needs

The supporting spouse's increased ability to pay may justify increased support, but only if there is a showing that the amount of support originally ordered was inadequate to meet the supported spouse's reasonable needs at that time. *Marriage of Smith* (1990) 225 CA3d 469, 482-483, 274 CR 911. An enhanced ability to pay alone does not justify an increase in support. *Marriage of Zywiciel* (2000) 83 CA4th 1078, 1081, 100 CR2d 242.

b. [§201.101] Supported Spouse Cohabiting With Person of Opposite Sex

Except as the parties have otherwise agreed in writing, there is a rebuttable presumption of a decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex. Fam C §4323(a)(1). Cohabitation may constitute a material change of circumstances for purposes of modifying a spousal support award because the cohabitant's income may be available to the supported spouse, and sharing a household may result in a decrease in the supported spouse's expenses. *Marriage of Bower* (2002) 96 CA4th 893, 899, 117 CR2d 520.

- **JUDICIAL TIP:** Under the California Domestic Partner Rights and Responsibilities Act of 2003 (see §201.2), it appears that the above rebuttable presumption applies to a supported domestic partner cohabiting with a person of the same sex.

c. [§201.102] Retirement of Supporting Spouse

The supporting spouse's retirement may constitute a material change in circumstances justifying a reduction or termination of spousal support. *Marriage of Reynolds* (1998) 63 CA4th 1373, 1377-1379, 74 CR2d 636. A supporting spouse cannot be compelled to work after the usual retirement age of 65 in order to pay the same level of spousal support as when he or she was employed. 63 CA4th at 1378-1379. Nor, however, may a supporting spouse be compelled to retire after the usual retirement age of 65, in order to increase his or her support obligation. *Marriage of Kochran* (2011) 193 CA4th 420, 429-430, 122 CR3d 61 (supporting

spouse's hypothetical retirement income is not proper basis for increasing his spousal support obligation).

If the supporting spouse elects early retirement, however, the court may impute income to that spouse under the general principle that a supporting spouse must make reasonable efforts to obtain employment that would generate a reasonable income under the circumstances to meet a continuing support obligation. *Marriage of Stephenson* (1995) 39 CA4th 71, 80–81, 46 CR2d 8. But see *Marriage of Meegan* (1992) 11 CA4th 156, 161–163, 13 CR2d 799 (supporting spouse's bona fide retirement at age 50 to enter monastery constituted change of circumstances justifying termination of support, on finding that retirement was not motivated by intention to avoid support obligation).

2. [§201.103] No Consideration of Income of Supporting Spouse's Subsequent Spouse or Partner

A court may not consider the income of a supporting spouse's subsequent spouse or nonmarital partner when determining or modifying spousal support. Fam C §4323(b); *Marriage of Serna* (2000) 85 CA4th 482, 487, 102 CR2d 188. Both direct and indirect consideration of this income are precluded, *e.g.*, a court may not consider the indirect effects of this income on the supporting spouse's ability to pay support and on his or her standard of living. *Marriage of Romero* (2002) 99 CA4th 1436, 1438, 1442–1446, 122 CR2d 220 (legislative history of Fam C §4323(b) indicates that prohibition against consideration of new spouse's or nonmarital partner's income is "without exception"). On considering this income in connection with child support, see §201.16.

Family Code §4323(b) does not address how a court should consider the *expenses* resulting from a supporting spouse's remarriage. It would be inequitable to permit the supporting spouse to claim the entire amount of these expenses on his or her income and expense declaration when the court is prohibited from considering any portion of the new spouse's income. Therefore, some apportionment of these expenses between the supported spouse and the new spouse is required. 99 CA4th at 1445–1446.

3. [§201.104] Retroactive Modification

The court may make an order modifying or terminating a spousal support order retroactive to the date on which the notice of motion or order to show cause was filed, or to any subsequent date. Fam C §3653(a). If the order is made because of either party's unemployment, the court must make the order retroactive to the date on which the notice of motion or order to show cause was served or the date of unemployment, whichever is later, unless the court finds good cause not to make the order retroactive and states its reasons on the record. Fam C §3653(b). "Good

cause” for denying retroactivity requires the court to make a good faith finding that nonretroactivity is justified by real circumstances, substantial reasons, and objective conditions. *Marriage of Leonard* (2004) 119 CA4th 546, 559, 14 CR3d 482.

If the court enters a retroactive order decreasing or terminating support, it may order the support obligee to repay any amounts the support obligor paid under the prior order that exceed the amounts due under the retroactive order. Fam C §3653(c). The court may require repayment over any period of time and in any manner it deems just and reasonable, including by an offset against future support payments or a wage assignment. Fam C §3653(c). In determining whether to order repayment, and in establishing the terms of repayment, the court must consider all of the following factors (Fam C §3653(c)):

- The amount to be repaid.
- The duration of the support order before modification or termination.
- The financial impact on the support obligee of the method of repayment.
- Any other facts or circumstances the court deems relevant. See, e.g., *Marriage of Petropoulos* (2001) 91 CA4th 161, 174–175, 110 CR2d 111 (court had statutory authority to order reimbursement of support overpayments for entire period, from filing of husband’s modification motion until its determination nearly three years later).

4. [§201.105] Parties Agreement Not To Modify or Terminate Order

A court may not modify or terminate spousal support when the parties have executed a written agreement or entered an oral agreement in open court that specifically precludes modification or termination of the support award. Fam C §§3591(c), 3651(d).

