

# CHILD AND SPOUSAL SUPPORT Bench Handbook

[2019]



JUDICIAL COUNCIL  
OF CALIFORNIA

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OPERATIONS AND PROGRAMS DIVISION  
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# CONTENTS

Introduction.....	iii
<b>1</b> Child and Spousal Support .....	1
<b>2</b> Child Support Proceedings .....	87
<b>3</b> UIFSA—Interstate and Foreign Support Orders, and Intercounty (Intrastate) Registrations .....	129
<b>4</b> Support Enforcement .....	155
<b>5</b> AB 1058 Proceedings .....	241
Scripts A–J .....	S-A-1
<b>Script A: Establishing Marital Presumption/Registered Domestic Partner Under     Family Code Section 7540</b>	
<b>Script B: Establishing Biological Parentage</b>	
<b>Script C: Parentage Under Family Code Section 7611(a)</b>	
<b>Script D: Parentage Under Family Code Section 7611(d)</b>	
<b>Script E: Parentage Findings</b>	
<b>Script F: Departure From Guideline Formula</b>	
<b>Script G: Advisement of Rights</b>	
<b>Script H: Oral Advisement—Status as Judge Pro Tem</b>	
<b>Script I: Oral Advisement and Opening Statement</b>	
<b>Script J: Order for Child Support</b>	
Appendices A–K .....	App-A-1
<b>Appendix A: Index of Family Code Sections</b>	
<b>Appendix B: Voluntary Declaration of Parentage (“POP”) Chart</b>	
<b>Appendix C: Work Search Order Form</b>	
<b>Appendix D: Benefits Chart</b>	
<b>Appendix E: Sample Parent/Child Time-Sharing Percentages</b>	
<b>Appendix F: Sample Spousal Support Worksheet</b>	
<b>Appendix G: Attorney’s Fees Chart</b>	
<b>Appendix H: Contempt and Probation Revocation Checklists</b>	
<b>Appendix I: Interest Rates Chart</b>	

**Appendix J: Chart for Setting Aside Judgments or Orders**

**Appendix K: Federal Parent Locator Service**

**Table of Statutes..... TOS-1**  
**Table of Cases..... TOC-1**

# INTRODUCTION

## I. SCOPE OF BENCH HANDBOOK

This bench handbook covers child and spousal support, the Uniform Interstate Family Support Act, child support proceedings, support enforcement, and AB 1058 proceedings. It combines in one volume information formerly contained in California Judges Benchguide 201: Child and Spousal Support, California Judges Benchguide 203: AB 1058 Child Support Proceedings: Establishing Support, and California Judges Benchguide 204: AB 1058 Child Support Proceedings: Enforcing Support.

As used in this handbook and for purposes of family law rules and proceedings (Cal Rules of Ct 5.2(b)(3)), the terms “spouse(s),” “husband,” and “wife” encompass “domestic partner(s);” “father” and “mother” encompass “parent”; and “marriage” and “marital status” encompass “domestic partnership” and “domestic partnership status.” Fam C §297.5(j).

For a convenient, topically arranged chart of key Family Code sections relating to child support proceedings, see [Appendix A](#).

## II. TREATMENT OF SAME-SEX MARRIAGES AND REGISTERED DOMESTIC PARTNERSHIPS IN THIS HANDBOOK

The California Supreme Court held in 2008 that by limiting marriage to opposite-sex couples, the marriage statutes (former Fam C §§300, 308.5) violate a same-sex couple’s fundamental right to marry. *Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683. Proposition 8, approved by the voters in November 2008, sought to overturn this ruling and establish a constitutional ban against same-sex marriages. The federal district court concluded that Proposition 8 is unconstitutional under both the due process and the equal protection clauses, and entered an order enjoining its enforcement. *Perry v Schwarzenegger* (ND Cal 2010) 704 F Supp 2d 921, 1003–1004 (opinion by J. Vaughn Walker). Subsequent attempts to appeal by the initiative’s proponents ultimately failed, with the United States Supreme Court holding that the proponents had no Article III standing. See *Hollingsworth v Perry* (2013) 570 US 693, 133 S Ct 2652, 2668, 186 L Ed 2d 768 (5-4 decision, opinion by Chief Justice John Roberts). On remand, the Ninth Circuit of Appeals dismissed the proponents’ appeal for lack of jurisdiction and ordered that mandate issue immediately. *Perry v Brown* (9th Cir 2013) 725 F3d 1140, 1141. Thus, the district court order—permanently enjoining the enforcement of Proposition 8—took effect.

In 2015 the United States Supreme Court held that under the due process and equal protection clauses of the Fourteenth Amendment, same-sex couples had a fundamental right to marry, and there was no lawful basis for any state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of same-sex character. *Obergefell v Hodges* (2015) 135 S Ct 2584, 192 L Ed 2d 609.

For couples that register as domestic partners, the California Domestic Partner Rights and Responsibilities Act of 2003 extends the same rights, protections, benefits, and obligations to registered domestic partners that apply to spouses under California law both during and on termination of the union. Stats 2003, ch 421; Fam C §297.5. These rights and protections also

extend to a domestic partnership with an underage person that was approved by the court. Fam C §297.1. 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).

# Chapter 1

## CHILD AND SPOUSAL SUPPORT

### I. [§1.1] SCOPE OF CHAPTER

### II. PROCEDURAL CHECKLISTS

- A. [§1.2] Parentage
- B. [§1.3] Child Support
- C. [§1.4] Spousal Support

### III. PARENTAGE

- A. Establishing Parentage
  - 1. [§1.5] Introduction
  - 2. [§1.6] Action to Establish Parentage
  - 3. [§1.7] Defaults
  - 4. Contested Parentage
    - a. [§1.8] Advisement of Rights and Setting for Trial
    - b. [§1.9] Evidence and Findings
- B. Theories of Parentage
  - 1. [§1.10] Parentage by Res Judicata
  - 2. [§1.11] Parentage by Admission or Stipulation
  - 3. Voluntary Declaration of Paternity
    - a. [§1.12] In General
    - b. [§1.13] Rescission of or Setting Aside Voluntary Declaration
  - 4. Conclusive Presumptions
    - a. Conclusive Marital Presumption
      - (1) [§1.14] In General
      - (2) [§1.15] Exception to Conclusive Presumption
    - b. [§1.16] Conclusive Presumption of Maternity
  - 5. Rebuttable Presumptions
    - a. [§1.17] Presumed Parent Status
    - b. [§1.18] Presumptions Under Family Code §7611
      - (1) [§1.19] Other Rebuttable Marital Presumptions
      - (2) [§1.20] Holding Out Child as Own
      - (3) [§1.21] Child in Utero After Decedent's Death
    - c. [§1.22] Resolving Multiple or Conflicting Presumptions of Parentage
    - d. [§1.23] Ordering Genetic Testing and Use of Results
    - e. [§1.24] Gender-Neutral Application of the Laws
    - f. [§1.25] More Than Two Parents
    - g. [§1.26] Rebuttal Evidence
  - 6. [§1.27] Parentage by Estoppel
  - 7. [§1.28] Assisted Reproduction
- C. [§1.29] Challenging Parentage

### IV. DETERMINING INCOME AVAILABLE FOR CHILD SUPPORT

- A. Income Generally

1. [§1.30] Gross Income
  2. [§1.31] Net Disposable Income
  - B. [§1.32] Types of Income
    1. [§1.33] Mandatory Income
      - a. [§1.34] Business and Self-Employment Income
      - b. [§1.35] Bonuses and Commissions
      - c. [§1.36] Overtime
      - d. [§1.37] Employee Stock Options
      - e. [§1.38] Income From Gifts or Inheritances
    2. [§1.39] Discretionary Income
      - a. [§1.40] Employment Benefits
      - b. [§1.41] Lottery Winnings
  - C. Governmental Benefits
    1. [§1.42] Social Security
    2. [§1.43] State Disability
    3. [§1.44] Workers' Compensation
    4. [§1.45] Unemployment Compensation
    5. [§1.46] Military Pay and Veteran's Benefits
  - D. [§1.47] Income of Parent's New Spouse or Nonmarital Partner
  - E. [§1.48] Evidence of Income
  - F. [§1.49] Fluctuating Income
  - G. Considering Parent's "Earning Capacity" Instead of Actual Income
    1. [§1.50] Statutory Rule
    2. Ability and Opportunity to Work
      - a. [§1.51] Bad Faith Not Required; *Regnery* Rule
      - b. [§1.52] Loss or Lack of Employment and Under-Employment
      - c. [§1.53] Burden of Proof and Evidence of Earning Capacity
      - d. [§1.54] Incarcerated Parent
    3. [§1.55] Objectively Reasonable Work Regimen
    4. [§1.56] Considering Children's Best Interests
    5. [§1.57] Imputing Income From Assets
    6. [§1.58] Presumed Income in Title IV-D Cases
    7. [§1.59] Seek-Work Orders
  - H. [§1.60] Exclusions From Income
  - I. [§1.61] Deductions From Income
  - J. Hardship Deduction
    1. [§1.62] Health Expenses or Uninsured Losses
    2. [§1.63] Support of Other Children Residing With Parent
    3. [§1.64] Considerations for Court
- V. SETTING CHILD SUPPORT**
- A. Statewide Uniform Guideline
    1. [§1.65] Based on Federal Requirements
    2. [§1.66] State Guideline
  - B. [§1.67] Principles in Implementing Guideline

- C. Child Support Guideline Formula
  - 1. The Guideline Formula and Use of Certified Calculator Programs
    - a. [§1.68] General Parameters
    - b. [§1.69] Using Computer Software to Calculate Support Amount
  - 2. Guideline Components
    - a. [§1.70] Time-Share With Children (H%)
      - (1) [§1.71] Imputed Time-Sharing
      - (2) [§1.72] Time-Share Adjustment When One Parent Defaults or Fails to Appear
    - b. [§1.73] Net Monthly Disposable Income (TN)
    - c. [§1.74] Amount of Income Allocated for Child Support (K)
  - 3. [§1.75] Child Support Amount for More Than One Child
  - 4. [§1.76] Allocation of Child Support Among Children
  - 5. [§1.77] Multiple Families
  - 6. [§1.78] Determining Who Is Payor
  - 7. [§1.79] Low-Income Adjustment
  - 8. [§1.80] Application of Guidelines to Child With More Than Two Parents
  - 9. [§1.81] Mandatory Findings and/or Statement of Decision on Request of Parties
- D. Additional Child Support
  - 1. [§1.82] Mandatory Add-Ons
  - 2. [§1.83] Discretionary Add-Ons
  - 3. [§1.84] Apportioning Add-Ons Between Parents
  - 4. [§1.85] Health Insurance Coverage
- E. Departing From Guideline Formula
  - 1. [§1.86] Bases for Departing From Formula
    - a. [§1.87] Stipulated Support
    - b. [§1.88] Deferred Sale of Home Order
    - c. [§1.89] Extraordinarily High-Income Payor
      - (1) [§1.90] “Extraordinarily High Income” Not Defined
      - (2) [§1.91] High Earner’s Burden of Proof in Rebutting Formula Amount
    - d. [§1.92] Disparity Between Support and Custodial Time
    - e. [§1.93] Special Circumstances Render Formula Unjust or Inappropriate
  - 2. [§1.94] Mandatory Findings When Support Order Varies From Guidelines
- F. [§1.95] Temporary Support
- G. [§1.96] Foster Care, Caretaker, or Third-Party Cases
- H. [§1.97] Expedited Support
- I. [§1.98] Family Support
- J. Duration of Obligation to Pay Child Support
  - 1. [§1.99] Termination Upon Emancipation
  - 2. [§1.100] Adult Disabled Child
  - 3. [§1.101] Termination by Operation of Law
- K. [§1.102] Modification of Child Support Order
- L. [§1.103] Setting Aside Child Support Order
- M. [§1.104] Deduction for Federal Dependency Exemption
- N. Retroactivity of Child Support Orders

1. [§1.105] Initial Order
2. [§1.106] Modifications

## VI. SPOUSAL SUPPORT

- A. [§1.107] Temporary Support
  1. [§1.108] Use of Court Schedules or Formulas
  2. [§1.109] Duration of Temporary Spousal Support Order
  3. [§1.110] Modification of Temporary Spousal Support
- B. Permanent Support
  1. [§1.111] What Constitutes Permanent Support
  2. [§1.112] Effect of Temporary Support on Permanent Support
- C. [§1.113] Factors Court Must Consider in Awarding Permanent Support
  1. [§1.114] Sufficiency of Earning Capacities to Maintain Marital Standard of Living
  2. [§1.115] Contributions to Supporting Party's Education and Training
  3. [§1.116] Supporting Party's Ability to Pay
  4. [§1.117] Parties' Needs
  5. [§1.118] Parties' Obligations and Assets
  6. [§1.119] Length of Marriage
  7. [§1.120] Employment of Supported Party and Its Impact on Children
  8. [§1.121] Age and Health of Parties
  9. [§1.122] History of Domestic Violence—Two Separate Factors Under Fam C §4320
  10. [§1.123] Tax Consequences
  11. [§1.124] Relative Hardships
  12. [§1.125] Goal of Self-Support
  13. [§1.126] Conviction for Domestic Violence, Attempted Murder, or Solicitation of Murder
  14. [§1.127] Criminal Conviction for Violent Sexual Felony
  15. [§1.128] Other "Just and Equitable" Factors
- D. [§1.129] Marital Standard of Living
- E. Findings
  1. [§1.130] Mandatory Findings on the Marital Standard of Living
  2. [§1.131] Findings of Other Circumstances on Request
- F. [§1.132] *Gavron* Warning
- G. [§1.133] Duration of Support Order
- H. [§1.134] Retention of Jurisdiction
- I. Types of Orders
  1. [§1.135] Order of Indeterminate Duration
  2. [§1.136] Fixed-Term Order
  3. [§1.137] Step-Down Order
  4. [§1.138] Contingent Order
  5. [§1.139] *Richmond* Order
- J. [§1.140] Modifying or Terminating Spousal Support
  1. [§1.141] Change of Circumstances Requirement

- a. [§1.142] Increased Ability to Pay and Original Order Inadequate to Meet Needs
- b. [§1.143] Supported Spouse Cohabiting With Nonmarital Partner
- c. [§1.144] Retirement of Supporting Spouse
2. [§1.145] No Consideration of Income of Supporting Spouse's Subsequent Spouse or Partner
3. [§1.146] Retroactive Modification
4. [§1.147] Parties Agreement Not to Modify or Terminate Order
- K. [§1.148] Termination of Spousal Support
- L. [§1.149] Setting Aside Spousal Support Order
- M. [§1.150] Effect of Premarital Agreement
- N. [§1.151] Effect of Immigration I-864 Affidavit of Support of Spouse

## I. [§1.1] SCOPE OF CHAPTER

This chapter covers the subject of child support, as well as both temporary and permanent spousal support. It includes a discussion on the application of the Statewide Uniform Guideline and on determining income available for child support. For discussion of procedural issues unique to Title IV-D (42 USC §§651 et seq) child support cases filed by local child support agencies (LCSA), see [Chapter 5](#).

## II. PROCEDURAL CHECKLISTS

*Note: As of July 1, 2012, Requests for Orders (RFO) for support are now required to be filed on a specific form: Judicial Council form FL-300. Cal Rules of Ct 5.92(a)(1)(B), (a)(3). 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(b)(1), 5.111. A local child support agency may use a different governmental form, Judicial Council form FL-680. Because the California Rules of Court and the Family Code still reference the term "orders to show cause" (OSC), this benchguide may use either term.*

### A. [§1.2] Parentage

Before any child support order is made, parentage must be established, *i.e.*, it is a threshold requirement. This is true whether the request for child support is made in an action for dissolution, legal separation, nullity, or brought under the Uniform Parentage Act (UPA) or the Domestic Violence Prevention Act (DVPA), or a governmental complaint filed by the Department of Child Support Services (DCSS).

There are many ways in which parentage can be established, but it is imperative that this issue is examined and resolved as early as possible. (See Parentage §§1.5–1.29 below). Failure to do so can jeopardize the validity of any child support orders issued.

## B. [§1.3] Child Support

*Note: The checklist below is to be used for establishing child support orders. In proceeding for modification of support, the court must **first** determine whether there are changed circumstances warranting a different support order. A modified child support order must be calculated under the guideline formula. See §1.102.*

(1) *Determine Parentage:* If parentage has not been established, then do so first. See Parentage §§1.5–1.29 below.

(2) *Determine Timeshare:* This is generally based on the parents' respective period of primary physical responsibility, but may also be imputed or adjusted where one parent defaults or fails to appear. See §§1.70–1.72.

(3) *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 §§1.30–1.41. On what constitutes evidence of income, see §1.48.

➤ **JUDICIAL TIP:** Parties should exchange copies of tax returns, redacting or using only the last four digits of their Social Security Numbers, 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). In Title IV-D cases, the local child support agency (LCSA) will often have access to automated income reporting (e.g., through the Employment Development Department, or other sources). See §5.28.

(4) *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 §1.47. 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 §1.60.

(5) *Determine whether either parent's earning capacity should be considered instead of parent's actual income.* By statute, the court has discretion to consider imputing income by determining 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 §§1.50–1.56.

(6) *Determine whether to impute income to parent from his or her assets.* See §1.57.

(7) *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 §1.61.

(8) *Rule on any requests for hardship deductions, such as for health expenses or uninsured losses, or for support of other children residing with parent.* See §§1.62–1.64. If a deduction is allowed, state the reasons supporting the deduction in writing or on the record. See §1.64.

(9) *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, along with the*

*timeshare information, in computing amount of child support using the State Uniform Guideline formula. On using computer software to calculate amount of support, see §§1.69.*

- **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. Rather than manually calculate the guideline, judges should use the software program employed by their court.

(10) *If there is more than one child, multiply child support amount by appropriate figure specified in Fam C §4055(b)(4). See §§1.75–1.76.* Typically, the computer software program performs this multiplication and allocation between the children. In your order, state the amount of support per child.

(11) *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).

(12) *Determine whether parent ordered to pay support is entitled to a low-income adjustment reducing the child support amount.* See §1.79.

(13) *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 §1.81.

(14) *Determine whether to depart from guideline formula amount of support based on one or more factors set forth in Fam C §4057(b).* See §§1.86–1.93. 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).

(15) *If the amount of child support ordered differs from the guideline formula amount, make the mandatory findings specified in Fam C §4056(a).* See §1.94.

(16) *Order one or both parents to maintain health insurance coverage for the supported child.* See §1.85.

(17) *Order as additional child support child care, costs related to employment or education, and children's reasonable uninsured health care costs.* These are mandatory add-ons. Fam C §4062(a). See §§1.82, 1.84.

(18) *Determine whether to order as additional child support, costs related to the children's educational or other special needs, or travel expenses for visitation.* These are discretionary add-ons. Fam C §4062(b). See §§1.83–1.84.

(19) *If parties have stipulated to child support amount, confirm that they have made the declarations required by Fam C §4065(a).* See §1.87.

(20) *Determine any request for the support of an adult child who is incapacitated and without sufficient means.* See §1.100.

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

### C. [§1.4] Spousal Support

*Note: The checklist below is to be used for establishing spousal support orders, whether they are temporary (pre-judgment) or permanent (upon entry of judgment). In proceeding for modification or termination of spousal support in either instance, the court must first determine whether there are changed circumstances warranting a different support order. See §1.141. For a more detailed discussion on modification or termination of spousal support see §§1.140–1.149.*

(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 §§1.107–1.110.

(2) *Determine whether to award permanent spousal support after considering all of the applicable factors listed in Fam C §4320(a).* See §§1.113–1.28. Do not use the amount of temporary support or a computer calculation in determining the amount of permanent support because the considerations in awarding the two types of support are different. See §1.112.

(3) *Make specific factual findings regarding the parties' standard of living during marriage.* Fam C §4332. See §1.129.

(4) *Make other factual determinations with respect to other circumstances on party's request.* Fam C §4332. See §1.130.

(5) *Advise supported spouse, if appropriate, to make reasonable efforts to assist in providing for his or her support needs (Gavron warning).* Fam C §4330(b). See §1.132.

(6) *Make your support order.* For a discussion of common types of orders, see §§1.135–1.139.

(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 §1.134.

(8) *Determine whether step-down order providing for automatic reductions in amount of support is appropriate.* See §1.137.

(9) *Determine whether issuance of Richmond termination order is appropriate.* See §1.139.

(10) *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 §1.143. The court may not consider the income of the supporting spouse's subsequent spouse or nonmarital partner when determining or modifying spousal support. See §1.145.

(11) *Consider whether supporting party's retirement constitutes a change in circumstances warranting a reduction in or termination of support.* See §1.144.

(12) *Determine whether party seeking support has waived right to support under a premarital agreement.* See §1.150.

### III. PARENTAGE

#### A. Establishing Parentage

##### 1. [§1.5] Introduction

Paternity (fatherhood) and maternity (motherhood) establish a legal parental relationship between an alleged parent and a child. While most parentage cases coming before the court are requests to establish paternity, requests to establish maternity have increased significantly with the recognition of parental rights of non-biological same sex partners. See, *e.g.*, *Elisa B. v Superior Court (Emily B.)* (2005) 37 C4th 108, 33 CR3d 46.

“Parent and child relationship” means the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship. Fam C §7601(b). “Natural parent” means a nonadoptive parent established under the Uniform Parentage Act (UPA), whether biologically related to the child or not. Fam C §7601(a). The UPA does not preclude a finding that a child has a parent and child relationship with more than two parents. Fam C §7601(c). For purposes of state law, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, benefits, responsibilities, obligations, and duties of parents, any reference to two parents must be interpreted to apply to every parent of a child when that child has been found to have more than two parents under this part. Fam C §7601(d).

Parentage must be established before any support orders can be made. However, a court can issue a temporary support order under the Uniform Interstate Family Support Act (UIFSA), or in a Title IV-D case if a respondent appears on a motion to determine parentage and requests a continuance. Fam C §§17404(b), 5700.401(b).

- **JUDICIAL TIP:** Before the court sets a temporary support order, the court should identify the reasonable possibility of parentage.

The following discussion provides a broad overview of the complex topic of determining parentage in child support proceedings. Detailed discussion is beyond the scope of this publication.

*Note: AB 2684 was signed by the governor on September 28, 2018. Portions of the legislation became effective on January 1, 2019, and other portions will become effective on January 1, 2020. An effort has been made throughout this bench handbook to identify those sections of the Family Code that are affected. The Family Code sections effective January 1, 2020, could still be changed by the Legislature. It is suggested that the reader check the Family Code current near or after January 1, 2020.*

*The new provisions primarily adopt the uniform provisions of the Uniform Parentage Act of 2017. These new provisions expand the definition of conclusively presumed children to include children of same sex couples and revise (1) genetic testing statutes; (2) procedure for establishing parentage through a voluntary declaration of parentage; (3) procedures for challenging a voluntary declaration of parentage and other parentage judgments; and (4) assisted reproduction statutes. These new provisions also require a gamete bank and augment the legislative findings.*

## 2. [§1.6] Action to Establish Parentage

Standing to bring an action can vary according to the basis of parentage or non-parentage underlying the action. In general, the child (or child's personal representative), the DCSS (or LCSA), the child's natural parent, a presumed parent, an alleged parent, a party to an assisted reproduction agreement, a prospective adoptive parent, or a person seeking to be adjudicated as a parent or donor under Fam C §7613 or an adoption agency to whom the child has been relinquished may bring an action to establish parentage and support. Fam C §7630. See also Fam C §§7610, 7650. If any of the parent-types listed above are themselves a minor or deceased, then that individual's personal representative may bring the action. See also §1.29 on standing to challenge certain presumed parentage situations.

The statutory authority for determining parentage in family law cases stems primarily from the UPA (Fam C §§7600 et seq, 7601, 7610–7611, 7630–7644, 7650). Parentage of a child born before a marriage may be determined in proceedings for dissolution, legal separation or support of the children. Fam C §§5700.101 et seq. California courts may also determine parentage in child support actions brought by DCSS, and in actions brought under UIFSA and the DVPA. See Fam C §§17404(a), 5700.101 et seq, 6223, 6346.

There is no statute of limitations in establishing parentage under the UPA or UIFSA. A parentage action may be brought at any time, and laches may not be asserted as a bar. The action may be brought in any county in which the child resides or is found. Fam C §7620(b)(1).

In Title IV-D cases, DCSS will provide support enforcement services beyond the date of emancipation of a minor, but it will not provide parentage establishment services if there is no “dependent child.” Fam C §17000(f)(i), 17212(a)(1). The LCSA will file a summons and complaint or supplemental complaint regarding parental obligations. See form FL-600; see also §§5.14–5.15. To determine if the LCSA is seeking to establish parentage, the court should look to see if the box to “Establish Parentage” in item one of the complaint is checked for any children. The LCSA may also file separate actions under UIFSA where a parentage determination is sought and in any case it believes is appropriate. Fam C §7634(a). It should be noted that DCSS is the only recognized agency to handle support in Hague Convention proceedings. Fam C §5700.703. See also Chapter 3 on UIFSA proceedings.

## 3. [§1.7] Defaults

Generally, if the respondent does not file an answer, a request to enter a default judgment may be made. Prior to entering any default judgment, the court must determine there was proper service. The date of service (coupled with the date of filing of the initial pleading) is relevant to establish any retroactivity of the child support order. See Fam C §4009.

A prove-up hearing is not necessarily required. A default may be taken on the papers.

One or more of the following theories to establish parentage may be relied upon:

- A voluntary declaration of paternity (POP declaration) (see §1.12);
- A prior judgment or stipulation (see §§1.10, 1.11);
- The other parent's testimony;
- The marital presumption (Fam C §7540, see §1.14);
- Genetic testing (see §1.9); or

- Other presumption or theory (see §§1.19–1.21).

If parentage is based on the other parent’s testimony or the conclusive presumption of marriage and if the other parent is present, the court may proceed on a written declaration or take the testimony of the other parent.

For a script to use in establishing parentage by presumption, see [Script A](#), or for biological parentage, see [Script B](#).

In Title IV-D cases, the court may not refuse to approve a default judgment that complies with the statutory scheme. *County of Yuba v Savedra* (2000) 78 CA4th 1311, 1322, 93 CR2d 524. See [§5.19](#).

#### 4. Contested Parentage

##### a. [§1.8] Advisement of Rights and Setting for Trial

The respondent may appear at the hearing and may not want to admit parentage. The court should advise the respondent of rights insofar as the parentage issue. All of the rights of a respondent are discussed in [§2.5](#). For a script for advising of rights, see [Script G](#).

If the alleged parent waives rights and admits parentage, enter a judgment regarding parental obligations. If the alleged parent denies parentage, the matter may be set for trial. Before the date set for trial, the court may set a status conference to give the parties another chance to reach a stipulation or narrow the issues.

- **JUDICIAL TIP:** Instead of setting the case straight for trial, if a person has denied parentage at a hearing on a motion for judgment after an advisement, the court may order genetic testing if it has not been previously ordered or completed. See form FL-627.

For additional procedures unique to Title IV-D cases see [§5.20](#).

##### b. [§1.9] Evidence and Findings

A copy of any genetic test results performed must be served on all parties not later than 20 days prior to a hearing. Fam C §7552.5(a). The genetic test report is admissible by operation of law unless an objection was lodged with the court 5 days before the hearing. Fam C §7552.5(b). The court should receive the test results and announce that the paternity index exceeds 100. An index of over 100 creates a rebuttable presumption of paternity. Fam C §7555(a); see [§1.17](#). The issue may be submitted on the basis of the genetic tests. However, oftentimes, testimony or other evidence to establish a conclusive or rebuttable presumption of parentage may also be presented.

The court should ask if the respondent wants to present any evidence to rebut the genetic tests or offer any other evidence on the issue of parentage.

If a timely objection to the genetic tests is made, despite the records’ possible admission as a business record (see Fam C §7552.5(a)(1)–(4), the respondent’s ability to subpoena analysts does not obviate the moving party’s Confrontation Clause obligation to produce analysts for cross-examination. It is the burden of the moving party to present its witnesses, and not the respondent’s burden to bring those adverse witnesses into court. *Melendez-Diaz v Massachusetts* (2009) 129 S Ct 2527, 2540, 174 L Ed 2d 314.

For a script of findings regarding parentage, see [Script E](#).

## B. Theories of Parentage

### 1. [§1.10] Parentage by Res Judicata

A prior judgment or order determining the existence (or nonexistence) of a parent and child relationship is determinative of parentage, even if subsequent blood tests establish that the party was not the child's biological parent. Unless the underlying judgment is set aside, parentage cannot be challenged anew, and the court has no authority to order genetic testing. *City & County of San Francisco v Cartagena* (1995) 35 CA4th 1061, 1068–1069, 41 CR2d 797.

For methods of attacking a judgment determining parentage, see §1.29.

### 2. [§1.11] Parentage by Admission or Stipulation

The respondent may file and serve an answer and not appear for the hearing. If the answer admits parentage, it serves as an admission, and the court may enter a judgment on that basis.

- **JUDICIAL TIP:** In Title IV-D cases, sometimes the respondent does not file the answer with the court but instead, returns the answer directly to the LCSA. At the hearing, the LCSA will ask the court to receive the respondent's unfiled answer and file it with the court. Most child support commissioners will accept the unfiled answer from the LCSA and order it filed or consider it evidence and will enter a judgment of parentage on that basis.

