

# SOMEWHERE UNDER THE GUIDELINE

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## Okay – So You Have Convinced the Court (or Your Opponent) To Deviate from the Child Support Guideline Formula Under the High Earner Exception – Now What?

### A. Introduction

So you represent “Dad” who has some serious income. Dad’s net spendable income is \$400,000 per month. “Mom” has substantial investment income after the division of community property, which provides her with net spendable income of \$100,000 per month. There has been a complete waiver of spousal support. There are three children with Dad having 35% custodial time. These factors produce a guideline child support amount of \$73,872.

You have convinced either Mom’s lawyer or the court that \$73,872 exceeds the amount necessary to meet the reasonable needs of the children while in Mom’s care. Everyone agrees there is no disparity in the children’s lifestyle in each parent’s household. The court (or Mom’s lawyer) has accepted that the high earner exception of Family Code section 4057(b)(3) applies and the court will be ordering child support that is less than the guideline amount. This leaves you, as Dad’s lawyer, with three significant questions. They are:

1. How much child support should Dad pay to Mom under the circumstances?
2. How can you shield Dad from the general rule that no change in circumstances is required to obtain a modification of a below guideline child support order?
3. What do you want to include in the mandatory Judicial Council form Stipulation to Establish Child Support Order?

The first question is easier to answer when Mom has very minimal income, as the high earner will likely pay the entire amount necessary to meet the reasonable needs of the children while in Mom’s care.

This article focuses on those cases where Mom has significant income of her own and those cases where there is a substantial spousal support order that could or should be taken into account in allocating the children’s total needs in a high earner case. Hopefully, the approach outlined below will be helpful in negotiating a resolution under these circumstances, or if needed, a practical and perhaps persuasive argument to be made to the court on how the amount of below guideline child support should be decided.

### B. Background Regarding the High Earner Exception to the Guideline Formula

In dealing with these issues, it is helpful to focus on some of the provisions of the Family Code addressing guideline child support.



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Section 4053<sup>1</sup> instructs the court on what principles should be followed in setting child support. It provides in pertinent part:

#### → California Family Code section 4053

In implementing the statewide uniform guideline, the courts shall adhere to the following principles:

- (a) 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.
- (b) **Both parents are mutually responsible** for the support of their children.

[¶]

- (d) **Each parent should pay** for the support of the children **according to his or her ability**.

[¶]

- (j) The guideline seeks to **encourage fair and efficient settlements** of conflicts between parents and seeks to **minimize the need for litigation**. (FC, § 4053, emphasis added.)

Keep in mind the statutory requirements for a below guideline child support order under section 4056(a).

#### → California Family Code section 4056(a)

- (a) **To comply with federal law, the court shall state** ... the following information whenever the court is ordering an amount for support that differs from the statewide uniform guideline formula amount...
  - (1) The amount of support **that would have been ordered** under the guideline formula.

- (2) The **reasons the amount of support ordered differs** from the guideline formula amount.
- (3) The reasons the amount of support **ordered is consistent with the best interests** of the children.

(FC, § 4056(a), emphasis added.)

When dealing with the high earner exception particular attention needs to be paid to the structure of section 4057. It provides in pertinent part:

→ **California Family Code section 4057**

- (a) The amount of child support established by the formula ... **is presumed to be the correct amount** of child support to be ordered.
- (b) The presumption ... is a **rebuttable** presumption affecting the burden of proof and may be rebutted by admissible evidence showing that the **application of the formula would be unjust or inappropriate ... consistent with the principles set forth in Section 4053 because one or more of the following factors** is found to be applicable by a preponderance of the evidence....

- (1) The parties have stipulated to a different amount of child support under subdivision (a) of section 4065.

[9]

- (3) The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children.

(FC, § 4057, emphasis added.)

With respect to modifiability and whether a change of circumstances is required, section 4065 provides as follows:

→ **California Family Code section 4065**

- (a) **the parties may stipulate to a child support amount subject to the approval of the court.** However, **the court shall not approve a stipulated agreement** for child support **below the guideline formula amount unless** the parties declare **all** of the following:
  - (1) They are fully informed of their rights concerning child support.
  - (2) The order is being agreed to without coercion or duress.
  - (3) The agreement is in the best interests of the children involved.
  - (4) The needs of the children will be adequately met....
  - (5) The right to support has not been assigned to the county....