L. [§201.106] Termination of Spousal Support

The obligation to pay spousal support terminates in a variety of ways:

- When a spousal support order has a specific date on which support is due to terminate, the support will terminate on that date unless the order retains jurisdiction to extend it beyond that date. Fam C §4335.
- If the order is based on a contingent period of time, the order will terminate when the contingency occurs. The order may require the supported party to notify the supporting party when a contingency occurs. Fam C §4334(a).

- Support will terminate when either party dies or the supported party remarries, unless the parties agree in writing that the support will continue. Fam C §4337.
- The court may issue a modification order terminating support on the basis of changed circumstances. See §§201.99–201.102.

M. [§201.107] Setting Aside Support Order

The court may relieve a party from all or part of a spousal support order on any terms that may be just. For discussion, see §201.64.

N. [§201.108] Effect of Premarital Agreement

A provision in a premarital agreement under which each party agrees to waive spousal support on dissolution of their marriage does not violate public policy and is not per se unenforceable, when the waiver is executed by intelligent, well-educated persons, each of whom is advised by counsel at the time of executing the waiver. *Marriage of Pendleton & Fireman* (2000) 24 C4th 39, 53–54, 99 CR2d 278.

A provision in a premarital agreement regarding spousal support, including a waiver of support, is not enforceable against a party who was not represented by independent counsel when the agreement was signed *or* if the provision is unconscionable at the time of enforcement. An otherwise unenforceable provision does not become enforceable merely because the party against whom enforcement is sought was represented by independent counsel. See Fam C §1612(c).

Family Code §1612(c) was enacted in 2002 and is not retroactive. *Marriage of Howell* (2011) 195 CA4th 1062, 1077, 126 CR3d 539 (statute precluding enforcement of premarital spousal support waivers without independent counsel is not retroactive).

Appendix A: Sample Parent/Child Time-Sharing Percentages

Time-Sharing Arrangement	Days Per Year	Percent (rounded)
1 weekend/month	24	7
1 extended weekend /month	30	8
Alternate weekends	52	14
Alternate extended weekends	65	18
1 weekend/month and 1 evening/week	37	10
1 extended weekend/month and 1 evening/week	43	12
Alternate weekends and 1 evening/week	65	18
Alternate extended weekends and 1 evening/week	78	21
Alternate weekends and 1 overnight/week	78	21
Alternate weekends and 1 overnight/week and 1/2 holidays	84	23
Alternate extended weekends and 1 overnight/week	91	25
Alternate weekends and 2 weeks summer	66	18
Alternate weekends and 1/2 holidays and 2 weeks summer	72	20
Alternate weekends and 1/2 holidays and 4 weeks summer (with alternating weekends continuing in summer, and makeup if weekends lost due to the 4 weeks)	86	24
Alternate weekends and 1/2 holidays and 4 weeks summer (with no alternating weekends in summer)	73	20
Alternate weekends and 1/2 holidays and 1/2 summer (with alternating weekends continuing in summer, and makeup if weekends lost due to the 6 weeks)	93	25
Alternate weekends and 1/2 holidays and 1/2 summer (with no alternating weekends in summer)	80	22
Alternate weekends and 1/2 holidays, 1 evening/week, and 4 weeks summer (with alternating weekends continuing in summer, and makeup if weekends lost due to the 4 weeks)	99	27

Time-Sharing Arrangement	Days Per Year	Percent (rounded)
Alternate weekends and 1 evening/week when school is in session, and 1/2 school vacations	112	31
Two days/week	104	28
Three days/week	156	43

Definitions

Weekend	6 p.m. Friday–6 p.m. Sunday (2 days)
Extended Weekend	School closing Friday–school opening Monday (60 hours; 3 nights, 2 days)
Evening	After school–after dinner (6 hours; 1 evening/week = 13 days/yr)
Overnight	School close midweek–school opening next day (12 hours; 1 overnight/week = 26 days/yr)
Holidays	New Year’s Day, Martin Luther King Day, President’s Day, Easter, Memorial Day, Mother’s Day or Father’s Day, July 4, Labor Day, Veterans’ Day, Thanksgiving (2 days), Christmas (1/2 holidays = 6 days/yr)
Summer	10 weeks (70 days)
School Vacations	Summer, Winter Holiday Recess (14 days), Presidents’ Day Recess (7 days), Spring Recess (7 days); 14 weeks/yr (1/2 vacations = 49 days/yr, not counting subtraction of NCP’s ordinary alternating weekend and midweek visits and CP’s cross visits)

Appendix B: Spousal Support Worksheet

Spousal Support Worksheet – Family Code §4320

Marital Standard of Living:	Home: Vehicles: Vacations:	Assets/Savings: Annual Income: Recreational Activities:	
In ordering spousal support under this part, the court shall consider all of the following circumstances:	Husband:	Wife:	
(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:	§4320(a):	§4320(a):	
(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.	§4320(a)(1):	§4320(a)(1):	
(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.	§4320(a)(2):	§4320(a)(2):	
(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.	§4320(b):	§4320(b):	
(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.	§4320(c):	§4320(c):	
(d) The needs of each party based on the standard of living established during the marriage.	§4320(d):	§4320(d):	
(e) The obligations and assets, including the separate property, of each party.	§4320(e):	§4320(e):	
(f) The duration of the marriage.	§4320(f):	§4320(f):	
(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.	§4320(g):	§4320(g):	
(h) The age and health of the parties.	§4320(h):	§4320(h):	
(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.	§4320(i):	§4320(i):	
(j) The immediate and specific tax consequences to each party.	§4320(j):	§4320(j):	
(k) The balance of the hardships to each party.	§4320(k):	§4320(k):	
(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.	§4320(l):	§4320(l):	
(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.	§4320(m):	§4320(m):	
(n) Any other factors the court determines are just and equitable.	§4320(n):	§4320(n):	

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