On occasion, the respondent's answer will identify the children and contain certain statements, yet fail to admit or deny parentage. Every material allegation of a complaint not controverted by answer must be taken as true. CCP §431.20(a). On that basis, the court may enter a judgment of parentage. However, given the importance of the issue, it is a better practice whenever possible to determine the matter on its merits (putting substance over form).

A party can also sign a stipulated judgment in the action itself, but prior to signing such a judgment, it is important to ensure that the parties were properly advised of their rights. There are specific Judicial Council forms that are required to be used. In UPA actions, see forms FL-235 (Advisement and Waiver of Rights Re: Establishment of Parental Relationship), and FL-240 (Stipulation for Entry of Judgment) and FL150 (Judgment), the latter two are used in conjunction with FL-235. In governmental cases, see Judicial Council form FL-615 (Stipulation for Judgment), or form FL-692 (Minutes and Order or Judgment), which must attach FL-694 (Advisement and Waiver of Rights for Stipulation).

In DVPA proceedings to determine temporary custody, the court may accept a stipulation of parentage by the parties and, if parentage is uncontested, enter a judgment establishing parentage, subject to set-aside provisions. Fam C §6323(b)(2). Such a judgment would then be res judicata as to those parties.

- **JUDICIAL TIP:** While courts now have authority to enter a judgment establishing parentage by stipulation in DVPA proceedings, a court should proceed with caution. DVPA proceedings are often conducted in a relatively short time frame, with little or no time to determine whether other related cases exist in which parentage may have been addressed. There are also inherent concerns in domestic violence proceedings involving the dynamics of pressure that may exist for a victim/party to sign a stipulation. In addition, care should be taken that this process is not simply being used by parties as an

end run-around to legal parentage (*e.g.*, boyfriend seeks to become “parent” without going through adoption process). Finally, a parentage judgment in a DVPA proceeding may be difficult to search/locate if a court’s case management system does not track it properly—which can lead to conflicting paternity determinations.

### 3. Voluntary Declaration of Paternity

#### a. [§1.12] In General

Family Code §§7570 et seq provides a process by which paternity can be established by the unmarried father and mother signing a declaration in a form provided by the hospital (if at birth) or by the court or the LCSA thereafter (Paternity Opportunity Program or “POP” form). Once signed and filed with the state DCSS, this voluntary declaration has the same force and effect as a judgment of parentage issued by a court of competent jurisdiction. Fam C §7573. If the voluntary declaration is signed by a minor, it takes effect 60 days after the minor emancipates. Fam C §7577(a). (Effective January 1, 2020), see Fam C §7580(a)). Because a voluntary declaration has the force of a judgment, it trumps a presumption under Fam C §7611(d).

For example, a biological father’s voluntary declaration of paternity trumps the mother’s former boyfriend’s rebuttable presumption of paternity based on receiving the child into his home and holding out the child as his natural child. The biological father rather than mother’s former boyfriend is the child’s legal father, even if the biological father had not taken meaningful steps to maintain contact with the child or provided for his support, when the voluntary declaration of paternity was properly signed and filed and never rescinded or set aside. *Kevin Q. v Lauren W.* (2009) 175 CA4th 1119, 1137–1138, 95 CR3d 477. For further discussion, see §1.26.

A voluntary declaration of paternity is not to be given to a married woman and, thus, is voidable when executed by a married woman. *H.S. v Superior Court* (2010) 183 CA4th 1502, 1507–1508, 108 CR3d 723. Effective January 1, 2010, the voluntary declaration of parentage can be given to a married woman if the child was conceived through assisted reproduction and the other parent is the intended parent. Fam C §7551.

A voluntary declaration is invalid if, at the time when the declaration was signed, any of the following conditions exist (Fam C §7612(f)):

- The child already had a presumed parent under Fam C §7540 (child of marriage);
- The child already had a presumed parent under Fam C §7611(a), (b), or (c) (man and natural mother married, or attempted marriage before or after birth); or
- The man signing the declaration is a sperm donor, consistent with Fam C §7613(b).

A voluntary declaration is also invalid if it is not validly witnessed and timely filed. *In re D.R.* (2011) 193 CA4th 1494, 1509–1510, 122 CR3d 753.

*Effective January 1, 2020, Fam C §7612 is repealed. As of January 1, 2020, pursuant to Fam C §7573, a voluntary declaration of parentage is void if any of the following are true at the time of signing:*

- *The child already had a presumed parent pursuant to Fam C §7540 or Fam C §7611(a), (b), or (c);*
- *A court has entered a judgment of parentage of the child;*

- *Another person has signed a valid voluntary declaration of parentage;*
- *The child has a parent pursuant to Fam C §§7613 or 7962, other than the signatories;*
- *The person seeking to establish parentage is a sperm or ova donor pursuant to Fam C §7613(b) or (c); or*
- *The person seeking to establish parentage asserts that he or she is a parent pursuant to Fam C §7613, and conception was not through assisted reproduction.*

For a chart outlining the use of a POP form, see [Appendix B](#).

#### **b. [§1.13] Rescission of or Setting Aside Voluntary Declaration**

Either parent may rescind the voluntary declaration of paternity by filing a rescission form with the DCSS within 60 days of the date that the attesting father or attesting mother executed the declaration, whichever signature is later, unless a court order for custody, visitation, or child support has been entered in an action in which the signatory seeking to rescind was a party. Fam C §7575(a).

A presumed parent may file a petition under Fam C §7630 to set aside a voluntary declaration of paternity within 2 years of its execution. Fam C §7612(e); see [§4.166](#).

### **4. Conclusive Presumptions**

#### **a. Conclusive Marital Presumption**

##### **(1) [§1.14] In General**

Family Code §7540 provides that a child of spouses who cohabited at the time of conception and birth is conclusively presumed to be a child of the marriage. This presumption does not apply if the court determines that the husband of the woman who gave birth was impotent or sterile at the time of conception and the child was not conceived through assisted reproduction. This presumption is applicable only if the parties were cohabiting at the time of the child's conception. *Steven W. v Matthew S.* (1995) 33 CA4th 1108, 1114, 39 CR2d 535.

It should be noted that Fam C §7540 has been held not to apply as a matter of due process where application of the presumption in particular circumstances would not further the social policy of promoting family unity that underlies the statute. See *Comino v Kelly* (1994) 25 CA4th 678, 30 CR2d 728; *County of Orange v Leslie B.* (1993) 14 CA4th 976, 17 CR2d 797.

Under Fam C §297.5, any statute pertaining to "spouses" also applies to registered domestic partners. Therefore, a conclusive presumption of parentage might be created between same sex domestic partners. The rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses. Fam C §297.5(d). An appellate court has not yet determined whether the presumption of Fam C §7540 applies to same sex married parties or domestic partners.

##### **(2) [§1.15] Exception to Conclusive Presumption**

If the conclusive presumption applies, a motion for genetic testing may be filed by the presumed father or the child's guardian ad litem. It may also be filed by the mother if the child's biological father has filed an affidavit with the court acknowledging paternity of the child for

genetic testing. The motion must be filed within 2 years of the birth. If the court finds that the conclusions of all the experts are that the husband is not the father of the child, the question of the husband's paternity must be resolved accordingly. Fam C §7541(a)–(c).

The motion is not available in certain limited situations (paternity judgments that predate October 1980, artificial insemination, or conception by surgical procedure). Fam C §7541(d).

### **b. [§1.16] Conclusive Presumption of Maternity**

Pursuant to Fam C §7610(a) it has been held that “where a woman is both the birth and genetic mother of a child, and intends to raise the child as her own, her legal status as the child's natural mother is conclusively established under California law.” *In re D.S.* (2012) 207 CA4th 1088, 1100, 143 CR3d 918 (challenge to birth mother's maternity by step-mother who claimed to be presumed mother rejected).

## **5. Rebuttable Presumptions**

### **a. [§1.17] Presumed Parent Status**

Under the UPA, Fam C §7610(a) and (b) provides that a parent/child relationship may be established:

- Between a child and the natural parent by proof of having given birth to the child, or under the UPA itself;
- Between a child and an adoptive parent by proof of adoption.

A rebuttable presumption of maternity applies only in cases of surrogacy, relinquishment, abandonment of child, or when a nonbiological parent in a same-sex relationship seeks to establish parentage against the biological parent. See [§1.16](#) on Conclusive Presumption of Maternity.

### **b. [§1.18] Presumptions Under Family Code §7611**

Family Code §7611 of the UPA defines the ways that a person can achieve the status of a presumed parent. In addition to the marital conclusive presumption (see [§1.14](#)) and the voluntary declaration of paternity (see [§1.12](#)), other methods of achieving that status include the following:

#### **(1) [§1.19] Other Rebuttable Marital Presumptions**

The presumed parent and the child's natural mother are or have been married to each other, and the child is born during the marriage or born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court. Fam C §7611(a).

Before the child's birth, the presumed parent and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true (Fam C §7611(b)):

- If the attempted marriage could be declared invalid only by a court, and the child is born during the attempted marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

- If the attempted marriage is invalid without a court order, and the child is born within 300 days after the termination of cohabitation.

After the child's birth, the presumed parent and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true (Fam C §7611(c)):

- With his consent, he is named as the child's father on the child's birth certificate.
- He is obligated to support the child under a written voluntary promise or by court order.

### **(2) [§1.20] Holding Out Child as Own**

The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child. Fam C §7611(d). The receipt of the child into the home must be sufficiently unambiguous to be a clear declaration of the nature of the relationship but need not continue for any specific duration. *Charisma R. v Kristina S.* (2009) 175 CA4th 361, 374, 96 CR3d 26 (court found 13 weeks sufficient under the circumstances of this case), overruled on other grounds in 50 C4th 512, 532 n7; *In re D.M.* (2013) 210 CA4th 541, 549–550, 148 CR3d 349 (2-hour court ordered visits were insufficient to show that a boyfriend had accepted the child into his home). *W.S. v S.T.* (2018) 20 CA5th 132, 147, 228 CR3d 756 (the receiving requirement is not satisfied by simply receiving the child into one's home, it requires regular visitation and the "assumption of parent-type obligations and duties").

### **(3) [§1.21] Child in Utero After Decedent's Death**

The child is in utero after the decedent's death, and the conditions set forth in Prob C §249.5 are satisfied. Fam C §7611(f).

### **c. [§1.22] Resolving Multiple or Conflicting Presumptions of Parentage**

If two or more presumptions arise under Fam C §7610 or §7611 that conflict, or if a presumption under Fam C §7611 conflicts with a claim under Fam C §7610, the court must rule in favor of the presumption that on the facts is founded on the weightier considerations of policy and logic. Fam C §7612(b); see, e.g., *Gabriel P. v Suedi D.* (2006) 141 CA4th 850, 864, 46 CR3d 437.

Care should also be taken to examine who is making what claims regarding parentage. For example, an alleged biological father has no standing to challenge a mother's husband's presumption of paternity, even though the mother and husband were not cohabiting at the time of conception, when the alleged biological father has no standing as a presumed father (other than through a voluntary paternity declaration executed by the married mother, which the mother successfully moved to set aside). *H.S. v Superior Court* (2010) 183 CA4th 1502, 1507–1508, 108 CR3d 723. Even in a contest between competing presumptions of paternity, the biological father does not automatically prevail against the mother's husband; rather, the court must weigh all relevant factors, including biology, in determining which presumption is founded on weightier considerations of policy and logic. 183 CA4th at 1508; *In re P.A.* (2011) 198 CA4th 974, 981–983, 130 CR3d 556.

An alleged biological father also has no standing to challenge a mother's husband's presumption of paternity, when the alleged biological father has no standing as a presumed father (other than through his proposed prenatal relationship theory, which viewed the relationship from the alleged biological father's perspective, not the child's, and thus did not advance the policy considerations recognizing the value to the child of an established parent-child relationship). *Neil S. v Mary L.* (2011) 199 CA4th 240, 131 CR3d 51. An alleged biological father, however, may have standing when the mother precluded him from becoming a presumed father. See *J.R. v D.P.* (2012) 212 CA4th 374, 390, 150 CR3d 882.

#### **d. [§1.23] Ordering Genetic Testing and Use of Results**

In a civil action or proceeding in which paternity is a relevant factor, genetic testing may be ordered and used to establish paternity, as well as in situations where a prior paternity presumption, finding, or judgment is being challenged. Fam C §§7550 et seq. The court may order such testing on its own initiative, or upon suggestion made by or on behalf of any person involved, and shall order it upon motion of any party, if made at a time so as not to delay the proceedings. Fam C §7551.

There is a rebuttable presumption of parentage if the court finds that a person has at least a 99 percent probability of parentage, using a prior probability of 0.50, as calculated by using the combined relationship index, and a combined relationship index of at least 100 to 1. Fam C §7555(a)(1) and (2). See [§1.26](#).

There are time limits where testing can be ordered in certain types of cases, such as in cases involving the conclusive presumption (see [§1.15](#)), or in proceedings to set aside a voluntary declaration of paternity (see [§§1.13 and 4.164](#), and compare [§4.165](#)). Care should be taken to determine the nature of the action and basis for the request.

There are also some situations in which genetic testing or test results may not be used at all to challenge paternity, including older cases with a final judgment of paternity on or before September 30, 1980, cases brought under Fam C §7613 (assisted reproduction), or a case in which the wife, with consent of the husband, conceived by means of a surgical procedure. Fam C §7541(d).

#### **e. [§1.24] Gender-Neutral Application of the Laws**

Although the term "paternity" is used in many of the statutes in this parentage chapter, in light of Fam C §297.5, the domestic partnership law, and *Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683, they should be read to be gender-neutral and also apply to females. Family Code §7650 provides that the UPA provisions applicable to determining a father and child relationship shall be applied insofar as practicable to "an action to determine the existence or nonexistence of a mother and child relationship." Furthermore, *Elisa B. v Superior Court* (Emily B.) (2005) 37 C4th 108, 119–120, 33 CR3d 46; *S.Y. v S.B.* (2011) 201 CA4th 1023, 134 CR3d 1; and *E.C. v J.V.* (2012) 202 CA4th 1076, 136 CR3d 339 (includes factors to be considered by the trial court in making a Fam C §7611(d) determination involving same-sex couples) all confirm the application of Fam C §7611(d) to same-sex couples. See also *L.M. v M.G.* (2012) 208 CA4th 133, 145 CR3d 97, which held that a single-parent adoption does not necessarily preclude the court from determining that a child may have a second same-sex presumptive parent. Compare [§1.14](#).

### f. [§1.25] More Than Two Parents

In an appropriate action, a court may find that more than two persons with a claim to parentage are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court must consider all relevant factors, including the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and psychological needs for care and affection, and who assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage. Fam C §7612(c). By adopting §7612(c), the Legislature intended to abrogate *In re M.C.* (2011) 195 CA4th 197, 223, 123 CR3d 856, which held that when three people qualify as presumed parents for a child, the trial court must reconcile the competing presumptions and find only two parents. Stats 2013, ch 564, §1(b).

### g. [§1.26] Rebuttal Evidence

Presumed father status under Fam C §7611 may be rebutted in an appropriate action by clear and convincing evidence. Fam C §7612(a). A father's admission that he is not the biological father does not necessarily rebut the presumption when he has taken the child into his home and held the child out as his natural child. *In re Nicholas H.* (2002) 28 C4th 56, 63, 70, 120 CR2d 146. Nor does a parent's failure to stay in contact or support the child necessarily rebut the presumption. *In re J.O.* (2009) 178 CA4th 139, 147–150, 100 CR3d 276. A person's offer or refusal to sign a voluntary declaration of paternity can be considered as a factor, but is not determinative, as to the issue of legal parentage in any proceedings. See Fam C §7612(e), effective January 1, 2020.

Unless the court orders otherwise when more than two persons claim parentage (see discussion in §1.25), the presumption is rebutted by a judgment establishing parentage of the child by another person. Fam C §7612(d). A judgment of paternity for "child support purposes" is a paternity judgment within the meaning of Fam C §7612(d) and rebuts Fam C §7611(d) presumptions. *In re Cheyenne B.* (201 2) 203 CA4th 1361, 138 CR3d 267.

➤ **JUDICIAL TIP:** When the children are in foster care, there may already be a finding of parentage in the juvenile court. It is worthwhile to establish a protocol for cross-referencing cases to avoid duplication of effort. Note also that at times the man found to be the presumed father in the dependency case is *not* the biological father. If he is found to be the presumed father in the juvenile court, he is the legal father for support purposes. A parentage finding in a Title IV-D court for support purposes, however, may not be binding on a Dependency Court as to presumed father status.

A presumption of paternity resulting from genetic tests that produced a paternity index of 100 or greater may be rebutted by a preponderance of the evidence, even when the paternity index is high. *City & County of San Francisco v Givens* (2000) 85 CA4th 51, 55–56, 101 CR2d 859.

A voluntary declaration of paternity, if properly signed and filed after 1996 and never rescinded or set aside, rebuts a rebuttable presumption of paternity under Fam C §7611(d). *Kevin Q. v Lauren W.* (2009) 175 CA4th 1119, 1136–1139, 95 CR3d 477; *In re Levi H.* (2011) 197

CA4th 1279, 1287–1290, 128 CR3d 814. *Note*: These cases only involved the Fam C §7611(d) presumption, and may or may not rebut the other rebuttable presumptions.

## 6. [§1.27] Parentage by Estoppel

The elements of parentage by estoppel exist where, although biological parentage is unknown or lacking, the facts show that (*Clevenger v Clevenger* (1961) 189 CA2d 658, 671, 11 CR 707; see *Marriage of Johnson* (1979) 88 CA3d 848, 850, 152 CR 121; *Marriage of Valle* (1975) 53 CA3d 837, 840–841, 126 CR 38; *Guardianship of Ethan S.* (1990) 221 CA3d 1403, 1415–1417, 271 CR 121):

- The father or mother has expressly or implicitly represented to the child that he or she is the father or mother;
- He or she has intended that the representations be accepted and acted on by the child;
- The child relied on the representations and treated him or her as its father or mother and gave its love and affection to the father or mother; and
- The child was ignorant of the true facts.

The court in *County of San Diego v Arzaga* (2007) 152 CA4th 1336, 1347–1348, 62 CR3d 329, added a new element to parentage by estoppel: the doctrine of parentage by estoppel cannot be applied to an alleged father unless he knows he is not the father of a child even though he represents to the child he is the father.

The rationale of *Clevenger* is that “[t]he relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted.” *Clevenger v Clevenger, supra*, 189 CA2d at 674. A man who has lived with and treated a child as his son or daughter has developed a relationship that should not be lightly dissolved. This social relationship is much more important, at least to the child, than a biological relationship of actual paternity. *Guardianship of Caralyn S.* (1983) 148 CA3d 81, 86–87, 195 CR 646.

Although the case law in this area refers to “fathers,” it may also be applied to females to establish maternity

Other equitable doctrines apply, including, but not limited to, laches. In practice, laches is defined as an unreasonable delay in asserting an equitable right, causing prejudice to an adverse party such as to render the granting of relief to the other party inequitable. *Marriage of Plescia* (1997) 59 CA4th 252, 256, 69 CR2d 120, citing *Wells Fargo Bank v Bank of America* (1995) 32 CA4th 424, 439, 38 CR2d 521, superseded by statute as stated in 39 C4th 179, 186.

- **JUDICIAL TIP:** Although the bases for parentage under Fam C §7611(d) and parentage by estoppel may seem to be similar theories at first glance, they are quite different. Family Code §7611(d), which establishes parentage by receiving the child into the home and openly holding out the child as one’s natural child, involves representations the alleged parent makes to the world with respect to parentage that leads the world to believe this person is the child’s biological parent. Parentage by estoppel is established based on the representations of parentage the alleged parent makes to the child, leading the child to believe that this person is the child’s biological parent. The court looks to whom the representation is made and if it is believed and relied on by that party or parties.

## 7. [§1.28] Assisted Reproduction

If a woman, with consent of her spouse, conceives through physician-supervised assisted reproduction with semen donated by a man other than her husband, the woman's spouse is treated in law as if he or she were the natural parent of a child thereby conceived; the sperm donor is not considered the parent. Fam C §7613. Family Code §7613 specifies mandatory procedures for written consent. Genetic testing may not be used to challenge paternity of the resulting child if the requirements of this statute are met.

## C. [§1.29] Challenging Parentage

Some methods of attacking parentage determinations are discussed above, *e.g.*, rescission of a voluntary declaration of paternity (see §1.13), a motion for genetic tests following application of the conclusive presumption of parentage (see §1.15), and rebuttal evidence to presumed father status and other presumptions (see §1.26).

Other methods of challenging parentage determinations include the following:

- A motion to set aside a voluntary declaration of paternity based on genetic tests. Fam C §7575(b). (Effective until December 31, 2019).
- A motion to set aside a voluntary declaration of paternity on CCP §473 grounds. Fam C §7575(c). (May only be available to non-signatories of the declaration after January 1, 2020. Fam C §7577(k).
- A petition to set aside a voluntary declaration of paternity on grounds of the validity of the declaration or the child's best interest. Fam C §7612(e). (Effective until December 31, 2019.)
- A motion to set aside a judgment when genetic evidence excludes the adjudicated parent from being the biological parent (or "paternity disestablishment"). Fam C §§7645 et seq.
- Other procedures such as a motion for new trial, an appeal, or an action in equity.

For more discussion of these methods of challenging a parentage determination, see §§4.163–4.174.

# IV. DETERMINING INCOME AVAILABLE FOR CHILD SUPPORT

## A. Income Generally

### 1. [§1.30] 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 §§1.33–1.38) and discretionary items (see §§1.39–1.41).

- **JUDICIAL TIP:** The parties should submit Income and Expense Declarations (I&Es) (form FL-150 or, a simplified form FL-155, if eligible) that document each parent's income and provide the information needed to determine gross income. The court should demand these forms if not submitted. The court may have to rely on oral statements in default situations when no information has been submitted by the absent party. Once submitted, the court should verify income with independent records, such as a pay stub

wherever possible, as “self-reported” information is often not as accurate or reliable. (Common example: a full-time bi-weekly earner will often report monthly income on an I&E by multiplying either the net (inaccurate) or gross paystub by two (inaccurate)—when the correct monthly figure is the gross multiplied by 26 (not 24) pay periods, divided by 12).

## 2. [§1.31] 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. Net disposable income will be calculated by the computer program that each court uses for calculating child support.

## B. [§1.32] Types of Income

In order to reach an accurate guideline child support amount, the court must determine the gross income of the parties, considering both the mandatory and discretionary items set forth below.

### 1. [§1.33] 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 [§1.35](#).
- Business and Self Employment income. See [§1.34](#).
- 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 disability benefits in computing parent’s gross income).
- Social Security benefits. For further discussion of Social Security benefits, see [§1.42](#). Military allowances, including housing and food allowances. See *Marriage of Stanton* (2010) 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). For further discussion of military pay and allowances, see [§§2.71–2.72](#).

- 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.
- Tax refunds. A parent’s state and federal income tax refunds should be treated as income when all of the parent’s income tax withholdings and estimated income tax payments have been deducted from gross income. *Marriage of Morton* (2018) 27 CA5th 1025, 1042, 238 CR3d 407.

➤ **JUDICIAL TIP:** Due to special federal statutes, regulations and federal and state case law regarding Indian parties and Indian property, courts need to pay special attention to how support orders are worded. Trust income received by a parent from a tribe may be used in a calculation as the basis for determining one’s ability to provide support, and for which a court may impose a support obligation. However, jurisdiction to enforce such orders is a separate matter, and a best practice concerning support orders in such situations is to avoid requiring that the financial obligation imposed be specifically paid out of, or derived from, Indian trust assets. See also [§4.117](#).

It should also be noted that there is a special rule that allows for the transfer of Title IV-D support cases from the California superior court to the tribal IV-D court when there is concurrent subject matter jurisdiction. Cal Rules of Ct 5.372. See [§§5.37–5.40](#).

#### **a. [§1.34] Business and Self-Employment Income**

The court must consider a parent’s business income, which 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. *Marriage of Rodriguez* (2018) 23 CA5th 625, 634–635, 233 CR3d 187; *Asfaw v Woldberhan* (2007) 147 CA4th 1407, 1425–26, 55 CR3d 323.

➤ **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. [§1.35] 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 an 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 CA4th 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.

- **JUDICIAL TIP:** Bonus schedules can be very useful for judges by eliminating the need of the court to “guess” the probability and amount of a bonus. Most of the child support programs are equipped to produce a printout that can accurately calculate the amount of child support or spousal support that should be applicable to any given bonus.

### c. [§1.36] 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, *e.g.*, 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 a parent 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. See also JUDICIAL TIP in §1.35 regarding bonuses. A bonus schedule can also be used for irregular overtime. Some programs actually contain a separate schedule from the bonus table for additional wages/overtime, which should be used if available.

#### d. [§1.37] 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 inaccurately reflects 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); §1.49.

Stock options that have vested and for which there are no legal restrictions on the employee-parent's ability to exercise the options and sell the shares must be considered as "income" under Fam C §4058(a)(1) whether the parent has or has not actually exercised and sold the shares. *Marriage of Macilwaine* (2018) 26 CA5th 514, 532, 237 CR3d 156.

- 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. [§1.38] Income From Gifts or Inheritances

Although proceeds from inheritances and gifts are generally not considered income for child support purposes (see §1.60), 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); compare *Marriage of Williamson* (2014) 226 CA4th 1303, 172 CR3d 699 (historical gifts not treated as income when gifts ceased before trial and donors testified that they would not resume), *Anna M. v Jeffrey E* (2017) 7 CA5th 439, 455, 212 CR3d 652 (financial support provided by legal stranger does not represent regular, recurrent monetary benefit fairly representing income for purposes of calculating child support). 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*.

## 2. [§1.39] 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). Another area in which the court has discretion is with regard to lottery winnings (see §1.41).

### a. [§1.40] Employment Benefits

Employee or self-employment 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 §1.47), 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 Schlaflly* (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 reduces living expenses as income. First compute net disposable income; then, if there are circumstances making application of the statewide uniform guideline formula (see §1.66) 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 §1.93.

### **b. [§1.41] 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 *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.

## **C. Governmental Benefits**

### **1. [§1.42] Social Security**

Social Security benefits are commonly seen on the Title IV-D calendars, but can easily come up in regular family law cases. The judicial officer must look carefully at the type of benefit to determine if:

- It is income for support purposes;
- It is taxable;
- It is benefits payable to supported children.

See the benefits chart in [Appendix D](#) for a quick reference regarding use for income and taxability.

*Social Security Disability Insurance (SSDI)/Retirement:* Benefits available to workers based on a disability or old age (including survivor’s benefits) are income for calculating child support. Minor children may be eligible for a derivative benefit if the disabled parent is receiving SSDI; that benefit is payable to the custodial parent on behalf of the child. If the disabled parent is the obligor, the derivative benefit should not be considered income to the obligor, rather, it is a credit against the child support obligation. Fam C §4504(a)–(c); *Marriage of Daugherty* (2014) 232 CA4th 463, 181 CR3d 427. Until January 1, 2005, dependent benefit payments (derivative benefits) that exceeded the monthly child support obligation could not be credited to support arrears. *Marriage of Robinson* (1998) 65 CA4th 93, 96–98, 76 CR2d 134. Now, unless otherwise taken into consideration in setting support, the excess of Social Security derivative benefits over current support is to be applied to support arrearages. Fam C §4504(b); *Marriage of Hall & Frencher* (2016) 247 CA4th 23, 201 CR3d 769 (trial court erred in determining derivative Social Security benefits could not be applied towards arrears, to the extent they exceeded monthly support obligation). Payments are credited in the order set forth in CCP §695.221. Fam C

§4504(b). A lump sum payment of derivative SSDI benefits, which often occurs when adjudication of eligibility for SSDI has been delayed, are to be applied to child support arrears or, if there are no arrears, are a credit towards future support obligations. *Y.H. v M.H.* (2018) 25 CA5th 300, 235 CR3d 663.

If notice of these benefits is given, the custodial parent or other child support obligee must contact the appropriate federal agency within 30 days of receiving notification that the noncustodial parent is receiving those payments to verify eligibility for each child to receive the payments because of the disability of the noncustodial parent. If the child is potentially eligible for those payments, the custodial parent or other child support obligee must apply for and cooperate with the appropriate federal agency for the receipt of those benefits on behalf of each child. The noncustodial parent must cooperate with the custodial parent or other child support obligee in making that application and must provide any information necessary to complete the application. Fam C §4504(a).

If the custodial parent or other child support obligee refuses to apply for those benefits or fails to cooperate with the appropriate federal agency in completing the application when the child or children are otherwise eligible to receive those benefits, the noncustodial parent is entitled to a credit against the court-ordered amount of child support to be paid for that month. The credit must be in the amount of payment that the child or children would have received that month had the custodial parent or other child support obligee completed an application for the benefits, so long as evidence is provided indicating the amount the child or children would have received. The credit for those payments must continue until the child or children would no longer be eligible for those benefits, or the order for child support for the child or children is no longer in effect, whichever occurs first. Fam C §4504(c).

- **JUDICIAL TIP:** Anytime an obligor is receiving SSDI, an inquiry must be made if the children are receiving derivative benefits. This is because only the custodial parent can apply for such benefits, and sometimes the obligor is unaware of the fact that they are being received and/or of the amount received for the child(ren). More importantly, if the court is ordering the noncustodial parent to pay support, Fam C §4504 actually directs the court to make appropriate orders in this situation depending upon the facts. Fam C §4504(b)–(c).