\*\*\*

- (d) **If the parties to a stipulated agreement stipulate to a child support order below the amount established by the statewide uniform guideline, no change of circumstances need be demonstrated to obtain a modification of the child**

**support order** to the applicable guideline level or above.

(FC, § 4065, emphasis added.)

**C. An Approach to Arrive at an Appropriate Amount of Below Guideline Child Support**

**1. The Theory**

If we are going below guideline, what would be the below guideline amount? To answer this we need to take a look at the stated principles of section 4053, subdivisions (a), (b), and (d), namely:

- (a) [a] parent's first and principal obligation is to support his or her children **according to the parent's circumstances** and station in life [and]
- (b) **[b]oth parents are mutually responsible** for the support of their children [and]
- (d) **[e]ach parent should pay** for the support of the children **according to his or her ability.**

(FC, § 4053, emphasis added.)

So how can we find an approach to determine an appropriate below guideline child support order that follows these principles? Well, maybe the answer is right under our noses!

Here, the question is how to apportion the expenses of the children *in both houses* so that *each parent bears responsibility* for the needs of the children *according to his or her ability*. Remember, here none of the children's expenses are going to be covered by a guideline order.

Hasn't the Legislature already devised a formula for paying expenses of the children that are not covered by a guideline order? The answer is "Yes." Is it a formula that takes into account the relative ability to pay of each parent? The answer is again "Yes."

The formula is found in section 4061(b) dealing with "add-on expenses." Proposing to Mom's lawyer or the court that child support should be determined using a formula that has been adopted by the Legislature for "add-on expenses" provides something of a "safe harbor" for the court, and for that matter, Mom's lawyer.

Remember, guideline child support only deals with how much one parent is going to pay to the other parent to assist with the expenses of the children in the recipient parent's house. The task here is to find a way to allocate the total reasonable needs of the children between parents that each have significant, albeit unequal, incomes so that each parent is paying for the support of the children according to his or her ability, recognizing that both parents are mutually responsible for the support of their children.

The suggested approach is to:

- 1. Determine the total reasonable needs of the children in both households,
- 2. Compare the relative net spendable incomes of the parties, and
- 3. Calculate a child support order that proportionally divides the children's needs in proportion to the net income of the parents.

Section 4061(b) does exactly that for children's "add-on expenses" by allocating those expenses based on the relative ability of each parent to pay those expenses.

Section 4062 identifies certain costs to be ordered "as additional child support." By definition, these are expenses the Legislature treats as not being covered by the guideline child support. They include certain child care costs, uninsured health care costs, and other special needs of the children. Section 4061(a) provides a default method for allocating those "add-on expenses" between the parties. The default is to have each party pay one-half of such expenses.

However, where ordering each party to pay one-half of the add-on expenses might not be appropriate, the Legislature provided an alternate formula in subdivision (b), which is *mandatory* if the "add-on expenses" are not to be paid one-half by each parent.

Section 4061 provides in pertinent part as follows:

The amounts in section 4062, if ordered to be paid, shall be considered additional support for the children and **shall be computed in accordance with the following:**

- (a) If there needs to be an apportionment ... the **expenses shall be divided one-half to each parent, unless either parent requests a different apportionment** pursuant to subdivision (b) and presents documentation which demonstrates that a different apportionment would be more appropriate.
- (b) **If requested by either parent, and the court determines it is appropriate to apportion expenses under 4062 other than one-half to each parent, the apportionment shall be as follows:**
  - (1) The basic child support obligation shall first be computed....
  - (2) **Any additional child support ... shall ... be paid by the parents in proportion to their net disposable incomes as adjusted** pursuant to subdivisions (c) and (d).
- (c) **In cases where spousal support is or has been ordered** to be paid by one parent to the other ... **the gross income of the parent paying support shall be decreased by the amount of spousal support paid and the gross income of the parent receiving the spousal support shall be increased by the amount of spousal support....**
- (d) [T]he net disposable **income of the parent paying child support shall be reduced by the amount of any basic child support order....** However, the net disposable **income of the parent receiving child support shall not be increased by any amount of child support received.**

(FC, § 4061, emphasis added.)