*Supplemental Security Income (SSI):* Benefits available to disabled persons who are indigent are not income for calculating child support because SSI is means-tested like welfare. Fam C §17516; *Elsenheimer v Elsenheimer* (2004) 124 CA4th 1532, 1536–1537, 22 CR3d 447; *In re S.M.* (2012) 209 CA4th 21, 29–30, 146 CR3d 659; see also CSS Letter 02–15. An SSI award for a California resident may have an SSP (State Supplemental Payment) portion that compensates for food stamps. If there is a small SSP portion, only that amount can be used to set and enforce child support.

- **JUDICIAL TIP:** When obligor is only receiving SSI or SSI/SSP, child support is typically reduced to zero, along with a zero payback on arrears, and the DCSS case is closed without further enforcement on existing arrears.

## 2. [§1.43] State Disability

Benefits received by injured workers through the State Disability Insurance program are nontaxable income that can be used to set and enforce child support.

### 3. [§1.44] Workers' Compensation

Workers' compensation benefits received by injured workers are nontaxable income that can be used to set and enforce child support.

- JUDICIAL TIP: Workers may elect a taxable benefit for private plans.

### 4. [§1.45] Unemployment Compensation

Benefits received by unemployed workers are income for setting support; the benefits are subject to federal but not California state tax.

- JUDICIAL TIP: There are detailed lines in the support programs for inputting unemployment to get the right tax effect.

### 5. [§1.46] Military Pay and Veteran's Benefits

The availability of military pay and veteran's benefits for support is discussed in [§§2.71–2.73](#).

## D. [§1.47] 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 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 [§1.63](#).

- JUDICIAL TIP: It is sometimes hard to distinguish between allegations that the income of a parent's “new spouse or partner” should be used when calculating child support

versus allegations that the court should base child support on the “earning capacity” of that parent because the new spouse or partner income has allowed that parent to reduce their income below their earning capacity. See §§1.50–159. How the court treats such allegations will depend on a number of factors. For example, if the moving parent does not raise the issue of new spouse or partner income, but raises the issue of voluntary reduction in income (*i.e.*, “working below their earning capacity”), then the court may want to treat the matter as an earning capacity case and impute income to the nonmoving spouse based on their 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 make a determination as to how to treat that new spouse or partner income.

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 and 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. [§1.48] 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, only 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 & 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 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 an admission of 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 income, expenses, and assets when high earner stipulates to 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. [§1.49] 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 inaccurately reflects 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 2- or 3-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 too short a 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.

- **JUDICIAL TIP:** The use of year-to-date numbers from a litigant’s paycheck can be tricky. If the paycheck is from early in the year and, if the first paycheck in January includes any part of December, the year-to-date amount could be grossly misleading.

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

### 1. [§1.50] 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.

- **JUDICIAL TIP:** Earning capacity and the concept of income imputation discussed here should not be confused with an entirely different concept known as presumed income, which is a separate statutory rule applicable only in Title IV-D cases that allows the use of presumed minimum wage in certain situations. See §§1.58, 4.159.

## 2. Ability and Opportunity to Work

### a. [§1.51] 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 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 quit attorney position at large law firm to raise children, when returning to work was in best interests of children).

### b. [§1.52] Loss or Lack of Employment and Under-Employment

The circumstances surrounding a parent’s loss of employment, continued lack of employment and/or under-employment, including the parent’s motivation for reducing available

income may be considered by the court in exercising its discretion to determine a parent's earning capacity. *Marriage of Bardzik* (2008) 165 CA4th 1291, 83 CR3d 72. The basic principles were summarized by the court in *Marriage of Eggers* (2005) 131 CA4th 695, 700, 32 CR3d 292:

When a supporting parent quits a job, the trial court has discretion to conclude the parent's conduct reflected a divestiture of resources required for child support obligations. It may refer to the former job as the basis for its findings of ability and opportunity and may impute income to the parent based on his or her prior earnings. When a supporting parent loses a job, the trial court may impute income to that parent based on his or her earning capacity if the amount of income imputed is supported by evidence of opportunity and ability to work reflecting that level of income.

See also *Marriage of McHugh* (2014) 231 CA4th 1238, 1242, 180 CR3d 448 (parent who voluntarily left job as part of scheme to reduce income available for support may be imputed income at former level without evidence parent has current opportunity to earn at that level).

Loss of a job because of misconduct, may not necessarily be considered 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 emails 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.

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*. See also *Marriage of Lim & Carrasco* (2013) 214 CA4th 768, 154 CR3d 179 (mother allowed to reduce work schedule to 80 percent and earning capacity not imputed based on previous full-time income as lawyer so as to allow her more time to care for the children). 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 Khera & Sameer* (2012) 206 CA4th 1467, 143 CR3d 81 (court affirmed reduction of support to zero to supported spouse who chose to enroll in doctoral program rather than to complete MSW which would have led to job earning over \$42,000 a year as social worker), *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).

- **JUDICIAL TIP:** If a parent has qualified for and is receiving unemployment benefits after the loss of a job, that piece of information is indicative of another agency having determined that the loss of employment was not voluntary. If the loss of employment was voluntary or due to misconduct, the individual is disqualified from receiving benefits. Un Ins C §1256. It is helpful to get information surrounding a parent's overall situation whenever possible. One common situation where imputing income may be appropriate is one in which a parent (supporting parent or supported parent) voluntarily leaves a job in order to be a stay at home parent for a *different* child, *e.g.*, a newborn beyond the traditional parental leave timeframe, or young child from another relationship to save on child care costs.

### c. [§1.53] 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 to show 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.

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 cannot provide support and that requires the recipient to either seek employment or to prepare for employment through, for example, educational programming instead of full-time work. *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 previous job and could not find employment thereafter). 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. [§1.54] 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 DCSS 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.

There is a separate statute that states every money judgment or order for support of a child shall be suspended, by operation of law, for incarcerated or involuntarily institutionalized individuals under specified conditions, and shall then resume upon release. Fam C §4007.5(a)–(b). The statute further provides a process, when DCSS is involved in the case and providing services, for arrears to be adjusted for qualifying periods of incarceration or institutionalization. Fam C §4007.5(c). The statute is not exclusive: obligors can still file for modification based upon changed circumstances and anyone can separately petition the court for a determination of child support or arrears amounts. Fam C §4007.5(b), (d).

For a discussion of the predicate conditions and the process for adjustment of arrears due to the suspension of the support obligation, see §§4.192, 5.51.

### 3. [§1.55] 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 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 earning capacity. *Marriage of Simpson, supra*, 4 C4th at 236.

### 4. [§1.56] Considering Children’s Best Interests

The statute authorizing consideration of a parent’s earning capacity in lieu of actual income limits such consideration to circumstances “consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children.” Fam C §4058(b); see also *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 quit attorney position at large law firm to raise children, when 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 salary as investment in company but continued to live extravagantly off of sizeable assets, precluding children from sharing benefits of parent’s current standard of living); see also *Marriage of Sorge* (2012) 202 CA4th 626, 134 CR3d 751. But see *Marriage of Lim & Carrasco* (2013) 214 CA4th 768, 154 CR3d 179 (parent allowed to reduce work schedule to 80 percent and earning capacity not imputed based on previous full-time income as lawyer so as to allow more time to care for children).

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. Effective January 1, 2019, Fam C §4058(b) was amended to give further guidance on the issue of the children’s best interest that is especially relevant to the circumstances of the parent who does not work or who limits work to care for children. Language was added requiring the court to take “into consideration the overall welfare and developmental needs of the children, and the time that the parent spends with the children.” 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. [§1.57] 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 parental obligations by reducing earning capacity through unemployment or underemployment, a parent cannot 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. See also *Marriage of Usher* (2016) 6 CA5th 347, 363, 210 CR3d 875 (trial court abused discretion by imputing an unreasonably low 1 percent rate of return to supporting parent’s tens of millions of dollars in assets).

A court may consider a parent’s “substantial” wealth under the principles that a parent must support his or her children according to parent’s circumstances, station in life, and ability, and that children should share in their parents’ standard of living. Fam C §4053(a), (d), (f); *Marriage of Usher*, *supra*, 6 CA5th at 360; *Marriage of Cheriton* (2001) 92 CA4th 269, 292, 111 CR2d 755; *Marriage of Berger* (2009) 170 CA4th 1070, 1084–1085, 88 CR3d 766.

## 6. [§1.58] Presumed Income in Title IV-D Cases

Fam C §17400(d)(2) provides that if a support obligation is being established by a local child support agency and the obligor's income or income history is not known, income is presumed at minimum wage for 40 hours per week. Once made, presumed income judgments or orders can be set aside and replaced with orders based on actual income, beyond the customary time limits for orders under CCP §473. Fam C §17432. See [§4.159](#).

## 7. [§1.59] Seek-Work Orders

After considering the earning capacity of each parent in calculating child support or in assessing the employment status of the parties, the court may require a parent to participate in job training, vocational rehabilitation, or work placement programs (Fam C §3558), or require an unemployed parent who has defaulted in support payments to submit to periodic proof of applications for employment (Fam C §4505(a)). These are often referred to as “seek-work orders” or “work search orders.” The parent subject to the order must document regular participation so the court may make a finding of good-faith attempts at job training and placement. Fam C §3558. See [Appendix C](#) for example of Work Search Order from the Superior Court of San Francisco.

If a parent is on CalWORKs (receiving cash public assistance; see Welf & I C §§11200 et seq) and is complying with the terms of that welfare-to-work program, the court may not order that parent to seek work. *Barron v Superior Court of Santa Clara County* (2009) 173 CA4th 293, 300, 92 CR3d 394.

It is up to the court to manage the cases involving seek-work orders, as it deems appropriate, including by calendaring regular compliance review dates as needed. In some cases, the court may simply order the party to provide the logs to the other party, or to the other party's counsel, and to notify them when employment is found. In many cases, especially in Title IV-D courts, the party is ordered to return to court for work-search review, and a failure to appear may result in the issuance of a civil bench warrant. See [§3.38](#).

- **JUDICIAL TIP:** Some courts, especially Title IV-D courts, have established *specialized* calendars to address these cases when one or both parents are under a seek-work order and must return to court regularly to determine if they are in compliance. This gives the court some flexibility and an opportunity to develop a more focused approach to addressing any barriers that may exist for individuals seeking work (*e.g.*, a criminal record, lack of high school education, etc.) and make appropriate referrals for resources that may exist within that county. Under Fam C §4505(a) some counties include, in the default judgments submitted to the court, a separate court-ordered work search provision in the event the respondent is unemployed; the provision requires log sheets to be submitted to the LCSA.

When the party being brought to court for a seek-work order is in default of their payments, an “alternative” order may be effective to get the party back on track. For example, the seek-work order requires the obligor to comply with all of the work-search requirements, *or in the alternative*, relieves the obligor from those requirements if they pay their current order in full, plus something towards any arrears, each and every month. This

can relieve the court or the LCSA from having to review work-search logs if a person gets themselves back on track, and can be helpful when a person claims to be self-employed. In cases where a party is in essence not looking in good faith, the court does have alternatives, on the appropriate request and proof, for example, to impute income (see §§1.51–1.59), or the other parent or LCSA may pursue another legal remedy, such as contempt. However, with the advent of “realignment” of certain state criminal cases down to the local level, counties are now grappling with more prisoners and consequently, are instituting more alternatives to pure incarceration (*e.g.*, ankle monitoring, restricted half-way housing, etc.), so courts will need to take into consideration any such restrictions before issuing a traditional seek-work order that may lead to contempt.

See [Appendix C](#) for an example of a seek-work order.

## H. [§1.60] 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). For further discussion of SSI benefits, see §1.42.
- JUDICIAL TIP: Although SSI is need based, basic Social Security retirement benefits are not, and thus are included in gross income.
- 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 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 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 §1.38.

- 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 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 from sale of business in which he or she was majority stockholder. *Marriage of Pearlstein* (2006) 137 CA4th 1361, 1375, 40 CR3d 910.

## I. [§1.61] 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 net disposable income given the exemptions input by the party.

- 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 §1.47.
- Federal Insurance Contributions Act (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 §§1.62–1.64.

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 §1.66.

## J. Hardship Deduction

### 1. [§1.62] 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. [§1.63] Support of Other Children Residing With Parent

If a parent is experiencing extreme financial hardship due to an 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).

- **JUDICIAL TIP:** All of the child support computer programs will calculate the exact amount of the hardship deduction after a determination by the court of the number of hardship deductions and/or percentage of hardship (1–100 percent) it wishes to apply.

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. [§1.64] 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. SETTING CHILD SUPPORT**

### **A. Statewide Uniform Guideline**

#### **1. [§1.65] Based on Federal Requirements**

Federal regulations require states to establish one set of guidelines, by law or by judicial or administrative action, for setting and modifying child support award amounts within a state. 45 CFR §302.56(a). The California Legislature adopted the Statewide Uniform Child Support Guideline in 1992. Fam C §§4050 et seq. Under 45 CFR §302.56(f), the state guideline must provide that there be a rebuttable presumption, in any judicial or administrative proceeding, that an award of child support under the statewide guideline is the correct amount of child support to be awarded. See Fam C §4057(a). Under Federal certification requirements related to DCSS's

statewide computer system, all Title IV-D courts are required to use the DCSS created Guideline Calculator program in calculating support. See §1.66.

## 2. [§1.66] State 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 §1.95);
- Expedited child support (see §1.97);
- 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 §1.102); or
- “Family support” (*i.e.*, combined child and spousal support) (see §1.98).

## B. [§1.67] 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 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. Child Support Guideline Formula

### 1. The Guideline Formula and Use of Certified Calculator Programs

#### a. [§1.68] 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. Rather than manually calculating the guideline, judges should use the software employed by their court.

### **b. [§1.69] Using Computer Software to Calculate Support Amount**

Virtually every family court uses computer software 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 six 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)
- Family Law Software
- FamilySoft™ SupportCalc® (Legal+Plus)
- Xspouse™ (Tolapa, Inc.)
- California Guideline Child Support Calculator (California Department of Child Support Services)

In all non-Title 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).

## **2. Guideline Components**

### **a. [§1.70] 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 E](#).

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).

- **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.

Courts are often asked to determine timeshare percentage based on a previously issued order for custody and visitation. Unless the plan is currently being followed or recently agreed to or ordered, it is essentially a “paper” order, and it is more accurate to determine the timeshare percentage based on the custodial time actually being exercised. As one court observed: “A trial court is more likely to arrive at a fair and just adjudication of the parties’ custody situation if it examines the realities of the present situation rather than the possible fictions of a prior order or judgment.” *Marriage of Lasich* (2002) 99 CA4th 702, 716, 121 CR2d 356 (disapproved on other ground in 32 C4th 1072, 1097). Unrepresented parents who complain about the other parent refusing to allow visitation should be referred to the family law facilitator for assistance in obtaining information regarding their parental rights, and how to seek, modify or enforce a custody and visitation order.

### (1) [§1.71] 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 son spends in day care because he pays half the tuition; mother has day-to-day responsibility of son, *i.e.*, burden to find, arrange, front the money, and provide transportation for day care as well as interrupt work days for medical or other emergencies). See also *Marriage of Katzberg* (2001) 88 CA4th 974, 982–983, 106 CR2d 157 (time child spent in boarding school imputed to father with primary custody; father paid for transportation to and from school and incidental expenses; education trust 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 was 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. See §1.100.

- *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).

There is no basis to impute a timeshare factor to a parent simply because the child is older and refuses to visit (a common situation with older teens).

- **JUDICIAL TIP:** The existence or enforcement of a duty of support owed by a noncustodial parent for the support of a minor child is not affected by a failure or refusal by the custodial parent to implement any court ordered custodial or visitation rights granted to the noncustodial parent. Fam C §3556. *Moffat v Moffat* (1980) 27 C3d 645, 165 CR 877 (parent under order to pay support must pay the support even if custodial parent interferes with payor's visitation). Rather, under Fam C §3028, the court may order financial compensation for interference with visitation. Certain types of conduct, however, such as active concealment of the child until the age of majority by the custodial parent, may be a defense to enforcement of a child support order. *Marriage of Damico* (1994) 7 C4th 673, 679–684, 29 CR2d 787. See §4.195.

## (2) [§1.72] 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. [§1.73] 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 §§1.31–1.64 for a comprehensive discussion of determining income available for child support.

### c. [§1.74] 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  $\mathbf{K} = (1 + 0.20) \times 0.25$ , or 0.30. If **H%** equals 80%, and the parents' total monthly net disposable income is \$1,000, then  $\mathbf{K} = (2 - 0.80) \times 0.25$ , or 0.30. Fam C §4055(b)(3).

### 3. [§1.75] 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. [§1.76] Allocation of Child Support Among Children

Unless the court orders otherwise, the child support order must allocate the support so that the amount for the youngest child is the amount 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 [§§1.62–1.64](#).

### 5. [§1.77] Multiple Families

If the obligor is actually paying child support for another child (who is not the subject of the order to be established by the court), the amount of the support payment is to be put on the appropriate line in the computer program as a deduction from the obligor's net disposable income. The parent must have a legal obligation to support that child whether the amount is established by a court order or is a voluntary payment that does not exceed the guideline amount. Fam C §4059(e).

- **JUDICIAL TIP:** If a previously set order is so high in another jurisdiction that it is unfair for the subject child, some judicial officers will temporarily adjust the order to give the obligor a chance to pursue a modification in the other jurisdiction.

If the obligor has child support obligations for more than one family (one or more children with different mothers) that are before the court at the same time, the judicial officer must calculate the child support obligations simultaneously to ensure that an appropriate guideline amount can be determined for each case. It may be necessary to toggle back and forth between calculations (adjusting the other child support amount deduction each time) to reach an amount that complies with the guideline.

### 6. [§1.78] 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).

### 7. [§1.79] Low-Income Adjustment

When the monthly net disposable income of the parent paying child support is less than \$1,755, there is a rebuttable presumption that the parent is entitled to a low-income adjustment. Fam C §4055(b)(7).

*NOTE: Amendments to Fam C §4055(b)(7) raising the net disposable income of the obligor to \$1,500 from \$1,000, adjusted annually for cost-of-living increases by an amount determined by the Judicial Council beginning on March 13, 2013, will sunset January 1, 2021, unless a statute enacted before January 1, 2021, deletes or extends that date. Fam C §4055(d).*

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)):

- $[1755 - \text{Payor's Net Monthly Disposable Income}] / 1755 = \text{Adjustment Fraction}$
- $\text{Presumed Support Amount} \times \text{Adjustment Fraction} = \text{Low-Income Adjustment}$

- **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 §1.67) 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).

### **8. [§1.80] Application of Guidelines to Child With More Than Two Parents**

The Uniform Guideline also applies when a child has more than two parents. The court must apply the guideline by dividing child support obligations among the parents based on income and the amount of time spent by the child with each parent, under Fam C §§4052.5(a), 4053. After calculating the amount of support owed by each parent under the guideline, the presumptively correct amount may be rebutted if the court finds that the guideline's application in such a case would be unjust or inappropriate. See Fam C §4057(b)(5)(A)–(D). If the court makes that finding, it must divide child support obligations among the parents in a manner that is just and appropriate based on income and amount of time spent with the child by each parent, applying the principles set forth in Fam C §4053 and the Uniform Guideline. Fam C §4052.5(b).

### **9. [§1.81] Mandatory Findings and/or Statement of Decision 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.

➤ **JUDICIAL TIP:** If your court does not have a court reporter, the court can either do the support calculation on its own or adopt one presented by the parties as the findings of the court. Printing support calculations on colored paper will make it easily identifiable in the court file.

Attaching a printout of the child support calculation to the order should suffice as to the findings.

Separate from the above, 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. Once requested, the court is obligated to issue a statement of decision even if the requesting spouse thereafter waives the request and the other spouse failed to make a similar request. See *Marriage of Sellers* (2003) 110 CA4th 1007, 2 CR3d 293.

A script for an order for child support is set forth in [Script J](#).

## D. Additional Child Support

### 1. [§1.82] Mandatory Add-Ons

Under Fam C §4062(a) 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. Fam C §4062(a)(1).
- Reasonable uninsured health care costs for the children as provided by Fam C §4063. Fam C §4062(a)(2).

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 reimburse or pay remaining costs within the period specified by the court. If no time period is specified, payment or reimbursement must be made within a reasonable time not to exceed 30 days from notification of the amount due, 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 first pay the requested amount before seeking 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 attorney's 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 its costs and any care or treatment obtained under this coverage that exceed costs that would incur under 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.
- ☛ JUDICIAL TIP: Once an amount owed for medical reimbursement is fixed by court order, if the case is being serviced by DCSS, the LCSA can set up a separate medical account and will provide collection services, along with enforcement of child support obligations.

## 2. [§1.83] Discretionary Add-Ons

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

- Costs related to the children's educational or other special needs. Fam C §4062(b)(1).
- Travel expenses for visitation. Fam C §4062(b)(2). 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-on expenses. *Boutte v Nears* (1996) 50 CA4th 162, 165–167, 57 CR2d 655 (court may not order attorney's 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. [§1.84] 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. [§1.85] 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 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 is deemed not reasonable unless the court determines that it is unjust and inappropriate to not require medical support and states its reasons on the record. 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).

The responsible parent may be able to obtain coverage for the minor children through the California Health Benefit Exchange (also called Covered California). Govt C §§100500 et seq. If a responsible parent is eligible to claim the children as a dependency tax exemption on the federal tax return, the parent also may be eligible for income-based federal subsidies for reduced cost coverage through the California Exchange. The parent eligible to take the children as a dependency exemption is the parent responsible under the individual mandate of the federal Patient Protection and Affordable Care Act (42 USC §§300gg-11, 18001 also referred to as the “ACA”) to provide health insurance coverage for the minor children unless determined to be exempt. The implications under the ACA regarding which parent is eligible for the dependency exemption should be considered when evaluating whether to allocate the dependency exemption. Other health care coverage such as Medi-Cal, other state coverage plans, and cash medical

support meet the requirement for medical support. For further discussion on this subject, see [§1.82](#).

If a parent is incarcerated, the trial court may still order health insurance for the child, should it become available at reasonable cost. *El Dorado County DCSS v Nutt* (2008) 167 CA4th 990, 994, 84 CR3d 523.

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 on 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. In situations where 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 on the providing parent, the court order shall require the parent who has been providing coverage to seek continuation if it is available at no or reasonable cost. Fam C §3751(c).

## E. Departing From Guideline Formula

### 1. [§1.86] 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 [§§1.87–1.93](#)) is found to be applicable by a preponderance of the evidence. Fam C §4057(b).

See [Script F](#) for a sample script for use when finding grounds to depart from the guideline amount.

#### a. [§1.87] 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).

A stipulated amount for child support can be either an above-or-below guideline amount. However, 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. A recipient of cash aid cannot enter into a stipulated support agreement since their rights have been assigned to the government (and their signature is not needed if the child support agency is presenting a stipulation for a guideline amount). However, the child support agency cannot sign a stipulated agreement ordering a below guideline amount if the children are receiving cash public assistance (*e.g.*, CalWORKS) or if there is a pending application for such aid. In all other cases, the agency cannot sign a stipulated agreement 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 §1.94). *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.

#### **b. [§1.88] Deferred Sale of Home Order**

The court may adjust a presumptively correct guideline figure if sale of the family home where 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, *Duke* orders have become more rare.

#### **c. [§1.89] Extraordinarily High-Income Payor**

The court may adjust a presumptively correct guideline 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). If the court decides to make such an adjustment, the court must also make the required findings. See §1.94.

- JUDICIAL TIP: Before making a determination on whether a party has such a high income that the guideline should not be followed, it is important first to run the support calculations to examine what resources are available to the child and parents.

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 income, see §1.48.

### **(1) [§1.90] “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) [§1.91] 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.

Failing to apply the correct legal standard under Fam C §4057(a)(3), as well as failure to provide the explanatory findings required by Fam C §4056(a) can result in reversal of the trial court's order. See *Marriage of Macilwaine* (2018) 26 CA5th 514, 237 CR3d 156.

### **d. [§1.92] Disparity Between Support and Custodial Time**

The court may adjust a presumptively correct guideline figure when a parent is not contributing to the children's needs at a level commensurate with that parent's 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.

### **e. [§1.93] Special Circumstances Render Formula Unjust or Inappropriate**

The court may adjust a presumptively correct guideline figure in a case when 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)–(D)):

- The parents have different time-sharing arrangements for different children. Fam C §4057(b)(5)(A).
- 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. Fam C §4057(b)(5)(B).
- The children have special medical or other needs that could require child support that would be greater than the formula amount. Fam C §4057(b)(5)(C).
- A child is found to have more than two parents. Fam C §4057(b)(5)(D).

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/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).
- *Children have special needs.* *Marriage of Rodriguez* (2018) 23 CA5th 625, 634–635, 233 CR3d 187. The trial court did not err in deviating from guideline where the parties’ three children had special needs due to fetal alcohol syndrome known to parties when children were adopted.

➤ **JUDICIAL TIP:** In considering this issue, the court will need to look at the obligor’s net disposable income, to determine—if the obligor were required to pay the full guideline amount—would it leave the obligor enough to meet very basic living expenses. Very basic means just that, and, as a rule of thumb, generally only includes rent (must be reasonable and only that person’s share), food for oneself (not others in household), basic utilities, and basic phone service.

- *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 9-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 “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.

Cases that involve more than two parents are not common, and are very fact specific. Once a guideline amount is determined (see §§1.68–1.81), the court has the authority to depart from the guideline amounts if application of the guideline would be unjust or inappropriate due to special circumstances. Fam C §4052.5(b). Appropriate findings must be made. See §1.80.

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 discretionary expenses to pay the guideline. *Marriage of Denise & Kevin 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, *i.e.*, when the custodial parent relocates with the child or children requiring travel for parenting time with the noncustodial parent, 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 §1.83 (travel expenses for visitation as discretionary add-on).

## 2. [§1.94] 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. See also *Y.R. v A.F.* (2017) 9 CA5th 974, 215 CR3d 577 (trial court’s order for support less than guideline in a high-income earner case reversed for failure to make the required findings).

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); *Marriage of Macilwaine* (2018) 26 CA5th 514, 237 CR3d 156 (court failed to apply correct legal standard in high-income earner case, and also failed to make required findings under Fam C §4056(a)). 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.

See [Script F](#) for a sample script for use when finding grounds to depart from the guideline amount.

## F. [§1.95] 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 Hamer* (2000) 81 CA4th 712, 717, 97 CR2d 195, superseded by statute on other grounds as stated in 39 C4th 179. See *Marriage of Fellows* (2006) 39 C4th 179, 203, 46 CR3d 49 (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.

### G. [§1.96] Foster Care, Caretaker, or Third-Party Cases

The formula for computing child support in foster care situations is clearly outlined in Fam C §17402(c). Both parents have an equal duty to support their minor children. Fam C §3900. The child support obligation owed by the parent or parents of a minor child placed into a facility or with a caretaker is not based on the amount of monies the government spends to care for the minor child but on the respective incomes of the parent or parents. Fam C §17402(d); *Ohio v Barron* (1997) 52 CA4th 62, 69–70, 76–77, 60 CR2d 342.

Parents are responsible for reimbursing the county if their minor child or children are placed voluntarily or involuntarily into a foster care placement receiving public assistance. *County of San Mateo v Dell J.* (1988) 46 C3d 1236, 1244, 1246, 1250–1252, 252 CR 478. If neither parent remains the custodial parent but the parents reside together, the guideline child support is computed by combining both noncustodial parents' incomes. No income, wages, or earnings are attributed to the caretaker or the governmental agency. Because both parents have a duty to support the minor child based on their respective incomes, the guideline support resulting from the combined use of the parents' incomes is proportionately shared between the noncustodial parents based on their net monthly disposable incomes. Fam C §17402(c)(2).

When the parents of a minor child do not reside with each other or with the minor child, then the guideline child support is calculated separately, treating each parent as the noncustodial parent. Again, no income is attributed to the child's caretaker or the government. Fam C §17402(c)(3). Because each parent has a separate and independent obligation, the cases do not need to be heard simultaneously.

Whether the guideline child support is reached based on combining the incomes of cohabitating noncustodial parents or parents who live separately, the visitation factor is based on the actual visitation (**H%** factor) exercised by one or both of the parents. See Fam C §4055(b)(1)(D). The issue for the court when attempting to calculate the visitation in these situations is one of *primary physical responsibility*. The court has to decide when calculating time-share if the noncustodial parent or parents should be credited for visitation time spent with a minor child at a government-funded facility or home.

For example, should the noncustodial parent receive credit for visiting with the minor child for 2 hours every Saturday at a children's home? Or is no visitation credit given because primary physical responsibility remains with the government facility or caretaker? See *Marriage of Katzberg* (2001) 88 CA4th 974, 106 CR2d 157, discussed in §1.71. Additionally, the court needs to look at the financial expenditures of the noncustodial parent when exercising visitation with the minor child. The legislative intent is to reduce the child support obligation for a noncustodial parent who is visiting with a minor child and therefore expending monies for the child's care. These are issues of fact that must be addressed on a case-by-case basis.

A parent is not bound to compensate another for the voluntary support of the parent's child without an agreement for compensation. Fam C §3951; *Plumas County DCSS v Rodriguez*

(2007) 161 CA4th 1021, 1028, 76 CR3d 1. In response to *Plumas*, DCSS issued a policy letter stating that *Plumas* should be limited on its facts, and the ruling only impacts cases where public assistance is not being provided. The policy letter instructs LCSAs to continue to provide services to third-party applicants who are guardians of the person for the child in their custody. In existing cases payments may be redirected to a third-party caregiver, if the custodial parent submits a notarized written authorization, or signs an authorization at the LCSA. CSS Letter 10-04.

A parent has agreed to the payment of child support to a stepparent by appearing at a child support hearing, asking the court to order child support, not appealing the decision, and paying the ordered child support. *Marriage of Schopfer* (2010) 186 CA4th 524, 530, 112 CR3d 512.

See §2.46–2.61 for discussion of crossover issues that can affect calculation of support.

## H. [§1.97] 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 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. [§1.98] 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 §§92, 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.

### ➤ JUDICIAL TIPS:

- Although in some circumstances the parties may benefit from a family support order, the court should make such an order only if the litigants clearly understand its consequences. Many self-represented litigants, particularly the recipients of the support, are not aware that they are required to pay taxes on the entire sum received and, therefore, should either put money away for that eventuality or pay estimated taxes.
- Care should be taken so that no part of the family support order relates to a date within 6 months of an event within a child’s life, such as a birthday, graduation from high school or college, death, marriage, etc. See IRC §§71, 215 and Treas Reg §1.71-1T, Q-16, 17, and 18). Otherwise, the amount related to such an event may be determined by the IRS to be child support, and the tax benefit of such an order would be lost.

## J. Duration of Obligation to Pay Child Support

### 1. [§1.99] Termination Upon Emancipation

A child support ordered during a proceeding continues in effect until it is terminated by the court or terminates by operation of law. Fam C §3601. A parent’s duty to pay child support normally terminates when the child reaches age 18. However, a parent’s obligation to pay support for an unmarried 18-year-old child who is a full-time high school student and not self-supporting 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 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)),
- The child (of any age) is incapacitated from earning a living and is without sufficient means within the meaning of 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. See §1.100—below, or
- It otherwise ends by operation of law. See §1.101.

## 2. [§1.100] Adult Disabled Child

Under Fam C §3910, each parent has an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means. A child support obligation can continue beyond the date of emancipation, or commence after emancipation, if the child is disabled within the meaning of the statute. *Marriage of Cecilia & David W.* (2015) 241 CA4th 1277, 194 CR3d 559 (jurisdiction existed to rule on support issue raised 5 years after marital settlement agreement provision on support had expired for alleged adult disabled child).

The test to determine the applicability of Fam C §3910 is a two-prong test: the adult child must be: (1) “incapacitated from earning a living,” and (2) “without sufficient means.” Where there is a dispute over capacity, the court’s inquiry must focus not on the adult child’s conditions and their potential impact on employment, but rather on the ability to find work or become self-supporting in light of such conditions. Vocational evidence is likely necessary. *Marriage of Cecilia & David W.*, *supra*, 241 CA4th at 1288 (evidence insufficient). The question of “sufficient means” must be examined in terms of the likelihood a child will become a public charge. *Marriage of Drake* (1997) 53 CA4th 1139, 1154, 62 CR2d 466. It is not measured in terms of the parents’ standard of living. *Marriage of Cecilia & David W.*, *supra*, 241 CA4th at 1287 (error to consider parents’ standard of living in context of minimum wage ability); compare *Marriage of Terri & Glenn Richard Drake* (2015) 241 CA4th 934, 941, 194 CR3d 252 (although tuition, room, and board covered by school district, there were other necessary expenses not covered, putting adult disabled child at risk of becoming 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. *Marriage of Drake*, *supra*, 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.

Finally, the court may, if the facts warrant it, order that the payments be made directly to the adult disabled child or his or her legal representative (or any other reasonable alternative). *Marriage of Terri & Glenn Richard Drake*, *supra*, 241 CA4th at 942 (adult disabled child lived in residential facility).

## 3. [§1.101] Termination by Operation of Law

In dependency cases, the child support obligation ceases from the date of the order terminating parental rights. *County of Ventura v Gonzales* (2001) 88 CA4th 1120, 1123–1124, 106 CR2d 461.

The child support (and custody) provisions of a paternity judgment are *nullified* when the parents marry, and are replaced by the law governing the rights and obligations of married parents on their separation or divorce. *Marriage of Wilson & Bodine* (2012) 207 CA4th 768, 776–777, 143 CR3d 803.

In addition, the birth parents of an adopted child are relieved from all parental duties and responsibilities from the time of adoption. Fam C §8617(a). The termination of these duties and responsibilities, however, may be waived if both the existing parent(s) and the prospective adoptive parent(s) sign and file a waiver with the court any time before finalization of the adoption. Fam C §8617(b).

*Procedural Note:* The dismissal for delay in prosecution of a dissolution or legal separation action is prohibited if there is a child or spousal support order in place that has not been terminated. CCP §583.161(a)–(b). Effective January 1, 2014, the prohibition was expanded to include custody and visitation orders, DVPA restraining orders, when issues have been bifurcated and a separate trial has been conducted, and in actions under Fam C §299 (domestic partnerships), Fam C §2250 (annulment), and Fam C §7600 (UPA). CCP §583.161(a), (c)–(d).

### **K. [§1.102] 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 CR3d 722. The court has the power to modify a child support order, upward or downward, regardless of the parents' agreement to the contrary, and is not bound by any language in orders that purport to make child support “non-modifiable.” *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. A substantial change in circumstances can mean a change affecting the amount of support by at least 20 percent or \$50, whichever is less. 22 Cal Code Regs §115535(a)(3). 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 §1.94.

If the parties 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 increase support to or above the guideline amount. 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 modification of that order to decrease support to or below the applicable guideline amount. *Marriage of Laudeman, supra*, 92 CA4th at 1015–1016.

An order may be modified or terminated at any time except as to an amount that accrued before the date of the filing of the motion, order to show cause or request for order. Fam C §§3603, 3651(c). See §§1.105–1.106 regarding retroactivity of child support orders.

When Title IV-D services are being provided, see §§5.34–5.36 for information on modification and enforcement of support orders, as well as the required review and adjustment process done by the LCSA prior to filing its own motion to modify.

#### **L. [§1.103] Setting Aside Child Support Order**

The court may relieve a party from all or any part of a support order, on any terms that may be just, separate from the 6-month time limit of CCP §473. 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 6 months after the date on which the party discovered or reasonably should have discovered the ground for relief. See Fam C §3691.

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.

For a more detailed discussion on setting aside judgments and orders see §§4.151–4.174.

#### **M. [§1.104] Deduction for Federal Dependency Exemption**

The state court may allocate a deduction for the federal dependency exemption between parents when child support is at issue in order to maximize the amount of support for the children. *Monterey County v Cornejo* (1991) 53 C3d 1271, 1280, 283 CR 405.

To claim the exemption deduction, however, the NCP must attach IRS form 8332 (“Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent”), signed by the custodial parent, or a “written equivalent” to the return. See *Moody*, TC Memo 2012-268, \*2 (husband not entitled to dependency exemption due to failure to attach IRS form 8332 to return); *Shenk*, 140 TC No. 10, \*4–5 (husband not entitled under IRC §152(e)(2)(A) to claim dependency exemption or child tax credit when wife did not execute and husband did not attach form 8332 or equivalent to his return); *Armstrong v CIR* (2012) 139 US Tax Ct 468, 473–476 (conditional order that allowed father to claim a dependency exemption deduction for one child if he is current on his child support and directing mother to execute a release (form 8332) was not a written equivalent of form 8332).

- **JUDICIAL TIP:** Keep copies available in the court of IRS form 8332 (online at <https://www.irs.gov/pub/irs-pdf/f8332.pdf>) so that you can direct the custodial parent to execute the form at the hearing if you award the federal dependency exemption deduction to the noncustodial parent. Alternatively, some courts have put language in their orders that authorize the court clerk to sign the form if a parent who has been ordered to sign is unable or has refused to do so (sometimes called an elisor order).

## N. Retroactivity of Child Support Orders

### 1. [§1.105] Initial Order

An original order for child support may be made retroactive to the date of filing of the petition, complaint or other initial pleading. Fam C §4009. The “may” language allows the court to go back to that date, but does not require it.

In addition, if the parent ordered to pay support was not served with the petition, complaint, or other initial pleading within 90 days after the filing and the court finds that the parent was not intentionally evading service, the child support order shall be effective no earlier than the date of service. Fam C §4009.

- **JUDICIAL TIP:** Service of the summons and complaint must generally be accomplished within 3 years of the filing date. CCP §583.210. Where there has been a lengthy period of time between the filing and service of the petition or complaint, it can potentially lead to a large amount of arrearages owed. Where appropriate, the court should determine whether the parent being ordered to pay support was intentionally evading service.

The effective date for expedited child support orders are governed by Fam C §§3624–3525. See §1.97.

The effective date for support in a default situation in Title IV-D cases are governed by Fam C §17430. See §5.19.

### 2. [§1.106] Modifications

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 §§3603, 3653(a); *Marriage of Cheriton* (2001) 92 CA4th 269, 300, 111 CR2d 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*.

An order retroactively modifying a child support order to a date earlier than the filing of a request to modify the order exceeds the court’s jurisdiction. *Marriage of Gruen* (2011) 191 CA4th 627, 639, 120 CR3d 184 (court’s retroactive modification of support order when no modification motion pending exceeded the court’s jurisdiction); see also *Marriage of Tavares* (2007) 151 CA4th 620, 625–629, 60 CR3d 39 (trial court did not err in denying request to reduce child care arrearages based upon the alleged lack of evidence of actual child care payments; such an adjustment would have been an improper retroactive modification of the order for payment of a child care add on). An order prospectively allowing a retroactive modification on the occurrence of certain conditions can also violate the statutory prohibition against retroactive modifications. *Stover v Bruntz* (2017) 12 CA5th 19, 218 CR3d 551. However, in contrast to *Gruen*, if a court specifically reserves jurisdiction and continues the matter to a specific date and time, retroactivity can be applied. *Marriage of Freitas* (2012) 209 CA4th 1059, 147 CR3d 453.

If a modification order is entered due to a change of income resulting from the activation to United States military service or National Guard duty and deployment out of state for either the obligor or obligee, the order must be made retroactive to the later of the date of service of the notice of activation, notice of motion, order to show cause, or date of activation, unless the court

finds good cause not to make the order retroactive and states its reasons on the record. Fam C §3653(c).

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 also order the support obligee to repay any amounts paid in excess of the modified order, and require such 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(d). 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(d)(1)–(4)):

- 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.

## VI. SPOUSAL SUPPORT

### A. [§1.107] 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 generally 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. See [Appendix F](#) for sample worksheet that can be used to ensure all mandatory factors have been considered.

If a spouse has been convicted of domestic violence against the other spouse within 5 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 [§1.26](#). 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.

The authority and issues relating to setting or modifying spousal support in AB 1058 proceedings is discussed in [§5.13](#).

### 1. [§1.108] 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 Ct R 5.70, Santa Clara Ct R 3(C).

- **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.

Note that while use of a certified calculator program is allowed (not mandatory) for setting of temporary child support, its use is essentially prohibited in connection with setting permanent spousal support. See §§1.111–1.112.

## 2. [§1.109] 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. [§1.110] 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 RFO 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. However, unlike in *Marriage of Gruen*, if the trial court specifically reserves jurisdiction on a nonfinal order and continues the case to a specific date and time, retroactivity can be applied. *Marriage of Freitas* (2012) 209 CA4th 1059, 147 CR3d 453. See also *Marriage of Spector* (2018) 24 CA5th 201, 233 CR3d 855 (court had inherent authority to reconsider and modify its order retroactively).

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. [§1.111] 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, 4330(a). See §§1.113–1.128. 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.

☛ **JUDICIAL TIP:** Since a payor spouse will frequently be requesting a credit for community debts paid from separate funds, known as “*Epstein credits*” (*Marriage of Epstein* (1979) 24 C3d 76, 154 CR 413, superseded on other grounds as stated in 203 CA3d 1198, 1201–1202), it is generally the better practice to avoid reducing support because of a supporting spouse's payment of community debts and instead, allow for a full support award and then allow the supporting spouse to claim an *Epstein* credit at the end of the case.

- 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 attorney's fees based on need.

### 2. [§1.112] 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 §§1.113–1.128), 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. [§1.113] 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 §§1.114–1.128.

#### 1. [§1.114] 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. [§1.115] 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 already attained before the marriage. *Marriage of Cheriton* (2001) 92 CA4th 269, 306, 111 CR2d 755.

## 3. [§1.116] 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; *Marriage of Khera & Sameer* (2012) 206 CA4th 1467, 143 CR3d 81 (court affirmed reduction of support to zero to supported spouse who chose to enroll in doctoral program rather than to complete MSW which would have led to job earning over \$42,000 a year as social worker). 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 §1.144. On considering earning capacity in setting child support, see §§1.50–1.59.

A party's ability to pay encompasses 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 spousal support obligation. *Marriage of Blazer* (2009) 176 CA4th 1438, 1447, 99 CR3d 42. Compare *Marriage of Berman* (2017) 15 CA5th 914, 921–922, 223 CR3d 604 (not an abuse of discretion for trial court to impute income to husband of over \$200,000 from business he transferred to current wife for no consideration).

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; *Marriage of Minkin* (2017) 11 CA5th 939, 950–952, 218 CR3d 407 (“annual bonus” constitutes a discretionary payment to an employee based upon performance, not any payment above base salary)).

#### **4. [§1.117] 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 [§1.129](#).

#### **5. [§1.118] 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 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. [§1.119] 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 [§1.133](#).

### 7. [§1.120] 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. [§1.121] 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 5-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 9 years, trial court erred in terminating support for physically disabled spouse after passage of 1 year when there was no evidence that the spouse could be self-supporting).

### 9. [§1.122] History of Domestic Violence—Two Separate Factors Under Fam C §4320

When determining a spousal support award, the court must consider any documented evidence, including a plea of *nolo contendere*, of any history of domestic violence, as defined in Fam C §6211, between the parties or perpetrated by either party against either party's child, 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 or acts of child abuse 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).

Documented acts of child abuse perpetrated against the minor children of the parties may serve as a basis for the court to deny permanent spousal support under the analysis required under Fam C §4320. *Marriage of Schu* (2016) 6 CA5th 470, 474, 211 CR3d 413. When qualifying convictions of domestic violence exist, a rebuttable presumption is created that any award of temporary or permanent spousal support to the abusive spouse should not be made, that affects the burden of proof. This rebuttable presumption may be rebutted by a preponderance of the evidence. Fam C §4325.

Separately, whenever the court will be making a reduction or elimination of a spousal support award, the court is required, under Fam C §4320(m), to consider certain criminal convictions of an abusive spouse in accordance with Fam C §§4324.5 or 4325. See [§§1.126–1.127](#).

#### **10. [§1.123] Tax Consequences**

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

As of December 22, 2017, The Tax Cut & Jobs Act was signed into law, which, among other things, repealed 26 USC §215. Section 11051 of the Act declares that spousal support orders entered into on January 2, 2019, or later are no longer deductible from the taxes of the paying spouse nor reportable as income to the supported spouse. It is unclear, as of the writing of this handbook, as to whether spousal support orders entered before January 2, 2019, but modified January 2, 2019, or later will continue to enjoy deductibility to the paying spouse or need to be reported as income to the receiving spouse.

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.

On occasion, parties may agree to lump-sum payment or “buy-out” of a spousal support obligation; in essence, an up-front payment of spousal support in exchange for an agreement that the supported spouse will absolutely and forever waive a right to receive spousal support in the future. In *Logue*, TC Memo 2017-234, it was held that a lump-sum payment did not qualify for alimony tax treatment because the obligation to make the payment would not have terminated had the payee died prior to payment. See also *Koester*, TC Summ Op 2017-88; “transitional alimony” based upon bonus income did not qualify for alimony tax treatment as obligation to pay based upon bonus income did not automatically terminate upon recipient spouse’s death.

#### **11. [§1.124] Relative Hardships**

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

#### **12. [§1.125] 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 California 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. See also *Marriage of Khera & Sameer* (2012) 206 CA4th 1467, 143 CR3d 81 (court affirmed reduction of support to zero to supported spouse who chose to enroll in doctoral program rather than to complete MSW which would have led to job earning over \$42,000 a year as social worker).

### **13. [§1.126] Conviction for Domestic Violence, Attempted Murder, or Solicitation of Murder**

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. [§1.127] Criminal Conviction for Violent Sexual Felony**

In any proceeding for dissolution of marriage where there is a criminal conviction for a violent sexual felony or domestic violence felony perpetrated by one spouse against the other spouse filed before 5 years following the conviction and any time served in custody, on probation or on parole, the following shall apply (Fam C §4324.5):

- An award of spousal support to the convicted spouse from the injured spouse is prohibited.
- If economic circumstances warrant, the court must order the attorney's fees and costs incurred by the parties to be paid from community assets. The injured spouse may not be required to pay any attorney's fees of the convicted spouse out of his or her separate property.
- At the request of the injured spouse, the date of legal separation, as defined in section 70, shall be the date of the incident giving rise to the conviction, or earlier, if the court finds circumstances justifying the earlier date.
- The injured spouse shall be entitled to 100 percent of the community property interest in the retirement and pension benefits of the injured spouse.
- "Injured spouse" means the spouse who has been the subject of the violent sexual felony or domestic violence felony for which the other spouse was convicted. Fam C §4325.5(b)(2).

See Pen C §667.5(c)(3), (4), (5), (11), (18) for descriptions of offenses considered a "violent sexual felony."

Effective January 1, 2019, Fam C §§4324.5 and 4325 were amended to modify the rebuttable presumption against making an award of temporary or permanent spousal support that is applicable to all criminal convictions for an act of domestic violence by distinguishing between a criminal conviction for a domestic violence felony and a domestic violence misdemeanor. If one spouse has been convicted of a misdemeanor domestic violence charge against the other spouse within 5 years of the filing of the dissolution proceeding, or at any time thereafter, there is a rebuttable presumption that an award of spousal support to the convicted spouse from the injured spouse is prohibited. Fam C §§4320(m), 4325(a)(1).

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).

Family Code §4325 may be applied retroactively to a conviction of a domestic violence-related crime when the criminal act occurred prior to the enactment of Fam C §4325. The retroactive application even arises in a situation where the parties have previously stipulated to an award of spousal support to the perpetrator of domestic violence. *Marriage of Kelkar* (2014) 229 CA4th 833, 176 CR3d 905.

A criminal conviction for a domestic violence felony would prohibit awards relating to spousal support, attorney's fees, setting the date of separation, and retirement and pension benefits in a manner similar to a criminal conviction for a violent sexual felony. Fam C §4324.5(a).

### **15. [§1.128] 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. [§1.129] 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 (commonly referred to as “MSOL”) 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 the 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. [§1.130] Mandatory Findings on the Marital Standard of Living

The court may award permanent spousal support for a period of time that the court determines is just and reasonable based on the standard of living established during the marriage. Fam C §4330(a). 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 their size, how many cars, travel habits, savings and investments) because greater specificity is helpful when responding to a modification motion.

### 2. [§1.131] 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. Once requested, the court is obligated to issue a statement of decision even if the requesting spouse thereafter waives the request and the other spouse failed to make a similar request. See *Marriage of Sellers* (2003) 110 CA4th 1007, 2 CR3d 293.

## F. [§1.132] Gavron Warning

When ordering permanent spousal support, the court may advise the supported party to make reasonable efforts to assist in providing for his or her own support needs. The court may also decide that a warning is not needed after the supported spouse reaches the usual retirement age. See *Marriage of McClain* (2017) 7 CA5th 262, 271–272, 212 CR3d 537 (court properly considered Fam C §4320 factors to determine that wife’s age and retirement being part of the

parties' established lifestyle, outweighed the obligation of supported party to become self-supporting); *Marriage of Reynolds* (1998) 63 CA4th 1373, 1377, 1378–1379, 74 CR2d 636. 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 §§1.113–1.128. 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. 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.

### G. [§1.133] 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 to financially assist 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 cannot 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 to enable 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.

### H. [§1.134] Retention of Jurisdiction

There are different rules for marriages of short to mid-duration than 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 of the expectation 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 6 months was appropriate in case involving 3-year marriage, when supported spouse had marketable skill she could make use of with little retraining); *Marriage of Hebring* (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).

## I. Types of Orders

### 1. [§1.135] 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 lacks 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"). An order for spousal support may be retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date. See Fam C §4333.

## 2. [§1.136] 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. [§1.137] Step-Down Order

A step-down order automatically decreases the support amount at specified intervals. The court can retain jurisdiction to modify the amount of support payments by specifically reserving jurisdiction to do so. *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 be self-supporting at the time of each step-down. *Marriage of Anninger* (1990) 220 CA3d 230, 240, 269 CR 388, superseded by statute on other grounds at 59 CA4th 877, 882.

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. [§1.138] 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. [§1.139] *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(I) 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 on 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 lacks 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 §1.132) should accompany the issuance of a *Richmond* support order.

### J. [§1.140] 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. [§1.141] 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 decrease or increase in the supporting spouse's ability to pay and/or a decrease or increase 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 §§1.113–1.128) 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, supra*, 203 CA3d at 710.

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 Khera & Sameer* (2012) 206 CA4th 1467, 143 CR3d 81 (court affirmed reduction of support to zero to supported spouse who chose to enroll in doctoral program rather than to complete MSW which would have led to job earning over \$42,000 a year as social worker), *Marriage of Schaffer* (1999) 69 CA4th 801, 811–812, 81 CR2d 797 (court may consider whether supported spouse has made unwise decisions that have prevented the ability to become 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 the absence of findings in the judgment regarding the marital standard of living (“MSOL”) upon which the support order was based, the trial court considering a request for modification may have to attempt to reconstruct the financial circumstances at the time the support order was made by examining Income and Expense Declarations, form FL-150 filed at or before the entry of judgment.

In a proceeding in which a spousal support order exists or in which the court has retained jurisdiction over a spousal support order, if there is a companion child support order in effect, the termination of child support under Fam C §3901(a) (see §1.99), 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 6 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 is filed, either party may request the appointment of a vocational training counselor under Fam C §4331. Fam C §4326(c). See also *Marriage of Stupp & Schilders* (2017) 11 CA5th 907, 913–914, 217 CR3d 825 (no authority for court to order vocational evaluation when no motion to modify or terminate support order pending).

#### **a. [§1.142] 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. See also *Marriage of Hoffmeister* (Hoffmeister II) (1987) 191 CA3d 351, 364, 236 CR 543 (“Unless [the supported spouse] can establish by credible evidence that she had a standard of living at the time of separation of the parties that was higher than that provided by the prior award, her motion for modification is no more than an attempt to collaterally attack the prior decree. This is impermissible.”) An enhanced ability to pay alone does not justify an increase in support. *Marriage of Zywiciel* (2000) 83 CA4th 1078, 1081, 100 CR2d 242. A marital settlement agreement that contemplates future increases in payor wife’s income cannot be interpreted to mean that any increase in payor wife’s income does not constitute a change in circumstances which may warrant a modification of spousal support. The question for the trial court to determine is what magnitude of an earnings increase would constitute a change in circumstances. *Marriage of T.C. & D.C.* (2018) 30 CA5th 419, 241 CR3d 450.

#### **b. [§1.143] Supported Spouse Cohabiting With Nonmarital Partner**

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 nonmarital partner. 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.

### c. [§1.144] 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 Kochan* (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).

A veteran's waiver of retirement pay and the payee spouse's loss of her community share of those retirement benefits along with the veteran's receipt of disability benefits instead of retirement pay may constitute a change of circumstances warranting analysis of the factors under Fam C §4320. *Marriage of Cassinelli* (2018) 20 CA5th 1267, 229 CR3d 801.

### 2. [§1.145] 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 §1.47.

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 an 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. *Marriage of Romero, supra*, 99 CA4th at 1445–1446.

### 3. [§1.146] 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) and 4333. *Marriage of Mendoza & Cuellar* (2017) 14 CA5th 939, 222 CR3d 420 (request for permanent spousal support may not be made retroactive to date of filing

of dissolution petition). See also *Marriage of Freitas* (2012) 209 CA4th 1059, 147 CR3d 453 (court may order retroactive support only if retroactivity is specifically reserved and there is a particular date and time to which the case is continued). See also the *Gruen* case discussed in §1.106. A court also has the authority to reconsider and modify its own orders retroactively under appropriate circumstances. *Marriage of Spector* (2018) 24 CA5th 201, 233 CR3d 855.

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; and
- 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 3 years later).

#### **4. [§1.147] 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).

### **K. [§1.148] 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. A stipulation by the

parties to continue a spousal support obligation after the supported spouse remarries does not require a specific waiver of the terms of Fam C §4337. Clear language in the marital settlement agreement evidencing the intent to continue spousal support beyond remarriage will suffice as a waiver of said terms. *Marriage of Cohen* (2016) 3 CA5th 1014, 1020–1021, 207 CR3d 846.

- The court may issue a modification order terminating support on the basis of changed circumstances. See §§1.140–1.144.

#### **L. [§1.149] Setting Aside Spousal 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 §1.103. For a more detailed discussion on setting aside judgments and orders see §§4.151–4.174.

#### **M. [§1.150] 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.

Any 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 may 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). Family Code §1615 sets forth the necessary conditions to finding a premarital agreement is enforceable. Recitation in the agreement itself may not be binding if there is evidence presented to the contrary. *Marriage of Clarke & Akel* (2018) 19 CA5th 914, 223 CR3d 483 (recitation in premarital agreement where evidence showed unrepresented party was not provided with the statutory 7-day period for review under Fam C §1615(c)(2)).

#### **N. [§1.151] Effect of Immigration I-864 Affidavit of Support of Spouse**

Separate and apart from the court's authority to award spousal support pursuant to Fam C §§4300 et seq, an immigrant spouse has independent standing to enforce a support obligation created by the I-864 affidavit as an enforceable contract in state court, and has no affirmative duty to mitigate damages. See *Marriage of Kumar* (2017) 13 CA5th 1072, 220 CR3d 863 (trial court erred to extent it found no standing, and erred in denying spouse's contract claim on ground she was not using best efforts to find work; case remanded to determine the merits of contract claim). An I-864 affidavit contains language that the affiant agrees to provide the intending immigrant any support necessary to maintain him or her at an income that is at least 125 percent of the Federal Poverty Guidelines for his or her household. The I-864 affiant is usually referred to as a "sponsor" (of an intended immigrant). As noted in *Kumar*, the purpose of the affidavit is to ensure that an immigrant does not become a public charge. 13 CA5th at 1072–

1073. Prior to any hearing on this issue, the court should review the provisions of Evid C §351.3 (effective May 17, 2018, and repealed as of January 1, 2022) which provides that a person's immigration status shall not be disclosed in open court except under specified circumstances. See [§2.29](#).

# Chapter 2

## CHILD SUPPORT PROCEEDINGS

### I. [§2.1] SCOPE OF CHAPTER

### II. OVERVIEW

- A. Family Law Facilitator
  - 1. [§2.2] In General
  - 2. [§2.3] Facilitator Services
  - 3. [§2.4] Relationship Between Facilitator and Parties
- B. Contested Trials and Hearings
  - 1. [§2.5] Rights of Respondent
  - 2. [§2.6] Appointment of Attorney
  - 3. [§2.7] Ordering Genetic Tests
  - 4. [§2.8] The Hearing
  - 5. [§2.9] Calculating Child Support and Issuing Orders
  - 6. [§2.10] Modifying Support Orders
  - 7. [§2.11] Reconsideration
  - 8. [§2.12] Suspension of Support Obligation Due to Incarceration

### III. COURT PROCEDURES

- A. Discovery Generally
  - 1. [§2.13] Discovery Before Modification or Termination Proceedings
  - 2. [§2.14] Other Discovery
  - 3. [§2.15] Discovery in Postjudgment Proceedings
- B. Tax Returns
  - 1. [§2.16] Access to Tax Returns
  - 2. [§2.17] Production of Tax Returns at Expedited Hearing
  - 3. [§2.18] Confidentiality of Tax Returns
- C. Confidentiality
  - 1. [§2.19] Uniform Parentage Act Cases
  - 2. [§2.20] Other Court Proceedings
  - 3. Records and Documents
    - a. [§2.21] In General
    - b. [§2.22] Child Support Registry Forms
    - c. [§2.23] UIFSA Protections
    - d. [§2.24] Child Abduction Records
    - e. [§2.25] Child Psychological Evaluations, Custody Reports, and Recommendations
    - f. [§2.26] Domestic Violence Criminal Search Information
    - g. [§2.27] Protective Orders and Other Domestic Violence Orders
  - 4. [§2.28] Social Security Numbers
  - 5. [§2.29] Prohibition on Disclosure of Immigration Status
- D. Attorney's Fees, Costs, and Sanctions
  - 1. [§2.30] Scope

2. [§2.31] General Types of Awards
3. [§2.32] Needs-Based: Disparity in Access and Ability to Pay Findings
4. [§2.33] Sanctions
5. [§2.34] Jurisdiction and Procedural Requirements
- E. Telephone Appearances
  1. [§2.35] Separate Statutes and Rules
  2. [§2.36] Family Law Cases
  3. [§2.37] Title IV-D Cases
- F. [§2.38] Civil Bench Warrants or Body Attachments
- G. Limited Scope Representation
  1. [§2.39] Defined
  2. [§2.40] Assistance With Document Preparation
  3. Limited Scope Representation Procedures
    - a. [§2.41] Stepping In
    - b. [§2.42] Stepping Out
- H. Consolidation Issues
  1. [§2.43] Consolidation Generally
  2. [§2.44] Consolidation of Support Orders by LCSA
  3. [§2.45] Priority of Consolidation
- I. Crossover Issues
  1. [§2.46] In General
  2. Juvenile Dependency and Delinquency Cases
    - a. [§2.47] General Crossover Issues
    - b. [§2.48] Parentage Determinations
    - c. [§2.49] Return-to-Home Orders
    - d. [§2.50] Parental Rights Termination Orders
    - e. [§2.51] Reunification Plans and Orders
    - f. [§2.52] Locate Information
    - g. [§2.53] Individualized Education Plans
    - h. [§2.54] AWOL Child
    - i. [§2.55] Exceptions to Liability for Child Support
  3. [§2.56] Probate Cases
  4. [§2.57] Tribal Court Cases
    - a. [§2.58] General Inquiries
    - b. [§2.59] Restraining Orders
    - c. [§2.60] Criminal Cases
- J. [§2.61] Minor Parent as Party

#### **IV. MILITARY ISSUES**

- A. Servicemembers Civil Relief Act
  1. [§2.62] Scope of SCRA
  2. Protection Against Default Judgments
    - a. [§2.63] Affidavit of Military Status
    - b. [§2.64] Appointment of Attorney
    - c. [§2.65] Setting Aside Default Judgment

3. Stays Under SCRA
  - a. [§2.66] Stay of Proceedings
  - b. [§2.67] Stays of Execution
4. [§2.68] Modifications Due to Deployment
5. [§2.69] Compromise of Arrearages
6. [§2.70] Interest Limitations
- B. Military Pay
  1. [§2.71] Pay Versus Allowances
  2. [§2.72] Determining Amount of Pay
- C. [§2.73] Veteran's Disability Benefits
- D. [§2.74] Health Insurance

## I. [§2.1] SCOPE OF CHAPTER

This chapter covers the subject of child support proceedings generally in family law court and in Title IV-D cases in which the LCSA is providing services to establish parentage or to establish, modify, or enforce child support or spousal support.