Since there is no spousal support in this hypo, the spousal support adjustment in section 4061(c) is not applicable here. And because there is not a base child support order as yet,

there will not be a child support adjustment under section 4061(d) either.

The next step is to determine the "reasonable needs" of the children in Mom's house and the "reasonable needs" of the children in Dad's house. Presumably, if the children are spending different amounts of time in Dad's house and Mom's house, the expenses necessary for the children's care in each house will, to some extent, reflect the difference in custodial time with each parent.

So we need more facts. Assume the following are the children's "reasonable needs":

Children's needs at Mom's house	<b>\$40,000</b> per month
Children's needs at Dad's house	<b>\$20,000</b> per month
<b>Total "reasonable needs"</b>	<b>\$60,000</b> per month

## 2. The Mathematics of this Theory

The mathematics of the section 4061(b) formula would be to compare the net spendable income of each parent and apply those percentages to the total costs necessary to cover the reasonable needs of the children to calculate the amount each parent is to contribute to the total needs of the children.

Once that is done, the amount of Mom's contribution is applied towards the children's needs at Mom's house. The shortfall between Mom's contribution and the needs of the children at Mom's house will be the amount of below guideline child support that should be paid by Dad as part of his contribution to the total needs of the children.

## 3. Applying the Mathematics of this Theory to the Hypothetical

### a. The comparative net disposable income of the parties is:

Dad's net spendable income	\$400,000
Mom's net spendable income	<u>\$100,000</u>
<b>Total net spendable income</b>	<b>\$500,000</b>

### b. The resulting ratios are:

Dad's proportionate share of the total net spendable income	<b>80%</b>
Mom's proportionate share of the total net spendable income	<b>20%</b>

### c. Applying these percentages to the total needs of the children:

#### Step 1: Expenses to be covered by Dad

Children's total reasonable needs	\$60,000 per month
Dad's proportionate share of the net spendable income	<u>x 80%</u>
<b>Total expenses allocated to Dad</b>	<b>\$48,000 per month</b>

#### Step 2: Expenses to be covered by Mom

Children's total reasonable needs	\$60,000 per month
Mom's proportionate share of the net spendable income	<u>x 20%</u>
<b>Total expenses allocated to Mom</b>	<b>\$12,000 per month</b>

**Step 3: Allocate the total expenses between parties and households**

	Children's Expenses at Mom's House = \$40K	Children's Expenses at Dad's House = \$20K	Children's Total Expenses = \$60K
Mom Pays	\$12,000	None	\$12,000 (20%) Paid by Mom
Dad Pays	\$28,000	\$20,000	\$48,000 (80%) Paid by Dad
Total Available	\$40,000 At Mom's House	\$20,000 At Dad's House	\$60,000 (100%) Total Needs are Covered

Based upon the allocation formula in section 4061(b), \$48,000 of the total needs would be paid by Dad and \$12,000 would be paid by Mom. Dad would pay his \$48,000 share of the total expenses by paying \$20,000 for expenses at his own house **and paying Mom \$28,000 in child support** to cover that amount of the expenses at Mom's house. Mom would pay her \$12,000 share of the total expenses by paying the remaining \$12,000 of expenses required at her house. This approach is consistent with the principles in section 4053 because each parent is responsible for a share of the children's expenses based on his or her ability to do so.

**4. Applying the Mathematics of this Theory to a Fact Pattern with a Spousal Support Adjustment – Hypo 2**

The hypothetical facts for this scenario are:

Dad's net spendable income	\$590,000 per month
Mom's net spendable income	\$10,000 per month
Net after tax spousal support	\$80,000 per month
Child expenses in Mom's house	\$40,000 per month
Child expenses in Dad's house	<u>\$20,000 per month</u>
Total child expenses	\$60,000 per month

**a. Family Code Section 4061(c) – Adjusting Net Incomes for Spousal Support**

**Step 1: Deduct spousal support from Dad's net spendable income**

Dad's net spendable income	\$590,000
Less net spousal support	- \$80,000
<b>Dad's adjusted net spendable income</b>	<b>\$510,000</b>