For more discussion generally of child and spousal support, see [Chapter 1](#). For a more detailed discussion regarding Title IV-D proceedings, see [Chapter 5](#).

## II. OVERVIEW

### A. Family Law Facilitator

#### 1. [§2.2] In General

Each superior court is required to maintain an office of the family law facilitator. The office must be staffed by an attorney licensed to practice law in California who has mediation or litigation experience in family law. The facilitator is appointed by the superior court. Fam C §10002. The Judicial Council has adopted minimum standards for the office of the family law facilitator. Fam C §10010; Cal Rules of Ct 5.430.

The main purpose of the family law facilitator system is to help unrepresented individuals through the process of family law cases, including, but not limited to, obtaining court orders regarding support, health insurance and resolving support issues. Fam C §10000 et seq. Individuals who are represented by counsel do not qualify for the facilitator's services (although the facilitator may assist an individual with forms to help remove an attorney of record if the attorney is no longer around due to becoming inactive or disbarred, for example).

The support proceedings to which the Family Law Facilitator Act applies includes actions or proceedings for dissolution of marriage, nullity of marriage, legal separation, or exclusive child custody, or pursuant to the UPA, or the DVPA. Fam C §10003. In cases where DCSS is providing services, either parent may utilize the services of the family law facilitator as specified in the statute. Fam C §10008. See [§5.5](#).

#### 2. [§2.3] Facilitator Services

The free services provided by the family law facilitator include (Fam C §10004):

- Providing educational materials to parents concerning the process of establishing parentage and establishing, modifying, and enforcing child support and spousal support.

- Distributing necessary court forms and voluntary declarations of paternity.
- Providing assistance in completing forms.
- Preparing support schedules based on statutory guidelines.
- Providing referrals to the local child support agency, family court services, and other community agencies and resources that provide services for parents and children.

By local rule, the superior court may designate additional duties of the facilitator, including (Fam C §10005):

- Meeting with litigants to mediate issues of child support, spousal support, and maintenance of health insurance.
- Drafting stipulations to include all issues agreed to by the parties.
- Reviewing paperwork, examining documents, preparing support schedules, and advising the judge whether the matter is ready to proceed.
- Assisting the clerk in maintaining records.
- Preparing formal orders consistent with the court's announced order in cases when both parties are unrepresented.
- Serving as a special master, unless previously provided services as a mediator.
- Providing services concerning the issues of custody and visitation as they relate to calculating child support.
- Assisting the court with research and any other responsibilities that would enable the court to be responsible to the litigant's needs.
- Developing programs for bar and community outreach through day and evening programs, videotapes, and any other innovative means that will assist unrepresented and financially disadvantaged litigants in gaining meaningful access to family court.

### **3. [§2.4] Relationship Between Facilitator and Parties**

The family law facilitator must not represent any party. No attorney-client relationship is created between the facilitator and any party as a result of any information or services provided to a party. A conspicuous notice must be posted advising that no attorney-client relationship exists between the facilitator, its staff, and the party; that communications between the facilitator and the party are not privileged; and that the facilitator may provide services to the other party. Fam C §10013.

## **B. Contested Trials and Hearings**

### **1. [§2.5] Rights of Respondent**

A respondent has the following rights and privileges:

- The right to an attorney of one's own choosing at his or her expense. However, in certain cases, the court may find it necessary, and a respondent may be entitled as of right to a court-appointed counsel. The most common situations where this issue comes up is cases in which the respondent is in the military, or where parentage is at issue (in Title IV-D

cases). These are all discussed in more detail in §2.6 below regarding appointment of counsel.

- The right to genetic tests if parentage is an issue in the case. Fam C §§7550–7557. It is an abuse of discretion to order genetic tests if there is an existing parentage judgment with regard to the child and alleged father. *City & County of San Francisco v Cartagena* (1995) 35 CA4th 1061, 1065, 41 CR2d 797. Similarly, genetic tests should not be ordered after a respondent has stipulated to parentage. *Robert J. v Leslie M.* (1997) 51 CA4th 1642, 1648, 59 CR2d 90. But see Fam C §§7645 et seq (motion to set aside paternity judgment), discussed in §1.29. See also §1.23, as well as §2.7 below.
- The right to present and cross-examine witnesses.
- The right to testify.
- The privilege against self-incrimination.

A respondent does not have the right to a jury trial in a parentage action under Fam C §17402. *County of Butte v Superior Court* (Filipowicz) (1989) 210 CA3d 555, 558–559, 258 CR 516; *County of El Dorado v Schneider* (1987) 191 CA3d 1263, 1269–1271, 1280, 237 CR 51.

See form FL-694 for an advisement and waiver of rights when a stipulation is reached in a Title IV-D case. For a script for advising of rights in a parentage hearing, see §2.77. There is also an optional form FL-235 for an advisement and waiver of rights that can be used in UPA actions.

## 2. [§2.6] Appointment of Attorney

On a respondent’s request, the court may be required to appoint an attorney in the following situations:

- If parentage is an issue, an indigent respondent has the right to court-appointed counsel in Title IV-D cases. *Salas v Cortez* (1979) 24 C3d 22, 34, 154 CR 529. *Salas* specifically held: “that in proceedings to determine paternity in which the state appears as a party or appears on behalf of a mother or child, indigent defendants are constitutionally entitled to appointed counsel.” 24 C3d at 34. The California Supreme Court went on to state: “The extent to which the right to appointed counsel shall apply in cases other than those which are commenced in the future must ‘turn upon considerations of fairness and public policy.’ [Citations omitted.]” *Supra*. There is no right to appointed counsel if the contested issue is solely welfare reimbursement. *Clark v Superior Court* (1998) 62 CA4th 576, 587–592, 73 CR2d 53.
- If the respondent is in the military in any case, he or she may be entitled to a court-appointed attorney under the Servicemembers Civil Relief Act (50 USC §§521 et seq). For example, under the SCRA, the court cannot enter a default judgment until an attorney is appointed, and the court must extend the time to file a response to the petition or complaint. If DCSS is involved in the case, the LCSA should be directed to provide the attorney with the respondent’s current address. See §§2.62–2.74 regarding military issues.

The court must inquire into the respondent’s financial resources when such a request is made. If a respondent is indigent, the court may appoint the public defender or other local legal services group charged with this responsibility to represent the respondent. The court may reserve the right to order reimbursement for the costs of the attorney’s services. The case may then be continued in order to allow the respondent time to evaluate the matter. Specific reference

orders with time frames in which to contact the public defender or the appointed attorney are recommended to avoid further delays in the case.

If the respondent requests a continuance to obtain an attorney, the court must grant a short continuance for this purpose. See Fam C §17404(b).

### 3. [§2.7] Ordering Genetic Tests

If a respondent requests genetic tests in a non-marital case when parentage has not been previously determined, the court will order the alleged parent, the other parent, and the child or children to participate in genetic testing. An alleged father does not have the right to select a private facility to conduct the paternity test in place of the laboratory contracted by the county. See *County of San Diego v Mason* (2012) 209 CA4th 376, 381–382, 147 CR3d 135. The court should advise the respondent that failure to submit to genetic tests can lead to an order finding the respondent to be the parent of the child. Fam C §7551. See Fam C §7558 for circumstances in which an LCSA may issue an administrative genetic testing order.

Genetic tests are admissible into evidence without foundation testimony if the results are accompanied by a declaration from the custodian of records, are served on the parties no later than 20 days before the hearing, and no written objection to the results has been filed before 5 days before the hearing. Fam C §7552.5(a)–(b).

See also discussion in §§1.9, 1.15, and 1.29.

### 4. [§2.8] The Hearing

Many contested hearings or trials on support issues are short and can be handled as a short cause or as law and motion matters on the family law calendar (20 minutes or less). The parties are often unrepresented, and in a Title IV-D court may not have spoken with the LCSA before the date scheduled for the hearing.

- **JUDICIAL TIP:** “Triage time” can be an effective calendar management tool. Some judges call the calendar and then take a short recess before holding hearings to give the parties an opportunity to discuss settlement of their cases with LCSA representatives, or with a neutral “volunteer attorney for the day” (or similar program) in regular family law departments. Cases often settle when this is done, and issues in the remaining contested hearings can be narrowed.

Also, in order to determine what issues are being contested at the outset of a hearing, some courts use a form (an “issue sheet”) that the parties can complete for this purpose. Other courts have the LCSA, or the “volunteer attorney for the day,” summarize the contested issues for the court, and allow the parties to supplement them as needed. Often, parentage may not be contested, but disputes exist as to timeshare only, or on the requested amount of current child support or arrears.

If the court is going to continue the case, *e.g.*, due to incomplete information, the court should advise the parties and include in its order that it is specifically reserving jurisdiction over support, and set a hearing date. Failure to set a continued hearing date can cause the court to lose jurisdiction. See *Marriage of Gruen* (2011) 191 CA4th 627, 120 CR3d 184; compare *Marriage*

of *Freitas* (2012) 209 CA4th 1059, 1074–1075, 147 CR3d 453 (distinguishes *Gruen*). See also §§1.105–1.106 on retroactivity of a child support order.

With a high percentage of unrepresented litigants, there is often little documentation to work with, especially on a Title IV-D calendar. In many instances, parties have not filed Income and Expense Declarations (form FL-150) or Financial Statements (Simplified) (form FL-155). Some courts require parties to fill these out before beginning a hearing. Others work with pay stubs or testimony only. The family law facilitator may be present in court in some counties and will help the parties complete the required financial forms. In other counties, the bench officer refers the parties to the facilitator for assistance before holding the hearing. The facilitator may prepare support calculations for the court.

Each side is required to produce evidence regarding their positions. See Fam C §217 (court required to receive any live, competent testimony that is relevant and within the scope of the hearing absent a stipulation of the parties or a finding of good cause). The court may ask questions, which is often essential to get the information needed to calculate child support. However, where a party objects to a written declaration submitted with a request for order and there is no opportunity for cross-examination, the court may not consider it. *Marriage of Swain* (2018) 21 CA5th 830, 230 CR3d 614 (ex-wife failed to appear at hearing, but had filed an unserved Income and Expense Declaration with the court; ex-husband’s attorney objected to it because there was no opportunity to cross-examine; trial court initially agreed, but after the hearing relied upon it in making its ruling; trial court reversed. The decision contains a lengthy discussion of the history of Fam C §217).

If the court makes a determination of parentage, a finding must be made. For a discussion on establishing parentage see §1.5.

See Chapter 5 of this handbook for discussion of hearing procedures unique to Title IV-D courts.

## 5. [§2.9] Calculating Child Support and Issuing Orders

Child support is calculated the same whether the matter is in a regular family law department or a Title IV-D court. Fam C §§4050 et seq. For determining income and setting child support see §§1.30–1.106. Care should be taken to apply the low-income adjustment for those cases in which it is applicable, as that is the presumptively correct amount. Fam C §§4055(b)(7) (See also §1.79). The court must also consider the health insurance coverage of the parties. Fam C §4006. (See also §1.85).

- **JUDICIAL TIP:** The various certified calculation programs are not consistent in how they alert the user about the availability and range of the low-income adjustment amount. The DCSS calculator automatically alerts the user that the low income adjustment is available, asks if it should be applied and if so, the entire range will be displayed on the results page; other programs do not have that feature, and it is entirely up to the user to remember to affirmatively click a specific link in order to have the low income adjustment amount displayed.

After the guideline child support amount has been identified, including any low-income adjustment amount, the court may need to consider whether to deviate or depart from the guideline amount (see §§1.86–1.94), whether certain credits, such as Social Security derivative benefits or other benefits must be taken into account (see §4.78), or whether any appropriate

offsets should be ordered (see §§4.147–4.148). The court will also need to specify a commencement date, and address any issues of retroactivity (see §§1.105–1.106).

- **JUDICIAL TIP:** The court does have authority to implement a start date after the date of filing of a motion or RFO, (*i.e.*, to start on the 1st of the month following the filing vs. the exact filing date), and may also wish to consider issuing a “step-up” order for a limited period of time in circumstances where the amount of support may be increasing drastically (*i.e.*, order support at an increased, but lower level for 30 days, and then the full amount the following month), where the court finds it to be appropriate and just. This can provide an obligor a limited time to adjust their budget to be able to pay ongoing support.

When issuing any type of support order, it is important to be clear as to amounts and time frames, as well as to include all required findings. For the required findings in making child support orders, see §§1.81, 1.94. See also [Script G](#) and [Script H](#).

- **JUDICIAL TIP:** When ordering child support, the best practice is to attach the guideline calculation (or direct that it be attached) to the order, which can stand as the findings of the court with regard to determining what the guideline amount is, even if the court is then going to issue an off-guideline amount (above or below guideline). This can be of great assistance to the court at a later date for purposes of applying the appropriate burden when faced with a request to modify, *i.e.*, whether a change in circumstances is required to be shown (see §1.102). It can also be very helpful to the court to see what factors and findings were previously made, especially if the order is registered in another jurisdiction (county, state, or otherwise). Wherever possible, courts should use or insist upon use of the Judicial Council forms, as they will often contain the appropriate language for required findings, depending upon what orders are being made.

## 6. [§2.10] Modifying Support Orders

To determine what standard must be applied (*e.g.*, whether a change of circumstances must be shown), the court will need to know whether or not the prior order was a guideline order.

For the general rules regarding modifications of child support orders, see §1.102.

Note: Courts are not bound by any language in orders that purport to make child support “non-modifiable.” *Marriage of Alter* (2009) 171 CA4th 718, 728–729, 89 CR3d 849. A “material change in circumstances” is the same as “substantial change in circumstances” for purposes of modifying child support. *Marriage of Bodo* (2011) 198 CA4th 373, 389–392, 129 CR3d 298. Under the California Code of Regulations, a “substantial change in circumstances” can mean a change affecting the amount of support by at least 20 percent or \$50, whichever is less. 22 Cal Code Regs §115535(a)(3).

For the general rules regarding retroactivity on requests for modification, see §1.106.

## 7. [§2.11] Reconsideration

A party may seek reconsideration under CCP §1008. Separately, the court may sua sponte reconsider its orders and is not bound by the limitations contained in CCP §1008; See *Le Francois v Goel* (2005) 35 C4th 1094, 29 CR3d 249; *Marriage of Barthold* (2008) 158 CA4th 1301, 70 CR3d 691. *Marriage of Spector* (2018) 24 CA5th 201, 233 CR3d 855 (court had

inherent authority to reconsider and modify its order retroactively). However, a trial court may not expand a reconsideration hearing into a full evidentiary hearing amounting to granting a new trial. *Marriage of Herr* (2009) 174 CA4th 1463, 1469–1471, 95 CR3d 464. See also §4.152.

### **8. [§2.12] Suspension of Support Obligation Due to Incarceration**

Incarceration of an obligor can be relevant when first establishing a support order (see §1.54), when making determinations as to the enforceability of an order, or as to the amount of arrears owed (see §4.192).

Family Code §4007.5, effective October 8, 2015, applies to all money judgments or orders for support of a child, and was enacted to address the situation where obligors are incarcerated or involuntarily institutionalized for periods exceeding 90 days (the “trigger” date). It provides for the suspension of child support, by operation of law, under specified circumstances, as well as a resumption of the obligation upon release. Fam C §4007.5(a)–(b). It also provides a mechanism for local child support agencies to make adjustments administratively. Fam C §4007.5(c). DCSS developed forms as required by subdivision (g) of the statute, and has issued its own policy letter to LCSAs on the topic. See CSSP Letter 17-03 (dated October 10, 2017).

The statute does not preclude obligors from separately seeking a modification of their current order due to changed circumstances or any other appropriate reason, nor does it preclude any party, including the LCSA, from petitioning a court for a determination of arrears. Fam C §4007.5(b), (d).

For a detailed discussion of the predicate conditions and the process for adjustment of arrears due to the suspension of the support obligation, see §§4.192, 5.51.

## **III. COURT PROCEDURES**

### **A. Discovery Generally**

#### **1. [§2.13] Discovery Before Modification or Termination Proceedings**

Family Code §§3660 et seq provide an inexpensive discovery method for certain financial information before starting a modification or termination of support proceeding. This is the only method of discovery if there is no motion pending, and in the absence of a motion, a request under this statute cannot be done more than once every 12 months. Fam C §§3662, 3663. Under these circumstances following a judgment of dissolution or legal separation or a determination of paternity that provides for support, a party may request:

- A completed current income and expense (I&E) declaration from the other party. Fam C §3664(a); see form FL-150.
- A copy of the prior year’s tax returns, which must be attached to the I&E declaration. Fam C §3665(a).
- Income and benefits information from the other party’s employer (see form FL-397) if the other party fails to respond to the I&E declaration request or if the information on the I&E declaration is incomplete as to wage information, including missing pay stubs and tax return attachments. Fam C §3664(b). Notice to the employee must be given before the date set in the request from the employer. Fam C §3664(c); see form FL-397.

Enforcement for failure to comply is through the appropriate provisions of the Code of Civil Procedure and Civil Discovery Act. Fam C §3666. Sanctions are authorized and can be requested upon the subsequent filing of a motion for modification or terminations of support, and awarded

regardless of whether the requesting party took advantage of obtaining some of the information directly from an employer. Fam C §3667.

## 2. [§2.14] Other Discovery

On a very basic level, aside from the inexpensive discovery method discussed in §2.13 above, the primary methods used for obtaining financial discovery are either through the formal discovery process under the Civil Discovery Act, or through the more informal discovery process based upon various Family Code sections relating to interspousal post-separation fiduciary duties and disclosure obligations. This section is not intended to cover either process in detail, but to highlight some of the applicable statutes and case law, primarily under the Family Code.

The Civil Discovery Act (CCP §§2016.010 et seq) provides for a range of specific formal discovery methods, including but not limited to depositions, interrogatories, document inspections, mental examinations, requests for admissions, and expert witness exchanges. CCP §§2019.010. For further discussion see California Judges Benchbook: Civil Proceedings—Discovery (Cal CJER).

The basic source of financial information in child support and spousal support proceedings is the Income and Expense Declaration, form FL-150. For every hearing involving child or spousal support, both parties must complete, file, and serve a current Income and Expense Declaration (I&E) on all parties. Cal Rules of Ct 5.260(a). “Current” means that the form has been completed within the past 3 months. Cal Rules of Ct 5.260(a)(3). In child support proceedings only, a party may complete a current Financial Statement (simplified) form FL-155 instead of an I&E if they satisfy the requirements for submission of the simplified statement. Cal Rules of Ct 5.260(a)(4).

The Family Code also declares as sound public policy the reduction of the adversarial nature of marital dissolution and the attendant costs by “fostering full disclosure and cooperative discovery.” Fam C §2100(b). Against this backdrop, the Family Code includes several discovery and disclosure statutes.

Some common examples of both duties and disclosure obligations include:

- Fiduciary duties and responsibilities of spouses during marriage in any property transactions, including providing access to information. Fam C §721(b).
- Imposition of the standards under Fam C §721 to parties from date of separation to date of distribution for full disclosure of activities listed. Fam C §2102(a)–(b), and until a binding resolution of all issue relating to child or spousal support. Fam C §2102(c). See also Fam C §1100(e).
- Preliminary declarations of disclosure. Fam C §§2103, 2104.
- Final declarations of disclosure. Fam C §2105.
- Disclosure, upon request, of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts. Fam C §1100(e).

Additional sections of the Family Code provide penalties for failure to abide with these provisions. Such penalties can include evidentiary or monetary sanctions, attorney's fees and costs, or an award of part or all of an asset or its value. See, for example, Fam C §§2107(b),(c), 1101(g), (h). See also §§2.30–2.34 on attorney's fees generally.

An important case that discusses and interprets the fiduciary and disclosure duties under the Family Code is *Marriage of Feldman* (2007) 153 CA4th 1470, 64 CR3d 29. It involved a long-term marriage where the husband had established and operated various business entities. He had already provided a number of documents, submitted to a deposition, and given his wife a schedule of assets which he updated several times upon request, but she believed he had failed, among other things, to disclose some assets, and filed an application for order imposing monetary sanctions for violating his fiduciary obligations and attorney's fees based upon Fam C §§1101(g), 2107(c), and 271. The wife prevailed, and the trial court awarded sanctions (\$250,000) and attorney's fees (\$140,000) relying upon all three statutes. The appellate court affirmed the full sanctions and fees under Fam C §§2107(c) and 271 (finding no need to discuss whether an award might also be proper under Fam C §1101(g)).

- **JUDICIAL TIP:** *Feldman* is considered to be a seminal case on this topic. Encouraging parties to exchange information through informal discovery, or issuing orders specifying the exchange of certain financial information, such as the parties' last 12 months of any personal or business bank (or other financial) statements within 30–60 days, in addition to tax returns, etc., can often reduce the time and expense required for more formal discovery.

### 3. [§2.15] Discovery in Postjudgment Proceedings

Discovery automatically reopens when a request for order or other motion is filed and served after entry of judgment. Discovery is reopened only as to the issues currently before the court as a result of the request for order or other motion. Fam C §218. This statute was enacted to overrule *Marriage of Boblitt* (2014) 223 CA4th 1004, 167 CR3d 777, which held that a motion to reopen was necessary to obtain discovery in postjudgment proceedings.

## B. Tax Returns

### 1. [§2.16] Access to Tax Returns

Although tax returns are generally considered to be privileged (Rev & T C §§14251, 19542), no party to a proceeding involving child, family, or spousal support may refuse to submit copies of the party's state and federal income tax returns. Fam C §3552(a). The court, however, must provide clear safeguards. Fam C §3552(c). Thus, the statute provides (Fam C §3552):

- Parties cannot refuse to submit copies to court.
- Parties can examine copies of other party's tax returns.
- Parties can examine the other party regarding the contents of the tax returns.
- The court must:
  - Seal and maintain tax returns as confidential records if the court finds they are relevant to retain, or
  - Return all copies of the return to the party who submitted them if not relevant to disposition of the case.

- **JUDICIAL TIP:** If copies of the tax returns have been voluntarily exchanged by the parties or attorneys, it is often easier to simply use the copies in court during the proceedings and return them at the conclusion of the hearing, as sealing and maintaining confidential records can be a cumbersome process. Social Security Numbers should be redacted by the parties before submitting copies. Fam C §2024.5(a).

In addition, DCSS can request tax information directly from the Franchise Tax Board in accordance with federal and state privacy laws. Fam C §17452(a), (c). However, DCSS is prohibited from disclosing the source of federal tax information, even to the court. See CSS Letter 11-04 (March 17, 2011).

## **2. [§2.17] Production of Tax Returns at Expedited Hearing**

Parents must produce their most recently filed federal and state income tax returns for examination at the hearing on an application for an expedited support order. Fam C §3629(a)–(b). A parent who fails to do so may not be granted the relief requested (Fam C §3629(c)), except the court may grant the relief sought if the party submits a sworn declaration that (Fam C §3629(d)):

- No such documents exist, or
- The tax return cannot be produced, but a copy has been requested from the IRS or Franchise Tax Board.

## **3. [§2.18] Confidentiality of Tax Returns**

A party is prohibited from disclosing the contents of any tax returns produced or attached to discovery or from providing copies to anyone except (Fam C §3665(b)):

- The court,
- The party's attorney,
- The party's accountant,
- Other financial consultant assisting with matters related to the case, or
- Other person permitted by the court.

Tax return information provided by the Franchise Tax Board to DCSS must be done in accordance with privacy and confidentiality laws of the state and the United States. Fam C §17452(c). Any tax returns retained by the court are confidential and must be sealed. Fam C §3552(c).

## **C. Confidentiality**

### **1. [§2.19] Uniform Parentage Act Cases**

Records of actions filed under the Uniform Parentage Act (UPA) to determine the existence or nonexistence of a parent and child relationship are confidential, including all papers and records—other than the final judgment—whether part of the court file or a public agency file. Fam C §7643(a). The parties or their attorneys (or their agents with proper authorization) may inspect and copy any of the court's permanent records (Fam C §7643(b)), but any other inspection or copying is only allowed in exceptional circumstances on a showing of good cause.

Fam C §7643(a). An attorney must obtain the party's consent before authorizing an agent to inspect and copy the permanent record. The attorney must state in the written authorization that the party's consent was obtained. Fam C §7643(b).

Court hearings under the UPA may be held in closed court without admitting anyone except those necessary to the proceeding. Fam C §7643(a).

## **2. [§2.20] Other Court Proceedings**

General family law proceedings are public. This includes all proceedings before a private temporary judge that would be open to the public if held before a judge. Cal Rules of Ct 2.834. Exceptions to this general rule include:

- Conciliation proceedings under Fam C §§1800 et seq.
- Mediation proceedings under Fam C §§3175 et seq.
- A court-ordered private trial on issue(s) of fact if deemed necessary. Unless otherwise provided, the court can direct the trial of any issue of fact joined in a proceeding to be private, "when it considers it necessary in the interests of justice and the persons involved," and exclude all persons except officers of the court, the parties, their witnesses, and counsel. Fam C §214.
- A trial or hearing held in an action brought under the UPA may be closed to the public (court's discretion). Fam C §7643(a). See also [§2.19](#) regarding records in UPA cases.

For information on public access to court proceedings with regard to photographing, recording, broadcasting, see Cal Rules of Ct 1.150.

## **3. Records and Documents**

### **a. [§2.21] In General**

Generally, court records are presumed to be open, and the public must be provided with reasonable access to trial court records unless there are confidentiality laws or rules protecting their privacy, or the records have been sealed by the court. Cal Rules of Ct 1.150(c). Many courts also have electronic records, which are governed specifically by Cal Rules of Ct 2.500 et seq, under which such records are to be made publicly available under specified circumstances.

Specific confidentiality and related statutory provisions exist for various types of information and/or records. Records in a UPA action, for example, are subject to inspection only under exceptional circumstances (see [§2.19](#)); other examples are set forth in [§§2.22–2.29](#).

For information on the statutory responsibility of the state DCSS and local child support agencies to keep their own records confidential, see [§5.29](#).

Tax returns are discussed separately in [§§2.16–2.18](#).

### **b. [§2.22] Child Support Registry Forms**

Pursuant to Fam C §4104 and the corresponding Cal Rules of Ct 5.330, the court must require the parties to fill out and submit a completed child support case registry form (form FL-191) each time an initial order for child or family support, or a modification of such order, is made (except for cases the local child support agency is pursuing under Fam C §17400). The court may keep a copy of the form, or the information on the form, in an electronic format provided all information is kept confidential. Cal Rules of Ct 5.330(c), (g).

**c. [§2.23] UIFSA Protections**

Under the Uniform Interstate Family Support Act (UIFSA) (see §§3.1 *et seq*), if a party alleges in an affidavit or pleading under penalty of perjury that the health, safety, or liberty of a party or child would be jeopardized by disclosing identifying information, that information must be sealed and may not be disclosed to the other party or the public, unless a hearing is held where the court considers the health, safety, or liberty of the party or child and orders disclosure of information determined to be in the interest of justice. Fam C §5700.312. See also §3.20.

**d. [§2.24] Child Abduction Records**

Child abduction records are confidential. Fam C §17514.

**e. [§2.25] Child Psychological Evaluations, Custody Reports, and Recommendations**

Psychological evaluations of a child regarding custody or visitation, as well as reports prepared by court-appointed evaluators and recommendations submitted to the court by mediators, must be maintained in the confidential portion of the file and may not be disclosed except to certain individuals. Fam C §3025.5(a)(1)–(4). See also Fam C §3111; Cal Rules of Ct 5.220.