**Step 2: Add spousal support to Mom's net spendable income**

Mom's net spendable income	\$10,000
Plus net spendable spousal support	<u>\$80,000</u>
<b>Mom's adjusted net spendable income</b>	<b>\$90,000</b>

**Step 3: Determine each parent's percentage of the total adjusted net income:**

Dad's adjusted net spendable income	\$510,000
Mom's adjusted net spendable income	<u>\$90,000</u>
<b>Total net spendable income</b>	<b>\$600,000</b>
Dad's proportionate share of the adjusted net disposable income (\$510,000/\$600,000 =)	<b>85%</b>
Mom's proportionate share of the adjusted net disposable income (\$90,000/\$600,000 =)	<b>15%</b>

**Step 4: Determine each parent's proportionate responsibility for the total expenses for the children**

<b>Dad:</b>	
Total children's expenses	\$60,000
Dad's percentage share of adjusted net income	<u>x 85%</u>
<b>Dad's proportionate share of the children's total needs</b>	<b>\$51,000</b>
<b>Mom:</b>	
Total children's expenses	\$60,000
Mom's share of the Children's total needs	<u>x 15%</u>
<b>Mom's proportionate share of the children's total needs</b>	<b>\$9,000</b>

**Step 5: Allocating the children's total "Reasonable Needs" between the parties and the two households.**

	Children's Expenses at Mom's House = \$40K	Children's Expenses at Dad's House = \$20K	Children's Total Expenses = \$60K
Mom Pays	\$9,000	None	\$9,000 (15%) Paid by Mom
Dad Pays	\$31,000	\$20,000	\$51,000 (85%) Paid by Dad
Total Available	\$40,000 At Mom's House	\$20,000 At Dad's House	\$60,000 (100%) Total Needs are Covered

**D. Preventing the "No Need to Show a Change in Circumstance" Modification in a High Earner Exception Case**

In the first hypo you have succeeded in convincing Mom's lawyer that an appropriate resolution of the child support issue is for Dad to pay a below guideline child support order of \$28,000 per month. Both parties now agree that amount will adequately meet the children's needs and is consistent with the children's best interest. You are now left with the issue of:

“How can you shield Dad from the general rule that no change in circumstances is required to modify a below guideline child support order?”

So let's look at where this rule comes from and consider whether it actually applies to below guideline child support orders that result from the application of the high earner exception?

The “no change in circumstances rule” is found in section 4065(d). That subdivision states:

“(d) If the parties to a stipulated agreement stipulate to a child support order below the amount established by the statewide uniform guideline, no change of circumstances need be demonstrated to obtain a modification of the child support to the applicable guideline level or above.”

Subdivision (a) of the same section 4065 describes a stipulation of the parties to below guideline support without anyone having to establish any other statutory basis for the below guideline amount. Section 4065(a) allows for a “We just felt like agreeing to below guideline child support order.”

Section 4065(a) states:

“(a) Unless prohibited by applicable federal law, **the parties may stipulate to a child support amount subject to the approval of the court.** However, the court shall not approve a stipulated agreement for child support below the guideline formula amount unless the parties declare all of the following:

- (1) They are fully informed of their rights concerning child support.
- (2) The order is being agreed to without coercion or duress.
- (3) The agreement is in the best interests of the children involved.
- (4) The needs of the children will be adequately met by the stipulated amount.
- (5) [The right to support has not been assigned to the county.]”

The placement of the “no change in circumstances” rule only in section 4065 might signal it was only intended to apply to agreements where parties are simply stipulating to a below guideline “amount” under section 4065(a), as opposed to agreements to a below guideline amount based on the “high earner exception” under section 4057(b)(3).