**f. [§2.26] Domestic Violence Criminal Search Information**

Relevant information obtained by the court during the required criminal history search for restraining order hearings must be kept in a confidential case file. Fam C §6306(d). At the request of either party, the court must release the information it relied on to the party or counsel. Fam C §6306(c)(2). The court must disclose the information to court-appointed mediators or custody evaluators, who are made subject to the California Law Enforcement Telecommunications System (CLETS) policies, practices, and procedures under Govt C §15160. Fam C §6306(d).

**g. [§2.27] Protective Orders and Other Domestic Violence Orders**

In connection with a protective order, the court may issue an *ex parte* order enjoining a party from specified behavior that the court determines necessary to effectuate orders under Fam C §6320 (domestic violence) or Fam C §6321 (exclusion from dwelling) prohibiting disclosure of address or other identifying information of a party, child, parent, guardian, or other caretaker. Fam C §6322.5. The court must also order that any restrained party be prohibited from taking any action to obtain the address or location of any protected person unless there is good cause not to make such an order. Fam C §6322.7(a).

**4. [§2.28] Social Security Numbers**

In marital proceedings, either party may redact any Social Security Number from a document filed with the court. Fam C §2024.5(a); see also Fam C §45-6(a). Judicial Council forms now contain a notice of that right. As a general rule, parties must not include, or must redact when inclusion is necessary, Social Security Numbers and financial account numbers from the pleadings or other papers filed in a court's public file, unless otherwise provided by the

law or ordered by the court. If financial account numbers are required, only the last four digits may be used. On court order, a confidential reference list may be filed with the redacted documents. Cal Rules of Ct 1.201; see Judicial Council form MC-120.

Civil Code §1798.85 provides protection of an individual's Social Security Number, both to its use and disclosure. The provisions of the statute cannot be waived. CC §1798.86. An abstract of judgment that includes an order requiring payment of child support must also contain only the last four digits of the payor's Social Security Number. Fam C §4506(a) (for documents created on or after January 1, 2010).

## 5. [§2.29] Prohibition on Disclosure of Immigration Status

Effective May 17, 2018, in all civil actions not involving an action for personal injury or wrongful death, evidence of a person's immigration status must not be disclosed in open court by a party or attorney unless the court first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure of the person's immigration status. Evid C §351.3(a). This section does not apply to cases in which the person's immigration status is necessary to prove an element of a claim or an affirmative defense. Evid C §351.3(b)(1). This section also does not impact otherwise applicable laws governing the relevance of immigration status to liability or to standards applicable to inquiries regarding immigration status in discovery or to certain other proceedings as listed in Evid C §351.3(b)(2). This entire evidence code section, by its own terms, remains in effect only until January 1, 2022. Evid C §351.3(c).

## D. Attorney's Fees, Costs, and Sanctions

### 1. [§2.30] Scope

This section provides a very general background of attorney's fees, costs, and sanctions. There are a number of specific Family Code provisions relating to attorney's fees, costs, and sanctions in specific types of situations or circumstances that are not discussed here. For a complete list, see the table of attorney's fee and sanction provisions in [Appendix E](#).

This section does not cover statutory bases for an award that may arise in the court under other codes, such as CCP §§128.5 and 128.7 (bad-faith actions that are frivolous or cause unnecessary delay), CCP §177.5 (sanction for violating court order, up to \$1500 payable to the county), or CCP §§2023.010 et seq (discovery sanctions; see *Marriage of Eustice* (2015) 242 CA4th 1291, 195 CR3d 876). These sections are listed in [Appendix E](#). Attorneys who represent themselves cannot be awarded attorney's fees as sanctions under CCP §128.7. *Musaelian v Adams* (2009) 45 C4th 512, 517, 520, 87 CR3d 475.

For a discussion of attorney's fees and sanctions awarded on appeal, see *Marriage of Gong & Kwong* (2008) 163 CA4th 510, 77 CR3d 540. For a discussion of sanctions against an attorney, see *In re Henry James Koehler* (2010) 181 CA4th 1153, 104 CR3d 877.

### 2. [§2.31] General Types of Awards

In family law proceedings generally, an award of attorney's fees and costs can be made against a party to the case on either the basis of *need* under Fam C §§2030 et seq or as a *sanction* under Fam C §271. However, needs-based fees are not allowed against governmental agencies. Fam C §§273, 2030(a)(1). Indeed, Fam C §273 makes it clear that when governmental agencies are involved in family law matters or child support proceedings, courts may only award attorney's fees against governmental agencies if sanctions are appropriate under CCP §128.5 or

Fam C §271. See *Orange County DCSS v Superior Court (Ricketson)* (2005) 129 CA4th 798, 804, 28 CR3d 877 (sanctions recoverable under CCP §128.5). Also, before ordering attorney's fees or costs under the Family Code, the court must first determine the party has, or is reasonably likely to have the ability to pay. Fam C §270.

- **JUDICIAL TIP:** There are a variety of statutes encompassing different situations, and containing different requirements, where courts are authorized to award attorney's fees and costs, and in some instances where an award is mandated. As a result, the court should require any party or attorney seeking an award to state the specific statutory basis of the request for fees before making any ruling. See also §2.34 concerning jurisdictional and procedural requirements.

### 3. [§2.32] Needs-Based: Disparity in Access and Ability to Pay Findings

When there is a needs-based fee request, whether under Fam C §2030 (marital case generally), Fam C §3557 (order enforcing support order), Fam C §3652 (order modifying, terminating, or setting aside support order), or other fee statute under the Family Code, the court must first make a finding regarding an ability to pay. Fam C §270. The "need" aspect of an analysis is a *relative* need. *Marriage of Sorge* (2012) 202 CA4th 626, 134 CR3d 751 (both parents had substantial assets; award of attorney's fees upheld); see also *Marriage of Smith* (2015) 242 CA4th 529, 195 CR3d 162 (trial court properly considered large sums ex-wife's father paid to her attorneys, even though she characterized them as loans, in determining the parties' relative circumstances). If a party frustrates the court's ability to make the necessary finding regarding ability to pay, the court is not precluded from awarding attorney's fees. *Marriage of Hofer* (2012) 208 CA4th 454, 459, 145 CR3d 697 (husband "disentitled" from filing an appeal to trial court's order requiring him to pay \$200,000 in attorney's fees, due to multiple failures to comply with discovery and disclose information regarding his income and assets).

In ruling on a request for attorney's fees under Fam C §2030(a) or §3557(a), the court must make explicit findings on whether an award of attorney's fees and costs is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. Failure to make findings can constitute reversible error. See, e.g., *Marriage of Morton* (2018) 27 CA5th 1025, 238 CR3d 407; *Marriage of Shimkus* (2016) 244 CA4th 1262, 198 CR3d 799. If the findings demonstrate disparity in access and ability to pay, the court must make an order awarding fees and costs. Fam C §§2030(a)(2), 3557(a). When fees are sought to essentially equalize the parties' litigation power (Fam C §2032), whether to help pay for an existing attorney or to help provide a party with sufficient resources to adequately present the case and obtain access to legal representation, the court is required to consider, to the extent relevant, the circumstances of the respective parties described in Fam C §4320. Fam C §2032(b). See, e.g., *Alan S., Jr. v Superior Court (Mary T.)* (2009) 172 CA4th 238, 254–255, 91 CR3d 241 (lower court failed to consider all relevant factors in Fam C §4320 in determining fee award); *Marriage of Tharp* (2010) 188 CA4th 1295, 1313–1314, 116 CR3d 375 (trial court abused its discretion and failed to do an appropriate needs-based analysis). These are the same 14 factors the court must consider in ordering permanent spousal support. These factors are discussed more fully in §§1.114–1.127 of this handbook.

#### 4. [§2.33] Sanctions

When there is a request for sanctions, an award can be based on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigations, and when possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. There is no requirement to demonstrate any harm or financial need for the award. Fam C §271(a); see *Marriage of Feldman* (2007) 153 CA4th 1470, 1479–1480, 64 CR3d 29 (sanctions awarded during course of litigation affirmed); *Marriage of Tharp* (2010) 188 CA4th 1295, 1317–1318, 116 CR3d 375 (trial court abused its discretion in denying attorney’s fees as sanctions; record replete with instances of misuse of discovery process); *Marriage of Falcone & Fyke* (2012) 203 CA4th 964, 138 CR3d 44 (trial court affirmed; case involved multiple sanctions orders and appeals); *Parker v Harbert* (2012) 212 CA4th 1172, 1178–1180, 151 CR3d 642 (upheld award of \$92,000 in attorney’s fees as sanctions for bringing unwarranted contempt allegations).

In making a determination under this statute, the court must find that there has been some evidence that the party’s conduct, or that of the party’s counsel, frustrated the promotion of settlement and the reduction of litigation costs, such as engaging in obstreperous conduct. See *Marriage of Daniels* (1993) 19 CA4th 1102, 1106–1107, 23 CR2d 865; *Marriage of Davenport* (2011) 194 CA4th 1507, 125 CR3d 292 (affirmed \$100,000 sanctions award based on clear and convincing evidence of uncivil, rude, aggressive, and unprofessional conduct). The court must also “take into consideration all evidence concerning the parties’ incomes, assets, and liabilities,” and in no event can the court make an award “that imposes an unreasonable financial burden on the party against whom the sanction is imposed.” Fam C §271(a); *Marriage of Fong* (2011) 193 CA4th 278, 123 CR3d 260 (\$100,000 award not excessive based on disclosed assets). The amount of the award of attorney’s fees is not limited to the costs resulting from any bad conduct. *Marriage of Quay* (1993) 18 CA4th 961, 970, 22 CR2d 537 (awarding fees at the conclusion of a suit allows court to judge the extent and severity of the bad conduct; \$100,000 fee award upheld even though fees incurred after wrongful conduct). However, the court cannot award additional sanctions beyond attorney’s fees and costs. *Sagonowsky v Kekoa* (2016) 6 CA5th 1142, 212 CR3d 94 (sanctions under Fam C §271 are limited to “attorney’s fees and costs;” trial court erred in imposing \$500,000 for “relentless and culpable conduct” in driving up litigation costs, and \$180,000 for causing a reduction in sale price of real property; actual attorney’s fees and interest on such fees and other aspects of the court’s decision affirmed).

A trial court is not allowed to award sanctions to non-parties to the litigation under Fam C §271. *Webb v Webb* (2017) 14 CA5th 504, 221 CR3d 740 (trial court erred in awarding over \$80,000 in sanctions to wife’s former counsel).

#### 5. [§2.34] Jurisdiction and Procedural Requirements

The court must have personal jurisdiction over the party against whom any order is made. The court’s jurisdiction to award fees and costs in family law proceedings is set forth in Fam C §2010(f). Under Fam C §2030, needs-based fees apply in marriage cases and in any proceeding subsequent to entry of a related judgment. Fam C §2030(a). There is no such limitation under the sanctions provision of Fam C §271.

Generally, the court has broad discretion in awarding fees, costs, or sanctions, so long as the request was properly made and the court makes the requisite findings and determinations specific to the applicable statutes. See *Marriage of Sorge* (2012) 202 CA4th 626, 134 CR3d 751 (lack of

specificity as to amount of sanctions awarded under different statutory bases required reversal; attorney's fees award upheld).

Due process considerations require that there be a noticed motion or order to show cause when attorney's fees and costs are requested, except where temporary orders are being sought. Fam C §2031(a)(1). When a temporary order for fees is requested, it can be done orally without notice either at the hearing of the cause on the merits or any time before the entry of judgment against a party whose default has already been entered under CCP §585 or §586. Fam C §2031(b).

An award of fees and costs as a sanction can only be imposed after the party against whom the sanction is sought has been given notice and opportunity for that party to be heard. Fam C §271(b); *Marriage of Duris & Urbany* (2011) 193 CA4th 510, 513–515, 123 CR3d 150 (trial court erred in awarding attorney's fees as sanctions at support hearing without notice and based on insufficient evidence).

Whether by noticed motion, orally, or by the court sua sponte, the specific statutory basis for the request must be set forth, along with a specific description of the underlying conduct, as well as the identity of the person or entity against whom the order is sought. The court does not have the authority to make an award under a statute that was not specified. *Levy v Bloom* (2001) 92 CA4th 625, 638, 112 CR2d 144. Before ordering sanctions or attorney's fees, the court should take care to make all necessary or requisite findings. Regarding procedures for requesting attorney's fees under Fam C §2030, see Cal Rules of Ct 5.427; Judicial Council forms FL-300 (request for order), FL-319 (request for fees and costs attachment), FL-158 (supporting declaration).

When sanctions have been requested against the DCSS, the hearing should be held in front of the same commissioner. See *Orange County DCSS v Superior Court* (Ricketson) (2005) 129 CA4th 798, 805–807, 28 CR3d 877. The limitations in Fam C §273 apply.

A trial court may not impose sanctions on a party for filing an improper motion for reconsideration (CCP §1008(d)), without affording the party a 21-day safe harbor to withdraw the offending motion. *Moofly Productions, LLC v Favila* (2018) 24 CA5th 993, 234 CR3d 769.

Fam C §271 does not preclude consideration of sanctioned party's spousal support payments in analyzing income; trial court may order payment of sanctions from sanctioned party's spousal support funds if reducing those funds does not impose an unreasonable financial burden on that party. *Marriage of Pearson* (2018) 21 CA5th 218, 229 CR3d 916.

➤ **JUDICIAL TIP:** When faced with a request for attorney's fees and costs or for sanctions, check the following:

- Jurisdiction over the party against whom the award is sought.
- Properly noticed request (except where temporary order sought).
- Specific statutory grounds identified in the request.
- Evidence to support the underlying request (*e.g.*, predicate conduct for sanctions), to support the amount requested when required (*e.g.*, needs-based), and to support any factors the court may have to consider (*e.g.*, income information of the parties).
- Consider all factors that may be required by the statute under which the award is requested, and make findings where required.

- Consider any limitations in the court’s authority, such as the limitations on awards against governmental agencies (see [§2.31](#)).

## E. Telephone Appearances

### 1. [§2.35] Separate Statutes and Rules

The statutes and rules governing telephone appearances in general family law proceedings (Fam C §211; Cal Rules of Ct 5.9) are different from those applicable to Title IV-D proceedings (Fam C §4252(b)(4); Cal Rules of Ct 5.324). They both differ from the rules that apply to other civil proceedings (CCP §§367.5, 367.6; Cal Rules of Ct 3.670).

### 2. [§2.36] Family Law Cases

Under Cal Rules of Ct 5.9, the court has discretion to permit a party to appear by telephone at a hearing, conference or proceeding if it determines that a telephone appearance is appropriate. Cal Rules of Ct 5.9(b). The court is also given discretion to require a party to appear in person at a hearing, conference or proceeding if it determines that a personal appearance would materially assist in the determination of the proceedings, or in the effective management or resolution of the case. Cal Rules of Ct 5.9(c)(1).

If the court determines at any time during a hearing, conference, or proceeding being conducted by telephone that a personal appearance is necessary, the court may continue the matter and require a personal appearance. Cal Rules of Ct 5.9(c)(2).

Courts may develop their own local rules to specify procedures regarding appearances by telephone. Cal Rules of Ct 5.9(d).

- **JUDICIAL TIP:** Use of telephone appearances can be an effective tool in managing certain types of matters, *e.g.*, review hearings, verification or certain compliance review hearings, as well as for individuals who can no longer take additional days off of work (particularly where a hearing had to be continued due to the conduct of the other party). Many courts use an outside call provider, designated by local rule, who verify, manage, and “cue” the calls, while other courts have their own system, including initiating the call for verification purposes and then requiring the person to call right back to pay for the call. Some providers also have a policy of waiving costs in approved fee-waiver cases.

### 3. [§2.37] Title IV-D Cases

Cal Rules of Ct 5.324 applies to all Title IV-D hearings and conferences. It requires the use of a particular Judicial Council form—FL-679—and has specific deadlines for both the filing of the written request (at least 12 court days before hearing), as well as the filing of any opposition (at least 8 court days before hearing) in advance of the hearing. Cal Rules of Ct 5.324(e)–(f).

There is a separate special evidentiary rule for appearances by telephone in cases brought under UIFSA. Fam C §5700.316(f), see also [§3.14](#).

For a more detailed discussion of who can file the request in Title IV-D matters, the types of hearings in which telephone appearances are allowed or not permitted, the required procedures, and the court’s authority to change time frames as well as procedures under the rules, see [§§5.30–5.33](#).

## F. [§2.38] Civil Bench Warrants or Body Attachments

The term “bench warrant” is not defined in the codes, but in civil actions it is generally understood to mean a process issued by the court itself (or from the “bench”) for the attachment or arrest of a person to compel attendance before the court.

- **JUDICIAL TIP:** Different counties have adopted different nomenclature, and will sometimes use the term civil bench warrant, civil arrest warrant, warrant of attachment, or civil body attachment. All these terms essentially mean the same thing, but may have different jurisdictional and issuing requirements depending on the situation and type of proceeding. No specific Judicial Council forms for bench warrants exist.

The Government Code grants commissioners general judicial authority: “Within the jurisdiction of the court and under the direction of judges, commissioners are authorized to exercise all the powers and perform all of the duties prescribed by law.” Govt C §72190. If directed to perform such duties by the presiding judge, a commissioner “may conduct arraignment proceedings on a complaint..., including the issuance and signing of bench warrants” (Govt C §72190.1), and “may issue and sign a bench warrant for the arrest of a respondent who fails to appear in court when required to appear by law or who fails to perform any act required by court order.” Govt C §72190.2.

The following specific bench warrants or attachments are also authorized:

- *Contempt.* When an individual is brought before a court on contempt proceedings (e.g., an order to show cause re contempt) and fails to appear, the court may issue a warrant of attachment (or bench warrant) and must set bail. CCP §§1209, 1209.5, 1212, 1213; see also §§4.25).
  - *Absent Witness (subpoena or court order).* As an alternative to issuing a warrant for contempt under CCP §1209(5) (disobedience of any lawful judgment, order, or process of the court) or CCP §1209(9) (any other unlawful interference with court process or proceedings), the court may issue a warrant for the arrest of a witness who fails to appear under a subpoena or court order, on proof of service of the subpoena or order. CCP §1993(a)(1); see also *Silvagni v Superior Court* (1958) 157 CA2d 287, 291–292, 321 P2d 15 (no blanket inherent power to order physical presence of a party at any stage in civil proceedings other than as a witness).
- **JUDICIAL TIP:** A party or attorney may serve, and some LCSAs will regularly serve, an actual subpoena along with an OSC (order to show cause) re: Seek Work, for example, to provide unquestionable authority for the court to issue a bench warrant.

The court must issue a “Failure to Appear” notice *before* issuing the actual bench warrant for a failure to appear under a subpoena. This notice may be omitted, however, on a showing that the appearance of the person subject to the subpoena is material to the case and that urgency dictates an immediate appearance. CCP §1993(a)(2). The warrant must contain specific information, including the title and case number, information that identifies the person to be arrested, reasons for issuance, information regarding bail, and whether the person can be released on a promise to appear. CCP §1993(b). There is no direct guidance on how much notice a person must be given.

- **JUDICIAL TIP:** The “Failure to Appear” notice warns individuals that if they do not appear they will be subject to arrest, and provides an element of due process. CCP §1993(a)(2) refers to a failure to appear under a subpoena (a type of court order); it is unclear whether the Legislature intended to exclude failures to appear otherwise under a court order. Given the due process implications, it is prudent to provide this notice for all failures to appear under CCP §1993, to give obligors (who, *e.g.*, moved, were briefly incarcerated, or forgot a hearing date) an opportunity to cure their failure, and to allow the court to manage its calendar. For example, for a failure to appear on a “work search” review hearing, many courts will order a bench warrant to be issued, but stay its service to a date certain on a future calendar, after which the stay is lifted if the person fails to appear. Courts can place the “Failure to Appear” notice language within its own order continuing the matter once (*i.e.*, it does not have to be a separate notice), or in Title IV-D cases, can direct DCSS to provide the notice by, *e.g.*, serving the order after the hearing at which the person first failed to appear (*i.e.*, the order warns about possible arrest if no one shows up at the continued hearing date).
- *Uniform Interstate Family Support Act.* When a UIFSA petition has been filed, and “to the extent not prohibited by other law” (Fam C §5700.305(b)), a responding tribunal may “issue a bench warrant for an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants.” Fam C §700.305(b)(9).
  - *Debtor/Creditor Examinations.* If an order to appear for examination was served by a sheriff, marshal, a person specially appointed by the court in the order, or a registered process server, and the person fails to appear, the court may either have the person brought in under a warrant and punish the person for contempt, or issue a warrant for the arrest of the person who failed to appear, under CCP §1993. See CCP §708.170(a)(1)(A)–(B); see also §4.94.

The need to *recall* a previously ordered bench warrant or body attachment, as opposed to simply vacating a prior order to prepare it, depends on whether the previously ordered warrant or body attachment was in fact *issued* or actually prepared. If the court ordered the warrant but it had not yet been issued, *i.e.*, separately prepared with all identifying information and signed by the judicial officer, an order from the court vacating its prior order will stop the process. There is nothing to recall if the warrant was in fact never issued. However, if the court ordered the warrant and the actual warrant was issued, the court must issue a new order that states that the warrant is recalled as of that date, irrespective of whether it had been received or served by the sheriff. Case law does not specify the exact procedure for notifying the sheriff of a recall, but it is clear that the court clerk must notify the sheriff when the court orders a recall, otherwise the sheriff will not have accurate warrant status information. Compare *People v Willis* (2002) 28 C4th 22, 34, 44–46, 120 CR2d 105 (incorrect parole status information led to improper search being conducted by police).

- **JUDICIAL TIP:** When recalling a bench warrant, state clearly on the record both the date that the order for the warrant was made and the date that the bench warrant was actually issued. Many case management systems, or register of actions, document when the warrant itself was issued, which is itself a court order. Also make sure the clerk has an adequate system in place to formally notify the sheriff of all recalls so that an individual is not inadvertently arrested.

## G. Limited Scope Representation

### 1. [§2.39] Defined

Limited scope representation refers to when an attorney and a person seeking legal services agree that the scope of the legal services to be performed will be limited to specific tasks (also known as “unbundling” of services), in contrast to the traditional notion of an “attorney of record” for all purposes.

The Judicial Council adopted forms and rules relating to attorneys who assist clients under specified limited circumstances. See Cal Rules of Ct 5.425, which governs family law cases. A separate rule—not discussed here—governs civil cases (Cal Rules of Ct 3.35–3.37). These rules allow pro per litigants, especially those who cannot afford full representation, to obtain the assistance of an attorney for parts of their cases when needed. They also set forth the procedures for stepping “in” and “out” of the case on a limited scope basis.

### 2. [§2.40] Assistance With Document Preparation

Separate and distinct from an attorney making an actual appearance (limited or otherwise), Cal Rules of Ct 5.425(f) addresses the situation of an attorney assisting behind-the-scenes in preparing legal documents only, which is considered “undisclosed representation” (and sometimes referred to as “ghostwriting”). An attorney who contracts with a client to draft or assist in drafting legal documents, but not make an appearance, is not required to disclose that involvement within the document’s text. Cal Rules of Ct 5.425(f)(1). But if a litigant seeks an order for attorney’s fees incurred as a result of such document preparation, disclosure of pertinent information is required, including the attorney’s name, the time involved, the tasks performed, and billing information. Cal Rules of Ct 5.425(f)(2).

### 3. Limited Scope Representation Procedures

#### a. [§2.41] Stepping In

Attorneys who have an agreement with their client in which they are to be responsible for only a part of the case, and who do not wish to be held responsible as attorney of record for the entire case, must file the mandatory notice of limited scope representation (form FL-950) with the court. This is known as “stepping in.” Cal Rules of Ct 5.425(d).

The form allows an attorney to check certain boxes and serve as “attorney of record” for the party *only* for the issues specified on the form, whether to establish, enforce, or modify, issues regarding:

- Child support,
- Spousal support,
- Child custody and visitation,
- Division of property,
- Pension issues,
- Restraining order,
- Contempt, or
- “Other” issues that must be described in detail.

The form also allows the attorney to specify the duration of the representation, including:

- A single hearing date and (if box checked) any continuation of that hearing,
- Until resolution of the specified issues checked on the form, or
- Some other specified duration.

There is a separate box that must be affirmatively checked if submitting to the court an order after hearing or judgment is *not* within the scope of the attorney’s representation. Otherwise, before being relieved as counsel, the limited scope attorney is required to file and serve the order after hearing or judgment following the hearing in which representation was provided, unless otherwise directed by the court. Cal Rules of Ct 5.425(d)(4).

Once the notice of limited scope representation is filed, it is important to note that the attorney becomes the “attorney of record” for service of documents, but only to those specified issues. Documents that relate to all other issues outside the scope of the attorney’s representation must be served directly on the party or the attorney representing the party on those other issues. Cal Rules of Ct 5.425(d)(2).

- **JUDICIAL TIP:** The judicial officer should be able to quickly tell whether an attorney is a limited scope attorney or not to rule on service issues or objections, and to determine whether it is appropriate to go forward on the merits of the pending motion. The court clerk also needs to know who to contact for setting or continuing hearings or for sending orders or notices. Check with court operations to determine whether its systems have the ability to recognize the difference between a limited scope representation attorney versus an attorney of record for all purposes (*e.g.*, in the register of actions or somewhere in the court’s case management system). If so, you can avoid having to manually search the court file to know when an attorney has stepped in or out.

### **b. [§2.42] Stepping Out**

When a party signs the mandatory notice of limited scope representation form (form FL-950), it specifically states that the party “agrees to sign Substitution of Attorney—Civil (form MC-050) when the representation is completed.” A limited scope attorney who has completed the tasks originally specified in the filed notice of limited scope representation form, can simply file a signed MC-050 to get out of the case. CCP §284(1).

If the party fails to sign form MC-050 however, Cal Rules of Ct 5.425(e) effective January 1, 2018, provides an attorney who has completed limited scope representation an alternative procedure. The attorney must first *serve* the following three documents on the client: (1) a Notice of Completion of Limited Scope Representation (form FL-955), with the “Proposed” box marked and the deadline date inserted to file an objection (10 calendar days from the date form FL-955 was served); (2) a copy of form FL-955-INFO, and (3) a blank Objection to Proposed Notice of Completion of Limited Scope Representation (form FL-956). Cal Rules of Ct 5.425(e)(1)(A)–(C). Additional steps must be taken depending upon whether an objection is filed or not.

If *no objection* is timely filed and served, the following procedures apply: within 10 calendar days from the date the Notice of Completion of Limited Scope Representation was served, the attorney must (Cal Rules of Ct 5.425(e)(2)(A)–(C)):

- Serve the client and the other parties (or their attorneys if represented) with a Notice of Completion of Limited Scope Representation (form FL-955) with the “Final” box marked;

- File the final Notice of Completion of Limited Scope Representation (form FL-955) with the court, and attach the proofs of service of both the “Proposed” and “Final” notices of completion. The court cannot charge a fee to file the final notice even if the attorney has not previously made an appearance in the case.

After filing the final notice, the attorney is deemed to be relieved as attorney on the date the final notice of completion is served on the client. Cal Rules of Ct 5.425(e)(2)(D).

If *an objection* is timely filed and served, the following procedures apply (Cal Rules of Ct 5.425(e)(3)(A)–(E)):

- The clerk must set a hearing date directly onto the Objection to Proposed Notice of Completion of Limited Scope Representation (form FL-956), that is no later than 25 court days from the date the objection is filed.
- The objection—with hearing date, time and location included—must be served on the limited scope attorney and all other parties (or attorneys if represented). The objection must be served by the deadline specified in form FL-955-INFO, unless otherwise specified by the court.
- The attorney may file a response (form FL-957). Any response must be served on his or her client and all other parties (or attorneys if represented) at least 9 court days before the hearing, unless otherwise directed by the court.

Unless the court directs otherwise, the attorney must prepare the Order on Completion of Limited Scope Representation (form FL-958), obtain the judicial officer’s signature, as well as file and serve the order on the client and all other parties after the hearing. Cal Rules of Ct 5.425(e)(3)(E)–(F). The attorney’s representation is concluded on the date determined by the court in the Order on Completion of Limited Scope Representation (form FL-958). Cal Rules of Ct 5.425(e)(3)(G).

Separate and apart from the methods described above, the only other way to get out of the case is to obtain an order after filing a formal noticed motion to withdraw. See CCP §284(2) and Cal Rules of Ct 3.1362.

## H. Consolidation Issues

### 1. [§2.43] Consolidation Generally

Unless otherwise specified by statutes or rules specific to family law, the rules of practice and procedure under the Code of Civil Procedure apply. Fam C §210. The designation of parties and who is permitted to be a party, as well as the court’s jurisdiction, depend upon the type of family law action being filed. A party in a family law proceeding may only ask the court for orders against or involving the other party or any other person available under the Family Code or rules of court. Cal Rules of Ct 5.16, 5.17. Consolidation issues generally are governed by CCP §1048. Under that statute, the court may order a joint hearing or trial of issues, or a consolidation of actions, where there are common issues of law or fact. CCP §1048(a).

In general, the lowest numbered case in the consolidated cases is the lead case. Cal Rules of Ct 3.350. However, if the local child support agency is involved when a consolidation order is being made under this statute, the court must follow the priority of consolidation set forth in Cal Rules of Ct 5.365. See [§2.45](#).

## 2. [§2.44] Consolidation of Support Orders by LCSA

Actions brought by the local child support agency under Fam C §§17400 et seq generally cannot be joined with another action, except under certain circumstances. Fam C §17404(a). The court, however, may consolidate or combine support or reimbursement arrearages owed by one obligor to one obligee in two or more court files into a single court file if requested by an LCSA. The motion may be made only if the LCSA is seeking to enforce the orders being consolidated, and the motion must be brought only in the court file the LCSA is seeking to have designated as the primary file. Fam C §17408(a); see Cal Rules of Ct 5.365(a).

Consolidation is only proper if the children subject to the support orders have the same mother and father, and venue is proper. Fam C §17408(b).

Orders may be consolidated regardless of the nature of the underlying action, whether initiated under the Welfare and Institutions Code, the Family Law Code, or another law. Fam C §17408(b).

## 3. [§2.45] Priority of Consolidation

Whether an order of consolidation is made under CCP §1048(a) in cases in which the LCSA is appearing, or when consolidating support orders under Fam C §17408, absent a showing of good cause, the cases or support orders must be consolidated according to a list of priorities, regardless of whether the cases or orders were initiated or obtained from an action for dissolution, legal separation, or nullity, an action under the Uniform Parentage Act, an action initiated by an LCSA or an action for custody and support commenced by form FL-260, or an action brought under the Domestic Violence Protection Act or any similar law. See Cal Rules of Ct 5.365(a). The priority of consolidation is as follows: Cal Rules of Ct 5.365(a)(1)(A)–(D).

- Dissolution, nullity, legal separation action: If one of the cases or orders is or from an action for nullity, dissolution or legal separation, all cases must be consolidated into that action;
- Uniform Parentage Act: If no cases or orders fall into the category above, but one of the orders to be consolidated has been issued under the UPA, all orders must be consolidated into that action;
- Petition for custody and support of minor children: If no cases or orders fall into either of the categories above, but one of the orders to be consolidated has been issued in an action commenced by a Petition for Custody and Support of Minor Children (form FL-260), then all orders must be consolidated into that action;
- Case with lowest number: If no cases or orders fall into any of the categories above, the case(s) with the higher number(s) must be consolidated into the case with the lowest number, which must be the primary file. However, a domestic violence case must not be designated as the primary file.

Once consolidated, no further support orders may be issued in the subordinate files, and all future orders are entered in the primary file. Fam C §17408(d).

The court must also order the LCSA to file a notice in the subordinate files stating that the support orders in those actions were consolidated into the primary file, the date of the consolidation, the name of the court, and the primary file number. Fam C §17408(c); Cal Rules of Ct 5.365(a)(2); see form FL-920.

A single wage assignment based on the consolidated orders may be issued when possible. Fam C §17408(e).

- **JUDICIAL TIP:** Although the decision to consolidate cases is discretionary, as a practical matter, it allows all prior orders of the court to be available for the court's consideration in any future proceedings and generally makes the file easier to work with. This is particularly true when the parties disagree about the issues of time-share, assets available for support, or hardships.

## **I. Crossover Issues**

### **1. [§2.46] In General**

This section is intended to raise the court's awareness of the existence of crossover issues as they relate to the issues in both a family law and Title IV-D court in order to help the court to understand when it is appropriate and why it is important to consider possible crossover issues when ruling on parentage, support, or enforcement matters.

Although support issues in both family law and Title IV-D proceedings deal primarily with determining parentage and establishing, modifying, and enforcing child support and related spousal support matters, there are many times when an individual or family appearing in court may have other active cases in different areas of the law in other courts or jurisdictions that relate to the same child, and that may relate to the issues pending in the family law or IV-D court. For example, orders made in juvenile court, such as genetic testing orders, parentage findings, or an order terminating parental rights, can have an impact on the issue of parentage or even whether a child support order can be imposed at all in a family law or IV-D court. Similarly, child support orders made in a family law or IV-D court can have a profound impact on the ability of a parent to comply with orders previously made as part of a reunification plan in a related dependency proceeding, causing that parent to fail in the reunification process (for that parent's other children as well).

### **2. Juvenile Dependency and Delinquency Cases**

#### **a. [§2.47] General Crossover Issues**

When a child has either voluntarily been put in a placement or, as is more often the situation, has been removed from the home by Child Protective Services (CPS), or the child has entered the delinquency system, the state DCSS is responsible for seeking reimbursement from both parents in those cases when a referral has been made from the Title IV-A agency to the IV-D agency (DCSS). Thus, for example, for every dependency case, there can potentially be two IV-D cases opened and pursued in the IV-D court: one against each parent. The state Department of Social Services and DCSS are required to promulgate regulations regarding the timing and circumstances under which cases are to be referred to the LCSA for child support services. Fam C §17552; Welf & I C §§903 et seq; 22 Cal Code Regs §§112150, 112154, 112155 (processing CalWORKS, foster care, and non-public assistance referrals).

While the vast majority of crossover issues noted here as they relate to support issues will be most relevant to Title IV-D cases, it is still important for family law courts to be aware of the existence of dependency and delinquency cases for various reasons. For example, such knowledge can assist the family law court in determining whether a particular support issue

should be referred to a Title IV-D court, or it can help the family court avoid issuing a conflicting judgment in a UPA action, *e.g.*, by verifying if there are pre-existing parentage findings (see §2.8), or in understanding the demands upon a parent who may be under orders in another reunification plan (see §2.51).

There are a number of junctures in an active juvenile case when decisions made by the juvenile court can potentially impact a matter pending in a related child support hearing. Very generally, cases proceeding in dependency side go through the following stages of hearings:

- Detention (within 48 hours of case opening);
- Jurisdiction (15 days after detention hearing);
- Disposition (10 days after jurisdiction hearing);
- Review hearings set at 6 months, 12 months (from disposition, but no more than 18 months from detention), and 18 months;
- Implementation (120 days from the order terminating reunification services); and
- Postpermanency planning hearing (every 6 months until the case is dismissed).

Delinquency proceedings may differ somewhat from the above. Also, counties may vary with regard to what entity is responsible for recouping certain costs in delinquency versus dependency proceedings (*e.g.*, a county's probation department may be responsible for certain costs incurred in delinquency proceedings, whereas the state DCSS may file actions in both types of proceedings). This section only deals with those actions brought by the state DCSS through the local child support agencies. For a more detailed understanding of dependency proceedings, see California Judges Benchguides 100–104 (Cal CJER); for delinquency proceedings, see California Judges Benchguides 116–119 (Cal CJER).

At these various hearing stages, the juvenile court may make findings and orders in the areas outlined below, each of which can have an impact or may be something that needs to be considered during a child support proceeding. Therefore it is important to keep in mind that on the “child support side” the court may want to make certain inquiries when the case has been identified as having a related active juvenile court case (often referred to as a “foster care” case, whether involving federal/nonfederal foster care monies, or an in-home/out-of-home placement).

Also note that LCSAs have the authority under Welf & I C §827(a)(1)(N) to inspect juvenile court case files for the purpose of establishing paternity and establishing and enforcing child support orders, allowing them to access information regarding juvenile court orders and findings. Whereas under Welf & I C §827(a)(1)(L), a judicial officer assigned to a family law case is allowed to inspect the juvenile court case file only where there are issues concerning custody or visitation or both. As such, a general direct inquiry of the litigants in family court may provide helpful information.

- **JUDICIAL TIP:** If the Title IV-D court is unsure whether a child support case before it is a “foster care” case, a notation system (*e.g.*, special code on the pleadings) can be arranged with the local child support agency that allows identification based on the type of aid being expended in such cases without compromising any confidentiality requirements. In a regular family law court, a general inquiry as to whether the parent or child is participating in any other court proceedings can be made of the litigant. This allows the court to consider making further relevant inquiries:

- At what stage is the juvenile proceeding? This helps to determine if further inquiry is needed.
- Is there any better locate (whereabouts) information? If so, check for proper service.
- Have any parentage findings been made? If so, analyze basis and timing.
- Is there a reunification plan? If so, are there any terms to consider when determining any issue regarding child support (such as need to deviate) or enforcement?
- Have parental rights been terminated? If so, when?
- Is there an IEP (individualized education plan) for the child? If so, does it require the placement of the child in a facility?
- Has the child been returned? If so, when and to whom?

The importance and reasons why trial courts should consider making such inquiries are set forth below.

### **b. [§2.48] Parentage Determinations**

At the initial hearing on the petition in a dependency proceeding, or at the disposition hearing in a delinquency proceeding (where minor's care is ordered to be under probation officer supervision for foster care placement), the juvenile court is under a duty to make a "parentage inquiry." Welf & I C §316.2 (dependency) and Welf & I C §726.4 (delinquency); Cal Rules of Ct 5.635(a)–(b), 5.668(b). Rule 5.635 of the California Rules of Court sets forth the following procedure:

- The juvenile court must ask the parent or the person alleging parentage, and others present, whether any parentage finding has been made, and if so, what court made it, or whether a voluntary declaration has been executed and filed under the Family Code. Cal Rules of Ct 5.635(d)(1).
- The juvenile court clerk must prepare and transmit a form of parentage inquiry (form JV-500) to the local child support agency inquiring whether parentage has been established by judgment or a voluntary declaration under the Family Code. The local child support agency must complete and return the form within 25 judicial days, with certified copies if parentage is already established. The juvenile court must take judicial notice of the prior determination of parentage. Cal Rules of Ct 5.635(d)(2)–(4).
- Where there is no prior determination of parentage, the juvenile court may order the child and any alleged parents to submit to genetic testing, or may determine parentage based on the testimony, declarations, or statements of the mother and alleged father. Cal Rules of Ct 5.635(e). If parentage is established, that determination must be transmitted to the local child support agency on form of parentage finding and judgment (form JV-501). Cal Rules of Ct 5.635(f).
- If the juvenile court obtains information, after the filing of a dependency or delinquency petition, that there are one or more alleged parents, then under certain circumstances the court clerk must send out copies of the petition, the next hearing notice, and a parentage inquiry (form JV-505) to each of them. If a person appears and requests a judgment of parentage on form JV-505, the juvenile court must determine whether that person is (1)

the biological parent of the child and, if requested, (2) the presumed parent of the child. Cal Rules of Ct 5.635(g)–(h).

In addition, when there is an active dependency or delinquency proceeding, the juvenile court has the exclusive authority to hear an action filed under the UPA (Fam C §7630), until the petition in juvenile court is dismissed, the dependency or wardship is terminated, or parental rights are terminated. See Welf & I C §§302(c), 316.2(e) (dependency) and Welf & I C §726.4(e) (delinquency).

- **JUDICIAL TIP:** Anytime the issue of parentage is before the court in either a regular family law or a Title IV-D court, it is important to find out if the child in question is—or was ever—in juvenile court (in dependency, or placed out of home in delinquency proceedings). If so, a basic inquiry regarding whether any parentage determinations were made by the juvenile court should be done, and in a situation where the juvenile case is still active, any UPA action falls within the juvenile court’s jurisdiction. Where genetic testing has resulted in an alleged parent in a juvenile proceeding being excluded, particularly before a judgment or finding of parentage has been entered in any family law or IV-D child support proceeding, this information needs to be communicated to the family court, IV-D court and/or local child support agency in a timely fashion to avoid issuing an inconsistent finding or judgment.

Many courts and county agencies do not have computer systems that are fully compatible or linked. If the two county agencies (Title IV-A and Title IV-D) are not regularly exchanging appropriate information, such as updating each other when test results come back, two different people may be adjudicated in different courts. The same potential problem is true with regard to exchanging information in the other categories listed below.

### c. [§2.49] Return-to-Home Orders

When appropriate, the juvenile court can issue an order that returns the child to the home of one or both parents (if the family is intact); this can occur at different stages of the juvenile proceedings, depending on the progress of the case. Making an inquiry about the status of the juvenile case and whether the child has been returned home can assist the IV-D court in making the appropriate referrals or determinations in a child support case.

Clearly, when the juvenile court has ordered a child be placed with a parent (in home placement) or returned to a parent, any active current child support order *as to that parent* needs to be modified. If the child is returned and the juvenile case dismissed, any request for modification would then be heard either in family law or a Title IV-D court, depending upon whether DCSS remains “involved” in the case in which the child support order was made.

If the child is returned to an obligor, it is also possible *that parent* may be eligible for a compromise of arrearages on accumulated arrearages. Fam C §17550; see §§5.52, 5.54. If, however, the two agencies (Title IV-A and Title IV-D) are not regularly communicating with each other after the initial referral, or if it is now a case in which the local child support agency is no longer involved and it comes before the regular family law court, then it may take some time before the court will see the issue come up on the child support side, whether in a later modification proceeding, request for direct care and custody credits, or a judicial determination of arrears.

#### d. [§2.50] Parental Rights Termination Orders

The juvenile court has the authority to terminate the parental rights of one or both parents. In dependency, when a child is determined to be eligible for adoption, the court will terminate the parental rights of both parents, as well as all those who may have any claim of parentage. Generally, this is done at the implementation hearing (often referred to as a “.26 hearing”). Welf & I C §366.26. See Welf & I C §727.31 (delinquency).

It is important for all courts to be informed or inquire about whether parental rights have been terminated because once parental rights are terminated, child support stops as a matter of law. *County of Ventura v Gonzales* (2001) 88 CA4th 1120, 1122, 106 CR2d 461. This includes inquiring about any tribal custom adoption order, which must be given full faith and credit. Welf & I C §366.26(i)(2).

Although infrequent, note that it is possible for a parental rights termination order to be rescinded if a child is not adopted within 3 years, and adoption is no longer the permanent plan. Welf & I C §366.26(i)(3). Thus, the possibility exists that a child support obligation may once again arise.

#### e. [§2.51] Reunification Plans and Orders

For a period of time before the implementation stage in dependency proceedings, the juvenile court may order that services be provided to one or both parents in an effort to see if the parents can reunify with the children. If this occurs, a reunification plan is developed, and the juvenile court can make orders requiring the parents to complete a number of steps before the court will consider returning the child home. These include such things as entering substance abuse treatment programs, getting counseling, attending therapy, or obtaining housing that has room for the children. Welf & I C §§360 et seq; Cal Rules of Ct 5.695.

In some situations, individuals under such orders in the juvenile court may be put in a difficult situation if they are then placed under separate orders to pay child support in a different court. For instance, they may not be able to save the deposit necessary to obtain housing if their wages are garnished under a guideline child support order, or they may not be able to comply with a standard work search because of other commitments ordered under the reunification plan. Unless the court is made aware of these factors, there can be separate orders out of two courts that are operating in a negative fashion, putting the obligor in a “Catch-22” situation that could lead to a failure to comply in one court or the other. Thus, when appropriate, an inquiry in this area may provide the court with enough information that may justify, for example, a departure from guideline child support under Fam C §4057(b)(5). See §§1.86–1.94 for discussion of departures from the guideline formula. The information obtained on an inquiry may justify a denial of a standard work search or a tailoring of an order that allows the obligor to complete the terms of the reunification plan.

- **JUDICIAL TIP:** These cases will essentially be coming before the Title IV-D court since it is likely foster care monies are being expended while reunification services are pending. In departing from the guideline, the court may want to consider some creative solutions that will allow the obligor to achieve the goal in the other court. For example, instead of simply making the necessary findings for a downward departure from the guideline when the obligor must save for housing under the reunification plan, you could consider imposing conditions, such as setting child support at zero if the obligor

opens and maintains a bank account to save for the housing deposit at a certain rate per month and provides proof to the LCSA each month of the amount being saved.

**f. [§2.52] Locate Information**

The Title IV-A agency (social services) on the juvenile side and the Title IV-D agency (DCSS) on the child support side are not only mandated to deal with each other regarding referrals for aid reimbursement and parentage inquiries, but they are also responsible for cooperating and exchanging information, including locate information, *i.e.*, the whereabouts of the parents. Failure to do so can have consequences for an entire case.

For example, *County of Orange v Carl D.* (1999) 76 CA4th 429, 90 CR2d 440, involved a North Carolina family where the mother disappeared with three daughters in 1984. The father searched for them without success for 11 years; he then moved to Northern California in 1990, not knowing that they had moved to Southern California 4 years earlier. Dependency proceedings began in Los Angeles in 1990, and the mother stated she did not know the father's whereabouts. In 1992, the daughters were put in foster care when the mother was arrested, and the dependency case was transferred to Orange County. In 1993, the social services agency gave a referral to the district attorney's office for aid reimbursement. The district attorney found the father through the California Parent Locator Service, yet the agency repeatedly informed the juvenile court that the father's whereabouts were unknown, and further inquiry would be futile. Once the father was served with the summons and complaint, he promptly contacted the agency and successfully reunified with his daughters in 1995. The trial court, relying on *Marriage of Comer* (1996) 14 C4th 504, 59 CR2d 155 (cannot use concealment by other parent as excuse not to reimburse county), ordered the father to pay nearly \$16,000 in reimbursement. The appellate court reversed, distinguishing *Comer* because the county repeatedly informed the juvenile court that it was unable to locate the father. Because the information was available through the district attorney (now LCSA) at the time, the county failed in its constitutional responsibility to use due diligence to locate the father and inform him of the dependency case, which deprived him of his due-process right to participate in those proceedings and, in turn, caused the children to be kept in the foster care system with aid expended. This failure prejudiced both the father and the children, and the county was therefore estopped from collecting any reimbursement for that time frame. *County of Orange v Carl D.*, *supra*, 76 CA4th at 437–440.

- **JUDICIAL TIP:** The *Carl D.* case is a prime example of when the lack of communication between the two respective agencies can cause problems. Although that case involved the failure of the IV-A agency to “discover” the locate information that the IV-D agency had in its system, it would appear that the due process principles are applicable in both directions.

Confidentiality issues notwithstanding (both agencies must maintain confidentiality of information), the respective Title IV-A and Title IV-D agencies should be “talking” to one another on certain matters, *e.g.*, parentage and locate information. Likewise, both the juvenile and child support courts should have the ability to determine that such information exists on the other side (inquiry access) and should compare this information when necessary to satisfy such due process considerations. If not, at the very least, inquiries should be made of the litigants as to what may be happening and who is appearing in the “other court.” See also [§2.47](#).

### **g. [§2.53] Individualized Education Plans**

In California, school districts often prepare individualized education plans (IEPs) for children who have special needs or disabilities. Sometimes these plans recommend or require a residential placement to address that child's specialized and educational needs. In a situation when a child becomes a dependent or ward of the court and there is an IEP that essentially requires a residential placement to address the child's educational needs, the county is not entitled to seek either ongoing support or reimbursement for the aid or any expenses being paid for the child (which DCSS would normally do in a foster care case under Fam C §17402). *County of Los Angeles v Smith* (1999) 74 CA4th 500, 518–522, 88 CR2d 159. The rationale behind the *Smith* case is based on provisions of the Individuals With Disabilities Education Act (IDEA) (20 USC §§1400 et seq), in which children eligible under the Act are entitled to free appropriate public education.

- **JUDICIAL TIP:** The court should review the entire IEP (or series of IEPs) to make the appropriate determination of whether the child's placement is a result of the IEP (necessary given the child's needs), as opposed to the child being placed in a dependency system facility and happening to have an IEP that simply recommends certain specialized classes or assistance.

### **h. [§2.54] AWOL Child**

If a child who has been placed by the juvenile court runs away for any extended period of time (AWOL), monies usually expended by the county for the placement will cease until the child is found and returned. This raises an issue of whether it is appropriate to have an order for child support during those months in which the child was AWOL. Depending on whether the case is in the process of establishing child support, as opposed to enforcing an existing order for child support, there may be different views in the courts and the various counties.

Some may view the matter as one in which a monetary child support order is not appropriate (*i.e.*, there is no need or responsibility to reimburse the county) for those months in which the county did not actually support the child, regardless of whether the issue comes up at the establishment stage, during a determination on modifications, or on arrearages.

Others may view the issue differently and treat it as one in which there can be no retroactive modifications, nor judicial determination of arrearages, and that the AWOL status of the child cannot be considered, even though the county did not support the child during the AWOL periods.

If the IV-A and IV-D agencies are communicating with one another, the local child support agency may be aware of this issue, whether through monitoring and reporting of what months monies are expended on behalf of the child in the system or whether through limited access to specific information in juvenile court records that show AWOL status, and should bring it to the attention of the court. If not, however, then the court will not know unless an inquiry is made or if an obligor presents the issue in a noticed motion.

### **i. [§2.55] Exceptions to Liability for Child Support**

It is standard practice for a referral to be made to DCSS when a child is in an out-of-home placement either through the juvenile dependency or delinquency court and where IV-D funds

are being expended on behalf of the child. When such funds are not being expended (often in delinquency cases), a separate county entity may seek reimbursement of certain maintenance costs. Generally the parents are jointly and severally liable for support, but there are certain exceptions, such as when the petition that resulted from the child being removed from the parents' custody is ultimately dismissed, when the child is put on probation or in a certain supervision program, or when the parent was the victim of the child's crime. See generally Welf & I C §903. In delinquency there is an exception when the parent is the victim of the child's crime. Welf & I C §903(e). The parent must be a direct victim of the crime. *Yolo County DCSS v Lowery* (2009) 176 CA4th 1243, 1247, 98 CR3d 490.

For a discussion of child support in foster care cases, see §1.96.

➤ **JUDICIAL TIP:** Considering the number of potential crossover issues, it becomes extremely important for the family law and IV-D court to know whether the different courts on the juvenile side and the different agencies (*e.g.*, IV-A and IV-D) are regularly communicating and exchanging appropriate information, and/or for the court to make inquiries of the parties. If not, then the risk of creating conflicting orders increases dramatically, such as two different fathers for the same child or improper charging of child support when parental rights were terminated. Collaboration between the various courts and agencies is key. Some creative solutions that ensure accurate information is brought to light and may include:

- Streamlining and establishing a procedure that allows inspection of juvenile court records (Welf & I C §827; Cal Rules of Ct 5.552; *e.g.*, San Francisco County has a single designated DCSS Court Liaison allowed to view records for statutorily authorized purposes).
- Cross-designating judicial officers to hear both child support and juvenile cases.

### 3. [§2.56] Probate Cases

The probate court has the authority, among other things, to appoint guardians. Prob C §§1500–1543. These are essentially private actions that begin on the filing of a petition by any interested individual, not just a relative. The probate court will conduct an investigation and give notice to all family members. If a parent objects, the probate court will make a determination based on clear and convincing evidence that custody to the parent would be detrimental to the child, and custody to the guardian would be in the child's best interest. If there is no objection, the probate court makes a determination based on what is in the child's best interest; there is no requirement to determine unfitness of a parent. There is also a specific process to terminate a probate guardianship. These probate court orders can affect issues relating to custody and visitation.

Once appointed, the guardian has full responsibility to care for that child's needs, and if that guardian wants help for support of the child from a parent, the probate court will generally direct them to the local child support agency for services. Without there being a legal or contractual responsibility, a third party may not have standing to seek child support against the child's parent(s) See §1.96.

When there is information or evidence that the child was or is living with a relative, the court should consider asking whether there is or has ever been a guardianship. It is important to know if any guardianship exists whenever there are claims by an obligor that the child is now in their custody or that there is a big change in visitation. Such information can also be helpful, for

example, in a case where there may be disputes over any claimed “direct care and custody” credits under *Jackson v Jackson* (1975) 51 CA3d 363, 368, 124 CR 101.

- **JUDICIAL TIP:** In circumstances where the parents are unclear about their rights, duties, or responsibilities when there is a relative caretaker, it is helpful to give a referral to the family law facilitator for more information.

#### **4. [§2.57] Tribal Court Cases**

Rule 5.372 of the California Rules of Court establishes the procedure for transfer of Title IV-D child support cases from a California superior court to a tribal court. This transfer rule and process is unique to Title IV-D courts. For a more detailed discussion on these transfers see §§5.37–5.40.

##### **a. [§2.58] General Inquiries**

Asking a litigant if they have ever been to court regarding the child may help uncover other cases where a support order or parentage finding may already exist, whether in a dissolution action, a UPA case (Fam C §§7600 et seq), or otherwise. Given that individuals and families can have multiple cases going on that cross over into different areas of the law and different jurisdictions, and the lack of communication between agencies as well as various courts themselves, it is important to be aware of other ongoing cases, and that a “status inquiry” or other factual inquiries may be appropriate. See, *e.g.*, *Moore v Bedard* (2013) 213 CA4th 1206, 1211, 152 CR3d 809 (trial court has continuing jurisdiction to make child support orders even though protective order not granted under DVPA).

##### **b. [§2.59] Restraining Orders**

Restraining orders are an area where issues in the various cases and courts may intersect. Knowledge of the existence of the following types of cases and orders may be helpful: criminal domestic violence cases, juvenile court restraining orders, probate restraining orders, family law restraining orders, and/or civil harassment restraining orders.

- **JUDICIAL TIP:** Inquiring in court if such restraining orders exist in other departments can be useful because they occur with frequency, and orders out of a different court may be something the court needs to consider when determining support issues. The most restrictive order controls. For example, if the criminal law order allows for peaceful contact between the victim and the perpetrator, and the family law order is a complete stay-away order, the family law order controls. The court needs to be aware of such orders in the event an obligor is in court on a child support matter claiming the obligor now has custody or a much higher visitation factor.

##### **c. [§2.60] Criminal Cases**

Criminal cases may affect child support. If there are no other sources of income, an incarcerated individual does not have the ability to pay child support. *Oregon v Vargas* (1999) 70 CA4th 1123, 1126–1129, 83 CR2d 229. Nevertheless, an incarcerated individual may still have other sources of income that may be used to set support. *Brothers v Kern* (2007) 154 CA4th 126, 134–136, 64 CR3d 239 (court imputed interest income on criminal defense attorney’s retainer).

If an obligor is about to be incarcerated for a lengthy period of time or has felony convictions, these issues can impact the type of support order that is put in place and can impact the terms and conditions the court may want to consider on a seek work order. For discussion of how money judgments and support orders must include provisions regarding the suspension of support obligations when the obligor is incarcerated or involuntarily institutionalized for more than 90 days (Fam C §4007.5), see [§2.12](#).

- **JUDICIAL TIP:** Because of various crossover issues, it may be helpful to have informational handouts and referrals available in court to give to individuals to deal with such issues or barriers as they arise. For instance, many counties have programs to help an individual obtain a clean record after successfully completing probation or parole.

## **J. [§2.61] Minor Parent as Party**

A minor who is a parent of the child who is the subject of the proceeding may appear without a guardian ad litem in family court proceedings under the Uniform Parentage Act, or any other proceedings concerning child custody, visitation, or support. CCP §372(c)(1)(A), (D). However, if the court finds the minor parent is unable to understand the proceedings or assist in the preparation of the case, the court shall on its own motion, or a motion by the minor parent (or his or her counsel), appoint a guardian ad litem. CCP §372(c)(2). For more information on the status of the custodial parent in a governmental complaint filed in a new Title IV-D action, as well as what happens where Title IV-D services are being provided upon the death of the custodial parent, see [§5.22](#).

## **IV. MILITARY ISSUES**

### **A. Servicemembers Civil Relief Act**

#### **1. [§2.62] Scope of SCRA**

Effective December 19, 2003, Pub L 108–189 enacted the Servicemembers Civil Relief Act (SCRA), which revised and replaced the Soldiers’ and Sailors’ Civil Relief Act of 1940. 50 USC §§3901 et seq. Among other changes, the SCRA covers administrative as well as judicial proceedings, and it specifically applies to political subdivisions of the states, including the DCSS. 50 USC §3912(a)–(b). The SCRA thus applies to all Family Court proceedings, including child support actions against servicemembers.

In addition to the other branches of the armed forces (including reserves), the SCRA extends relief to National Guard members who have been called to active service for more than 30 consecutive days. 50 USC §3911(2)(A). It also defines a servicemember’s legal representative as including someone who has power of attorney, and it specifies that any reference to a servicemember in the SCRA includes a legal representative. 50 USC §3920.

- **JUDICIAL TIP:** For more detailed information on military issues, including a trainer guide for child support workers who process cases involving military members, see the Office of Child Support Enforcement website at <https://www.acf.hhs.gov/css/child-support-professionals/working-with/military-veterans>.

## 2. Protection Against Default Judgments

### a. [§2.63] Affidavit of Military Status

Before the court enters a default judgment in any case in which the respondent has not made an appearance, the SCRA requires that the petitioner file an affidavit stating whether the respondent is on active duty in the military. The affidavit must include facts supporting that statement and, if the petitioner does not know whether the respondent is in the service, must state that fact. 50 USC §3931(b)(1).

### b. [§2.64] Appointment of Attorney

In any case in which the respondent is apparently serving in the military and has not appeared, the SCRA prohibits the court from entering a default judgment until it appoints an attorney to represent the respondent. An appointed attorney who has not been able to contact the servicemember may not waive any of the servicemember's rights or take any actions that will bind the servicemember. 50 USC §3931(b)(2).

If the court has not been able to determine whether the respondent is a servicemember (based on the affidavit), it may require the petitioner to file a bond that will indemnify the respondent (if it turns out that the respondent is in the service) for any loss or damage resulting from a judgment that is later set aside. The bond will stay in effect until the time to appeal or set aside the judgment has expired. The court may also make any other order that it deems necessary to protect the servicemember's rights. 50 USC §3931(b)(3).

There is no specific provision in the Act regarding payment of the appointed counsel. A comment to the former Soldiers' and Sailors' Civil Relief Act of 1940 indicates that an attorney appointed to represent a servicemember under that law does so as his "patriotic duty." Many counties have a policy or local rule in place that provides for payment of these appointed attorneys or have created a panel of volunteer attorneys to serve in this role. Military Judge Advocate General (JAG) officers may serve as appointed counsel and appear in state court to protect the rights of the servicemember even if they are not licensed to practice law in California. The court can order the servicemember to pay the attorney for the attorney's services.