Section 4057 lends support to the argument that the “no change in circumstances rule” of section 4065(d) was not intended to apply to orders—even stipulated orders—to below guideline amounts in high earner exception cases. Section 4057 begins by stating in subdivision (a) that the guideline amount “is presumed to be the correct amount of child support to be ordered.” It goes on in subdivision (b) to state that the presumption is a rebuttable presumption affecting the burden of proof that may be rebutted by admissible evidence:

“showing that the application of the formula would be unjust or inappropriate in a particular case **consistent with the principles set forth in Section 4053, because one or more of the following factors is**

**found to be applicable by a preponderance of the evidence,** and the court states in writing or on the record the information required in subdivision (a) of Section 4056:

- (1) **The parties have stipulated to a different amount of child support under subdivision (a) of Section 4065.**
- (2) **[Not applicable to this issue]**
- (3) **The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children.**
- (4) **[Not applicable to this issue.]**
- (5) **[Not applicable to this issue.]**

As can be seen from the above, section 4057 allows the guideline formula to be rebutted in two separate and distinct ways. The first is just “because (1) the parties have stipulated to a different amount **under subdivision (a) of 4065**” and the second is found in a separate subsection (3) because “The parent being ordered to pay child support has extraordinarily high income...”

In subdivision 4057(b)(1) there is a specific reference to section 4065(a)—the “no change in circumstances rule.” By contrast, section 4057(b)(3) allows for a deviation from the guideline under the high earner exception with absolutely no reference to section 4065—the section containing the no change in circumstances rule.

Under section 4057(b)(3), once the presumption that the guideline is the correct amount is rebutted by evidence showing that the application of the formula would be unjust or inappropriate because the parent being ordered to pay child support has extraordinarily high income, *the court need only state* in writing or on the record the information required in subdivision (a) of section 4056, which states:

- (1) The amount of support that would have been ordered under the guideline formula;
- (2) The reasons the amount of support ordered differs from the guideline formula amount; and
- (3) The reasons the amount of support is consistent with the best interests of the children.

To conclude that a stipulation to a below guideline child support order based on the high earner exception would be subject to the “no change in circumstances rule” would prevent the parties from being able to resolve the issue of child support in a high earner case by settlement because the recipient could always walk into court the very next day and ask for a modification to a guideline order. That would be contrary to one of the section 4053 principles namely:

(j) The guideline seeks to **encourage fair and efficient settlements** of conflicts between parents and seeks to **minimize the need for litigation.**

If the “no change in circumstances rule” applies to a stipulation for a below guideline amount in a high earner case, then the only way the parties could avoid “the no change in circumstances rule” would be to never settle and always seek a judicial determination as to the appropriate below guideline

amount. Imagine the “contested hearing” where both sides are trying to get the court to make the same child support order—without “stipulating” or “agreeing” to the order!

It seems nonsensical that if the court finds in a “contested” proceeding that the high earner exception applies and that the amount of \$28,000 meets the children’s needs and is consistent with their best interests, no modification could be obtained unless there has been a material change in circumstances. But, if the parties stipulate that those same facts exist and wish to settle the child support issue by agreeing to the exact same order, no binding resolution will result because the “no change in circumstances rule” would apply.

While there is not yet a clear answer to this issue, the foregoing provides an argument that may be persuasive.

### **E. What to Include in the Stipulation to Establish Child Support**

If representing Dad, as high earner, care should be taken in preparing the Stipulation to Establish Child Support and Order. There are specific “findings” that the court must make when deviating from the guideline. They are set forth in section 4065(a). They include:

1. The amount of support that would have been ordered under the guideline formula;
2. The reasons the amount of support ordered differs from the guideline formula amount; and
3. The reasons the amount of spousal support ordered is consistent with the best interests of the children.

The third finding is not what many people think. It does not say that the amount of support “is in the children’s best interest.” It says “the amount of support ordered is consistent with the best interests of the children.” This distinction should dispel the argument sometimes made by support recipients of: “How can providing the children with less child support ever be in the children’s best interest?”

It is worth remembering that the Judicial Council form FL-350 “Stipulation to Establish or Modify Child Support Order” was adopted by the Judicial Council for mandatory use. It provides a helpful checklist of those findings the court must make when ordering a below guideline child support amount.

In completing the Judicial Council form the following comments may be of assistance:

**Item 1. Net Disposable Income** – Our hypo provides the net disposable income amounts. They are reflected at the top of the center column of a DissoMaster printout. However, if these amounts are disputed it would be perfectly acceptable to note they are disputed and explain the dispute on an Attachment 1.

**Item 2. Percentage of Time with Each Parent** – Normally this won’t be a contested issue, but if disputed, again, each party’s position can be set forth on an Attachment 2.

**Item 4. The Amount of Child Support Calculated Under the Guideline** – In our hypo, the amount is determined as \$78,872. However, if the parties have a dispute

over net disposable income there is no reason that item 4 could not indicate that the amount of guideline support is disputed and the parties’ respective positions are set forth and explained on an Attachment 4.

**Item 6(a). Why the Guideline Amount Should be Rebutted** – Item 6(a) provides a space for the agreed amount of child support. In our hypothetical it would be \$28,000 per month. The form goes on to state “the agreement is in the best interests of the children, the needs of the children will be adequately met by the agreed amount; and the application of the guideline would be unjust or inappropriate in this case.” This parrots the provisions of section 4057(b)(3).

**Item 6(b). “Other rebutting factors (specify)”** – Here, an Attachment 6(b) should be included to state something like “The parent paying support has extraordinarily high income, and the amount determined under the guideline would exceed the needs of the child.” (Section 4057(b)(3)).

**Item 7. The Actual Support Order** - Since the amount of support for each child has to be set forth, it is best to allocate the support from oldest to youngest the same way it would be allocated if it was a guideline support order. This can be done by taking the DissoMaster used to calculate the guideline amount and adjusting the amount of Dad’s income until the total guideline support equals the agreed upon below guideline amount (here \$28,000 per month).

The program will then allocate the \$28,000 proportionally between the children according to age. It is probably best to set forth that allocation in an Attachment 7(a) and then explain in a note how the allocation of child support between the children was determined by saying something like “The allocation of the agreed upon child support of \$28,000 is done in the same proportions as the allocation would be in a guideline child support payment of \$28,000.”

**Item 7(b) & 8(c). Add On Expenses and Uncovered Medical Expenses** – The percentage allocation should be determined with section 4061 by using the parties’ net disposable incomes and adjusting the incomes for any spousal support and then *adjusting it again for the agreed upon amount of child support*.

**Item 13. Other** - Here, if you have reached a pre-judgment agreement for below guideline child support based on a high earner exception, it is useful to include “this is the trial determination of child support and is not a temporary order.” This way you are not faced with having “hashed this out” at the pendente lite stage where the parties have already exchanged all information reasonably necessary for both parties to be satisfied they are using the correct income and expense figures and then having to deal with re-litigating every single issue at the time of trial.

**The Notice Provision** – The Judicial Council form contains the following notice above the signature provision:

“Notice: If the amount agreed to is less than the guideline amount, no change of circumstances need be shown to obtain a change in the support order to a higher amount. If the order is above the guideline, a change of circumstances will be required to modify

this order. This form must be signed by the court to be effective.”

In order to deal with the no change in circumstances modification rule in section 4065(d) the following should be added to this notice: “- **subject to Attachment 18.**” Attachment 18 should then state something like the following:

“Attachment 18 – Change of Circumstances are Required to Modify This Order.

Notwithstanding anything in this stipulation and order to the contrary, the parties agree that in order to modify this less than guideline amount of child support the party seeking a modification of the amount of child support must establish (1) that there has been a material change in circumstances wherein the financial needs of the children have materially changed from those in existence as of (date) and/or (2) there has been a material reduction in Mother’s disposable income that materially impacts her ability to contribute to the children’s economic needs. The parties expressly agree that because this order for child support adequately meets the needs of the children, an increase in the net disposable income of Father shall not constitute a change in circumstances and shall not be a basis for an increase in the amount of child support provided for in this stipulation. Nothing in this stipulation precludes Mother from seeking an increase in this below guideline child support order based on a decrease in her net disposable income or precludes Father from seeking a decrease in this below guideline child support order in the event that his net disposable income decreases to a level where the \$28,000 in basic child support would be above the amount that would then be calculated under the guideline formula. The parties agree that the following facts are true:

1. Father has an extraordinarily high income and the amount determined under the guideline formula would exceed the needs of the children.
2. Because the amount determined under the guideline amount exceeds the reasonable needs of the children the application of the guideline formula would be unjust and inappropriate in this case.
3. The needs of the children will be adequately met by the stipulated amount of child support.
4. The agreement to base child support in the amount of \$28,000 is consistent with the best interests of the children.
5. If the matter were submitted to the court for a determination, these facts would be found by the court to exist, having been established by a preponderance of the evidence.
6. The only circumstances under which the agreed upon basic child support would not meet the needs of the children would be if there was a material increase in the amount required to meet the needs of the children or a material decrease in the recipient’s net disposable income.”

Each practitioner should consider whether it would be appropriate to attach, as part of the factors upon which the parties’ stipulation is based, a schedule of each party’s expenses that include the allocation of those expenses to reflect the needs of the children and whether to include an explanation that the parties arrived at the agreed upon amount of base child support by adopting the formula utilized for add-on expenses in section 4061(b) and include an example of the mathematics applied to arrive at the agreed upon amount of support.

## F. How Has the Recent *Macilwaine* Decision Impacted How to Handle These Issues?

### 1. How to determine the needs of the children.

*Macilwaine* criticizes the trial court in apparently just deducting Mom’s needs from the total household expenses and assuming the balance represents the reasonable needs of the children. The Court of Appeal held that the children’s expenses need to be determined “independently.” (*In re Marriage of Macilwaine* (2018) 26 Cal.App.5th 514.)

Perhaps, where Dad is capable of testifying about the percentage costs allocated to children’s needs during the parties’ marriage (or when the parents were living together) and can apply those percentages to the detailed categories of expenses in Mom’s household based on his experience with those expenses, that may meet the *Macilwaine* “independent” determination of the children’s expenses.

If not, the more cautious approach would be to have the friendly forensic accountant put together the costs list for each of the children’s needs, including clothing, food, educational costs, extracurricular activities, and the like. Hopefully the *Macilwaine* decision won’t become the “CPA’s full employment act.”

### 2. The “consistent with the best interests of the children” requirement of section 4056.

*Macilwaine* provides definitive guidance on how the requirement that the below guideline child support in a high earner case is to be determined to be “consistent with the best interests of children.”

In *Macilwaine*, Patricia claimed the court erred by failing to explain why the lower amount (or capping income for child support) was “in the best interests of the children.” The Court of Appeal stated that Patricia was interpreting this phrase to require the court to find guideline support would harm the children. The Court of Appeal noted that such an interpretation was not supported by the authority Patricia cited or the plain language of the applicable code sections. The court noted: “Section 4056 only requires a finding that “the amount of support ordered is **consistent** with the best interests of the children.” (*In re Marriage of Macilwaine, supra*, 26 Cal.App.5th 514, emphasis added) (citing FC, § 4056(a)(3)).

The court went on to note that section 4057 requires the court find that guideline support “would be unjust or inappropriate in a particular case, consistent with the principles set forth in Section 4053, *because* one or more of the following factors is found to be applicable by a preponderance of the evidence.”

The court stated:

“The word ‘because’ suggests that **when a lower level of support has been shown to meet the children’s needs it is consistent with their best interests.** Thus *on remand, John need only show and the court need only explain why guideline support exceeds the needs of the children – not that guideline support would be detrimental to their interest.*”

(*In re Marriage of Macilwaine, supra*, 26 Cal.App.5th 514, emphasis added.)

It appears the *Macilwaine* has stated the rule as follows: “So long as the amount of child support that is being ordered meets the needs of the children it is consistent with their best interests.”

## G. Conclusion

The amount of child support determined under the statewide guideline is presumptively correct in all cases. It is a rebuttable presumption affecting the burden of proof. Putting together the proof necessary to establish the elements under the high earner exception is challenging. But once you get there the question becomes, “Now what?”

How do the parties—or how does the court—determine the appropriate amount of below guideline support that should be ordered. If the issue is to be resolved by settlement, the next challenge is how to prepare a stipulated child support order that will be approved by the court and will not be subject to the “no change in circumstances rule.” Hopefully the approach discussed above will be of assistance in these cases.

1 All references are to the Family Code unless otherwise indicated.

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