### c. [§2.65] Setting Aside Default Judgment

When a default judgment has been entered against a servicemember during (or within 60 days after) active duty, the SCRA requires the court to grant an application to reopen the judgment. The application must be filed within 90 days of the servicemember's termination or release from military service. It must show that (50 USC §3931(g)):

- The respondent's military service "materially affected" his or her ability to defend the action, and
- The servicemember has "a meritorious or legal defense" to all or part of the action.

However, if a default judgment is vacated, set aside, or reversed based on a provision in the act, the right or title that a bona fide purchaser acquired under the judgment is not impaired. 50 USC §3931(h).

In *Allen v Allen* (1947) 30 C2d 433, 435–436, 182 P2d 551, which reversed an order denying husband's motion to vacate support modification, the California Supreme Court held

that the trial court's error in failing to appoint an attorney to represent a servicemember rendered its order voidable, but not void. Therefore, the attack on the judgment must be direct as provided under the Act; it cannot be collateral. For discussion of direct versus collateral attacks, see 8 Witkin, California Procedure, Attack on Judgment in Trial Court (5th ed 2008).

### 3. Stays Under SCRA

#### a. [§2.66] Stay of Proceedings

When the respondent has not appeared because of active military duty, the court must grant a stay (either on its own motion or on counsel's application) for at least 90 days if it finds that (50 USC §3931(d)):

- A potential defense cannot be presented without the servicemember's presence, or
- Counsel has diligently tried but has not been able to contact the respondent or otherwise determine if the respondent may have a meritorious defense.

In proceedings when the servicemember has received notice, the respondent may apply for a stay while on active duty or within 90 days after it ends. The application must include (50 USC §3932(b)(2)):

- A letter describing how the servicemember's military duties materially affect the ability to appear and providing a date when the servicemember can appear; and
- A letter from the servicemember's commanding officer confirming that military duty prevents an appearance, and that there is no authorization for a military leave.

At any point before final judgment, the court must grant the application and may do so on its own motion. The stay must last at least 90 days. 50 USC §3932(b)(1). The servicemember may apply for an additional stay either at the time of the initial application or when it becomes apparent that the servicemember is unavailable to prosecute or defend the action, based on the continuing impact of military duty. 50 USC §3932(d)(1). An application for a stay under this section does not constitute an appearance for jurisdictional purposes or a waiver of any substantive or procedural defense. 50 USC §3932(c).

The SCRA must be liberally construed to prevent any disadvantage to a servicemember litigant resulting from military service, even if the servicemember has not strictly complied with the requirements of the Act. *In re Amber M.* (2010) 184 CA4th 1223, 1231, 110 CR3d 25. There is nothing in the SCRA that indicates that a telephonic appearance is sufficient to protect a servicemember's rights. Rather, the SCRA's requirement that a servicemember demonstrate inability to appear in the proceeding or obtain leave to do so, contemplates a physical appearance at the proceedings. *In re Amber M., supra*, 184 CA4th at 1231.

The court has discretion to deny an additional stay under the SCRA when it finds that military duties have not adversely affected a servicemember's ability to appear and participate in an action. *George P. v Superior Court* (2005) 127 CA4th 216, 224–226, 24 CR3d 919.

➡ JUDICIAL TIP: The best practice is to appoint counsel and stay the matter 90 days.

#### b. [§2.67] Stays of Execution

A servicemember may move to stay execution of a judgment, or move to vacate or stay any attachment or garnishment of property or money, at any time during active military duty and within 90 days after it ends. The court must grant the motion (and may order the stay on its own

motion) if it finds that the member's ability to comply with the judgment is materially affected by military status. 50 USC §3934.

#### **4. [§2.68] Modifications Due to Deployment**

Family Code §3651(c) adds an exception to the prohibition of retroactive modifications of child and spousal support before the filing date of the notice of motion or RFO. It applies when either party is deployed out of state on active military service or National Guard duty. The servicemember may file and serve a notice of activation (including the deployment date) and support modification request in lieu of a notice of motion or RFO based on the change of circumstances. If possible, the court must schedule the hearing before the deployment date; if that is not possible, it must grant a stay in accordance with the timelines provided in the SCRA, as long as the servicemember has met the relevant requirements. If the court declines to grant an additional, discretionary stay, it may not proceed until it appoints counsel for the servicemember unless the servicemember already has an attorney. In cases where the stay extends throughout the deployment, the servicemember must ask the court to set a hearing within 90 days after returning; otherwise, the retroactivity exception does not apply, and the matter will be taken off calendar. Fam C §3651(c)(2). There are two different statutes and two separate forms to be used depending upon whether the support order is being enforced by DCSS (Fam C §17440) or not (Fam C §3651). See Notice of Activation of Military Service and Deployment and Request to Modify a Support Order form FL-398, if DCSS is not enforcing the support order. See Notice of Deployment—Request for Review of Child Support Order, form DCSS 0585, if DCSS is enforcing the support order. See also CSS Letter 06-15, which discusses both forms for any parent (custodial and non-custodial) deploying out-of-state.

Even if the servicemember does not file the notice of activation and modification request before deployment, the servicemember is not subject to penalties on any amount of child support that would not have accrued if there had been a modification per Fam C §3651(c)(2), unless the court finds that there is good cause for a penalty and states the reasons on the record. Fam C §3651(c)(3).

No interest may accrue on any child support that the servicemember would not have owed if there had been a modification, unless there was no good cause for failing to request one or delaying such a request. Fam C §3651(c)(4); see also §2.70.

In addition, Fam C §3653 provides that in case of a modification based on a deployment-related income change, the order must be retroactive to the later of (1) the date that the notice of activation, notice of motion, or OSC was served on the opposing party; or (2) the activation date itself. However, there is an exception when the court finds and states on the record good cause for denying retroactivity, including an unreasonable delay in requesting the modification. Fam C §3653(c).

#### **5. [§2.69] Compromise of Arrearages**

It should be considered in the state's best interest to accept an offer in compromise for arrearages that accrued because a reservist or member of the National Guard experienced an income reduction while called to active duty but failed to modify the support order. An exception applies when there is good cause to the contrary, including circumstances in which the lack or tardiness of a modification request was unreasonable. DCSS must promulgate rules for

compromising at least the amount of support that would not have accrued if the order had been modified to reflect the income reduction during active service. Fam C §17560(f)(1)(B). See §§5.52–5.54 for information on compromise of arrears programs generally.

The 2005 amendments to Fam C §17560 (which language is continued in the current section) apply to all servicemembers who are deployed outside California, whether before or after the bill's effective date. Stats 2005, ch 154, §6.

## 6. [§2.70] Interest Limitations

Under the SCRA, creditors are limited to 6 percent interest on all *preservice* balances, notwithstanding the fact that the obligations provided for higher interest rates. This limitation applies (a) during military service and 1 year thereafter to a mortgage, trust deed, or similar security; or (b) during military service to any other obligation or liability, and applies to obligations or liabilities incurred by the servicemember or of the servicemember and spouse jointly, including child and spousal support. 50 USC §3937(a)(1). Interest in excess of 6 percent per year that would otherwise be incurred but for this prohibition is forgiven. 50 USC §3937(a)(2).

In order for an obligation or liability to be subject to this interest-rate limitation, the servicemember must give the creditor written notice and a copy of the orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from service. 50 USC §3937(b)(1). On receipt of the notice, the creditor must limit interest on the debt to 6 percent, effective on the date that the servicemember is called to military service. 50 USC §3937(b)(2).

The court may grant a creditor relief from this limitation if the servicemember's ability to pay interest at a rate in excess of 6 percent per year is not materially affected by reason of the servicemember's military service. 50 USC §3937(c).

Penalties for knowing violations of these interest limitations do not preclude other remedies, including consequential or punitive damages. 50 USC §3937(e), (f).

## B. Military Pay

### 1. [§2.71] Pay Versus Allowances

Generally, pay categories on a military leave and earnings statement (LES), which is what a military servicemember's pay stub is called, are divided between pay (base pay, sea pay, hazardous duty pay, etc.) and allowances (basic allowance for housing, basic allowance for subsistence, etc.).

The major distinction for child support purposes is that if it is a "pay" it is taxable and if it is an "allowance" it is not taxed. Please be aware that this is just a general rule and that some exceptions exist. Both may be used in calculating gross monthly income for calculating child support. See [Appendix B](#), Benefits Chart.

Federal statutes making military allowances for housing and food nontaxable and exempting them from garnishment do not preempt the inclusion of such allowances in a party's gross income for purposes of calculating child and spousal support. *Marriage of Stanton* (2010) 190 CA4th 547, 556–557, 118 CR3d 249. There is some disagreement on the characterization of these allowances. Some argue that they must be included in gross monthly income for support per Fam C §4058(a)(1); others argue that they are employee benefits, and it is within the court's

discretion to either include them or exclude them from the gross monthly income per Fam C §4058(a)(3).

## 2. [§2.72] Determining Amount of Pay

The servicemember's LES should contain all necessary information to determine the income for support. If the LES does not include a Basic Allowance for Housing (BAH), the government is providing housing for the servicemember. The value of this housing may be included in the gross monthly income for support. This amount is equal to the BAH the servicemember would receive if not in military quarters.

Military pay charts are posted on the Defense Finance and Accounting Services website at <https://www.dfas.mil/militarymembers/payentitlements/Pay-Tables.html>. This site also contains pay charts for civilian Department of Defense employees and retired military employees, general information regarding military pay, and links to other important sites. To find a servicemember's BAH rate, refer to <https://www.defensetravel.dod.mil/site/bahCalc.cfm> and enter the servicemember's pay grade and duty station ZIP code.

Every LES will indicate the servicemember's home state for tax purposes. In many cases, California tax rates will not apply for state taxes.

The SCRA provides that a nonresident servicemember's military income and personal property are not subject to state taxation if the servicemember is present in the state only due to military orders. 50 USC §4001(a)–(b). Similarly, the income of a military spouse is not taxable by the jurisdiction when the spouse is present due to the servicemember's military service. 50 USC §4001(c). The state is also prohibited from using the military pay of the nonresident servicemember to increase the state income tax of the spouse. 50 USC §4001(e).

## C. [§2.73] Veteran's Disability Benefits

The Social Security Act provides for the garnishment of certain federal payments for the enforcement of child support obligations. Benefits paid by the Department of Veterans Affairs (VA), however, are specifically excluded, with some exclusions. 42 USC §659(h)(1)–(2). The test to determine if a payment is subject to garnishment is whether the payment is remuneration for employment. 42 USC §659(a), (h)(1).

*VA disability compensation*, entitlement to which is generally based on disability from a service-connected injury or disease, is usually not considered to be remuneration for employment. Nevertheless, dependents are authorized to obtain financial support from veterans' benefits under certain circumstances:

- If the veteran is eligible to receive military retired/retainer pay and has waived a portion of his or her veteran's pay in order to receive disability compensation from the VA, that portion of the VA benefit received in lieu of retired/retainer pay is subject to garnishment. 42 USC §659(h)(1)(A)(ii)(V).
- If the veteran's children are not residing with the veteran and the veteran is not reasonably discharging his or her responsibility for the children's support, all or any part of the veteran's pension, disability compensation, or emergency officers' retirement pay may be apportioned. 38 CFR §3.450(a)(1)(ii).

- When a hardship is shown to exist, a special apportionment of a beneficiary's pension, disability compensation, emergency officers' retirement pay, or dependency and indemnity compensation may be made between the veteran and his or her dependents. The apportionment is based on the facts in the individual case, and may not cause undue hardship to the other persons in interest. 38 CFR §3.451.

The *VA disability pension* is a form of need-based aid paid to veterans who meet financial need requirements. It is *not* compensation for a service-connected disability. The veteran must have served at least 90 days, of which at least 1 day must have been during wartime. The disability need not be service connected, but it must prevent the veteran from being able to perform regular full-time work. The income of the veteran and the dependents is considered and results in a dollar-for-dollar reduction of the pension amount. The award is roughly the same as SSI benefits. The award is not taxable. Because this is a federal need-based aid, it is *not* considered in setting child support, nor is it reachable for enforcement purposes.

- JUDICIAL TIP: To distinguish between the two types of veteran's disability benefits, look to the veteran's award letter. If the veteran is receiving countable "disability compensation," those words will appear in the letter. If the veteran is receiving a different exempt need-based pension, the letter will refer to "countable income."

See the benefits chart in [Appendix B](#) for a quick reference regarding use for income and taxability of some veteran's benefits. For an Information Memorandum issued by the federal Office of Child Support Enforcement regarding garnishment of VA benefits, see <https://www.acf.hhs.gov/programs/cse/pol/IM/1998/im-9803.htm>. See also Final Rule: Processing Garnishment Orders for Child Support and/or Alimony (June 21, 1983) Office of Child Support Enforcement, AT-83-11, at <https://www.acf.hhs.gov/css/resource/final-rule-processing-garnishment-orders-for-child-support-and/or-alimony>.

#### D. [§2.74] Health Insurance

Health insurance provided by a servicemember for the servicemember's dependents is called Tricare. There are various options available, as with any other health insurance company. Health insurance for servicemembers and their children is administered through DEERS (Defense Eligibility Enrollment Reporting System). DEERS is a computerized database that identifies military sponsors, families, and others worldwide who are entitled to Tricare benefits. DEERS registration is required for Tricare eligibility. The servicemember must register family members and ensure that they are correctly entered in the database.

- JUDICIAL TIP: An obligor servicemember with children should be ordered to enroll the children into DEERS and obtain dependent ID cards for them so they can access dependent benefits, including health benefits. The court may also inform the custodial parent that the military will allow him or her to sign up to get the servicemember's children enrolled into DEERS; the custodial parent does not have to wait for the noncustodial parent to sign up.

*Note: The NMSN (National Medical Support Notice), which is used by local child support enforcement agencies to secure coverage for children under their noncustodial parent's group health plans, does not apply to health insurance provided by servicemembers.*



# Chapter 3

## UIFSA—INTERSTATE AND FOREIGN SUPPORT ORDERS, AND INTERCOUNTY (INTRASTATE) REGISTRATIONS

### I. INTERSTATE AND FOREIGN SUPPORT ORDERS UNDER UIFSA

#### A. Uniform Interstate Family Support Act

1. [§3.1] Introduction
  2. [§3.2] Acquiring Subject Matter Jurisdiction
  3. Acquiring Personal Jurisdiction Over Nonresident
    - a. [§3.3] Methods
    - b. [§3.4] Long-Arm Statute
  4. [§3.5] Establishing Support
  5. [§3.6] Simultaneous Proceedings in Another State
  6. Modification Jurisdiction and Continuing Exclusive Jurisdiction
    - a. [§3.7] Jurisdiction Over Child Support Orders
    - b. [§3.8] Jurisdiction Over Spousal Support Orders
  7. [§3.9] Multiple Orders
  8. [§3.10] Duties of Initiating Tribunals
  9. Duties and Powers of Responding Tribunals
    - a. [§3.11] California as Responding Tribunal
    - b. [§3.12] Inappropriate Tribunal
  10. Choice of Law
    - a. [§3.13] Generally Apply Forum Law
    - b. [§3.14] Special Evidence Rules
    - c. [§3.15] Cooperation Between Courts
  11. Registration of Out of State and Foreign Support Orders
    - a. [§3.16] Purpose and General Procedures
    - b. [§3.17] Notice of Registration and Effect of Confirmation
    - c. [§3.18] Registration for Enforcement
    - d. [§3.19] Registration for Modification
  12. Miscellaneous Provisions
    - a. [§3.20] Special Nondisclosure Rules
    - b. [§3.21] Employment of Private Attorney
    - c. [§3.22] Declaration of Reciprocating State Status
- #### B. [§3.23] Support Proceedings Under the Hague Convention
1. [§3.24] Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Convention)
    - a. [§3.25] Obligee's Proceedings
    - b. [§3.26] Obligor's Proceedings
    - c. [§3.27] Registration of a Convention Support Order
    - d. [§3.28] Contest of a Registered Convention Order
    - e. [§3.29] Grounds for Refusal for Recognition and Enforcement of a Registered Convention Order
    - f. [§3.30] Modification of a Convention Child Support Order

- g. [§3.31] Foreign Support Agreements

## II. REGISTRATION OF ORDERS FROM OTHER CALIFORNIA COUNTIES (INTRASTATE)

- A. Overview
  - 1. [§3.32] Introduction
  - 2. [§3.33] Who May Register
  - 3. [§3.34] Venue
- B. Intercounty Procedures
  - 1. Procedure for Registration
    - a. [§3.35] Registration by LCSA
    - b. [§3.36] Registration by Obligee
    - c. [§3.37] Duties of Court Clerk
    - d. [§3.38] Jurisdiction for Further Proceedings
  - 2. Motion to Vacate Registration
    - a. [§3.39] Timing and Hearing
    - b. [§3.40] Stay of Enforcement
    - c. [§3.41] Obligor's Defenses

## I. INTERSTATE AND FOREIGN SUPPORT ORDERS UNDER UIFSA

### A. Uniform Interstate Family Support Act

#### 1. [§3.1] Introduction

The Uniform Interstate Family Support Act (UIFSA) (Fam C §§5700.101 et seq) governs the establishment, enforcement, and modification of child and spousal support orders in cases relative to other states and foreign countries. UIFSA replaces the former URESA and RURESAs (Uniform or Revised Uniform Reciprocal Enforcement of Support Act). Support orders under those acts may remain enforceable until they expire of their own terms or are replaced by new UIFSA orders. *Lundahl v Telford* (2004) 116 CA4th 305, 315, 9 CR3d 902.

UIFSA 2008 became effective in California on January 1, 2016, as a result of Pub L 113–183 (Preventing Sex Trafficking and Strengthening Families Act (42 USC §666(f)), signed on September 14, 2014, which tied the receipt of federal funds supporting state child support programs to the enactment of UIFSA 2008 by the state legislatures by the end of their 2015 legislative sessions. All previously adopted UIFSA provisions were repealed, and the UIFSA 2008 provisions were enacted as Fam C §§5700.101 et seq. The Family Code sections are numbered to match the UIFSA 2008 provisions (UIFSA 2008 §102 corresponds to Fam C §5700.102).

UIFSA generally applies to orders from other states, as well as from other countries, with a separate chapter for Hague Convention (Convention) orders. If reciprocity is established either by California or the federal government, the foreign country is treated the same as another state in the United States. See *Willmer v Willmer* (2006) 144 CA4th 951, 51 CR3d 10.

If a foreign country does not fall within the definition of a “foreign country,” registration through UIFSA cannot be used to modify or enforce an order. However, recognition of the

foreign order could be based on the principles of comity, which is the acceptance or adoption of a decision by a court of another jurisdiction based on public policy, rather than legal mandate.

The primary principle of UIFSA is to ensure the existence of only one support order at a time concerning the same obligor and the same child or children. The “one-order” system contemplates a great deal of cooperation between the states or foreign country and allows for a state or foreign country to either make a parentage or child or spousal support order directly or request the assistance of another state or country in making an order.

The state or foreign country that initiates the process to establish support is the “initiating tribunal.” A tribunal means the court or administrative agency with authority to establish or enforce parentage or support judgments or orders within that state or foreign country. The initiating tribunal may ask another state or foreign country for assistance in either establishing a support order or enforcing a support order. This second state is the “responding state,” and the court or administrative agency with authority to establish or enforce parentage or support judgments or orders within that state is the “responding tribunal.”

The first order made by any state is the controlling order, and the state that actually made that order, either directly or at the request of another state, is the “issuing state.” The issuing state has continuing exclusive jurisdiction (CEJ) to modify the child support order with very limited exceptions. Even if the parties and the child leave the issuing state, the controlling order continues and is fully enforceable until a modification takes place under Fam C §§5700.601 et seq.

*Note: Definition of terms under UIFSA 2008 are contained in Fam C §5700.102.*

*Care should be taken to review the definitions when dealing with a case brought under UIFSA in order to determine which provisions may or may not apply. For example, Hague Convention orders, defined in Fam C §5700.102(3), are only one of several types of “foreign orders,” which are defined in Fam C §5700.102(5)(A)–(D). Convention orders have their own separate section within UIFSA which have some different provisions that apply.*

## **2. [§3.2] Acquiring Subject Matter Jurisdiction**

Parents have equal duties to support their minor children (Fam C §3900) or their incapacitated adult children (Fam C §3910). Either parent or the child through a guardian ad litem may bring an action for support against a parent. Fam C §4000. The court has authority to make an order that requires either parent or both parents to provide support for their child. Fam C §4001. For UIFSA purposes, subject matter jurisdiction may be acquired by a state that has personal jurisdiction over the obligor if the nonresident obligee or the support agency for another state files the appropriate pleading to establish support in that state. Fam C §5700.301(b).

## **3. Acquiring Personal Jurisdiction Over Nonresident**

### **a. [§3.3] Methods**

The “one-order” objective is facilitated by the use of a long-arm statute that is as broad as constitutionally permitted. Under UIFSA, the petitioner has two options to acquire jurisdiction over the nonresident respondent: either (1) use the long-arm statute or (2) initiate a two-state proceeding requesting that the respondent’s state of residence establish the judgment or order.

The petitioner may also use any other proceedings allowed under California law to establish parentage or support, such as an action for dissolution of marriage or legal separation. Fam C §5700.104. That support order may then be enforced by UIFSA proceedings and California would have continuing exclusive jurisdiction. Fam C §5700.205(a).

#### **b. [§3.4] Long-Arm Statute**

Family Code §§5700.201 and 5700.202 establish what is commonly described as long-arm jurisdiction over a nonresident respondent.

In a proceeding to establish or enforce a support order or to determine parentage, a California court may exercise personal jurisdiction over a nonresident if any of the following apply:

- The nonresident is served while in California. Fam C §5700.201(1).
- The nonresident submits to jurisdiction by entering a general appearance or by filing a responsive document that has the effect of waiving any objection to jurisdiction. Fam C §5700.201(2).
- The nonresident resided with a child in California. Fam C §5700.201(3). This provision contemplates reasonableness in asserting personal jurisdiction such that the assertion does not offend due process. *Examples:* (1) The parents and the child resided in California; the respondent moved to another state but the other parent or the child remained in California; (2) both parents and the child moved from California and one parent or the child returns to California within a relatively short period. Most courts, however, would hold that jurisdiction is not properly asserted if the parents and child left California and were absent for many years and then one parent and the child returned to California. See *Katz v Katz* (NJ Sup Ct Div 1998) 707 A2d 1353, 1356.
- The nonresident resided in California and provided prenatal expenses or support for the child. Fam C §5700.201(4). Mere knowledge that an individual with whom one is having sporadic relations lived in California, and the foreseeability of California effects (a child) from out-of-state sexual intercourse are insufficient to establish the requisite minimum contacts. *David L. v Superior Court* (2018) 29 CA5th 359, 240 CR3d 462 (court also found unrelated business trips and past contacts were jurisdictionally irrelevant).
- The child resides in California as a result of the acts or directives of the nonresident. Fam C §5700.201(5). This provision contemplates an act by the nonresident that would cause the child to locate in California, such as sending the child to California to live with relatives or abuse of the child or custodial parent that would cause the parent or child to separate from the other parent and relocate in California. *Marriage of Malwitz & Parr* (Colo 2004) 99 P3d 56, 59. Mere consent to allow the child to reside in California, however, does not give the state personal jurisdiction over the nonresident. *Marriage of Nosbisch* (1992) 5 CA4th 629, 634, 6 CR2d 817.
- The nonresident engaged in sexual intercourse in this state, and the child may have been conceived by that act of intercourse. Fam C §5700.201(6).
- The nonresident has filed a declaration of paternity under Fam C §7570. Fam C §5700.201(7). *Note:* Not all states maintain putative father registries.

- There is any other basis for personal jurisdiction consistent with the constitutions of California and the United States. Fam C §5700.201(8).

The bases of personal jurisdiction set forth above or under any other California law may not be used to acquire personal jurisdiction to modify child support order of another state or a foreign support order unless the respective registration requirements for modification under this Act are met. Fam C §§5700.201(b), 5700.611 (orders from another state), 5700.615 (foreign support orders).

- **JUDICIAL TIP:** Exercise of personal jurisdiction to establish child support under UIFSA *does not* grant jurisdiction over the issues of child custody or visitation. Fam C §5700.104(b)(2).

Except in limited circumstances, support orders are excluded from the home state jurisdictional limitation of custody determinations. *Marriage of Richardson* (2009) 179 CA4th 1240, 1243, 102 CR3d 391.

#### 4. [§3.5] Establishing Support

An initiating tribunal may establish support orders consistent with its own laws.

A responding tribunal with personal jurisdiction over the parties may issue a support order if one has not been previously issued (Fam C §§5700.305(b)(1), 5700.401) and if:

- The individual seeking the order is a nonresident (Fam C §5700.401(a)(1)); or
- The support enforcement agency seeking support is located in another state (Fam C §5700.401(a)(2)).

A responding state's tribunal may issue a temporary support order if the tribunal determines that such an order is appropriate and the individual ordered to pay is (Fam C §5700.401(b)):

- A presumed father of the child;
- Petitioning to have his paternity adjudicated;
- Identified as the father of the child through genetic testing;
- An alleged father who has declined to submit to genetic testing;
- Shown by clear and convincing evidence to be the father of the child;
- The mother of the child; or
- An individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated.

- **JUDICIAL TIP:** Making an order for *temporary* support does not confer continuing exclusive jurisdiction. Fam C §5700.205(e).

#### 5. [§3.6] Simultaneous Proceedings in Another State

If a pleading to establish a support order is filed in California after a similar pleading is filed in another state, California may exercise jurisdiction only if (Fam C §5700.204(a)):

- The pleading is filed in California before the expiration of the time to file a response challenging jurisdiction in the other state;
- The contesting party timely challenges the exercise of jurisdiction in the other state; and

- If relevant, California is the child's home state.

California *may not* exercise jurisdiction if a pleading to establish support was filed in California before a similar pleading was filed in another state if (Fam C §5700.204(b)):

- The pleading is filed in the other state before the expiration of the time to file a response in California;
- The contesting party timely challenges the exercise of jurisdiction by California; and
- If relevant, the other state is the child's home state.

☛ **JUDICIAL TIP:** This provision requires cooperation between states in order to avoid issuing multiple orders regarding the same obligor and child. Tribunals should take active roles in communicating with each other. Fam C §5700.317. Depending on the circumstances, one state should decline to exercise jurisdiction in favor of the other state.

## 6. Modification Jurisdiction and Continuing Exclusive Jurisdiction

### a. [§3.7] Jurisdiction Over Child Support Orders

A child support order that is controlling in accordance with UIFSA remains controlling until it is modified, even if the party and the child have left the state. No other state has modification jurisdiction until the issuing state loses jurisdiction *and* a new state acquires jurisdiction to modify and actually modifies the order. Modification of an order establishes a new controlling order, and the tribunal that modifies the order acquires continuing exclusive jurisdiction (CEJ) for future modification and becomes the issuing tribunal.

The issuing tribunal retains CEJ to modify its child support order, if the order is the controlling order and:

- At the time of filing a request for modification, either party or the child resides in the issuing state. Fam C §5700.205(a)(1). Continuing residency in the issuing state is not necessary if a parent or the child resides in the state when the request to modify is filed. The issue is one of residency and not domicile; or
- Even if this state is no longer the residence of the obligor, obligee, or child, the parties consent in a record in open court that the tribunal of this state may continue to exercise CEJ to modify its order. Fam C §5700.205(a)(2).

The issuing tribunal may *not* exercise CEJ to modify a support order if (1) all of the parties who are individuals file written consent with the issuing tribunal that the tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume CEJ; or (2) its order is not the controlling order. Fam C §5700.205(b). The parties' signatures are not required on a stipulation to transfer CEJ when their attorneys have signed it. *Knabe v Brister* (2007) 154 CA4th 1316, 1323, 1327, 65 CR3d 493.

The doctrine of forum non conveniens is not a ground to transfer CEJ to another state; furthermore, subject matter jurisdiction cannot be conferred by estoppel. *Stone v Davis* (2007) 148 CA4th 596, 600, 602–603, 55 CR3d 833. A temporary support order issued ex parte or

pending hearing on a jurisdictional challenge, also does not create CEJ in the issuing tribunal. Fam C §5700.205(e).

If another state has assumed jurisdiction and modified a California order under UIFSA or similar law, California must recognize the CEJ of the modifying state. Fam C §5700.205(c). The California tribunal loses its CEJ, and:

- May enforce its order that was modified only as to arrears and interest that accrued before the modification (Fam C §5700.612(1));
- May provide other appropriate relief for violations of its order that occurred before it was modified (Fam C §5700.612 (2)); and
- Shall recognize the modifying order of the other state, upon registration, for the purpose of enforcement (Fam C §5700.612 (3)).

A California tribunal that lacks CEJ to modify a child support order may initiate a request that another state enforce or modify the order issued in that state. Fam C §5700.205(d).

### **b. [§3.8] Jurisdiction Over Spousal Support Orders**

A California court that issues a spousal support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation. Fam C §5700.211(a). It may also serve as an initiating tribunal to request a tribunal of another state or foreign county to enforce the order, or as a responding tribunal to enforce or modify its own spousal support order. Fam C §5700.211(c)(1)–(2).

A California court may not modify a spousal support order issued by a tribunal of another state or foreign country having continuing exclusive jurisdiction over that order under the law of that state or foreign country. Fam C §5700.211(b).

### **7. [§3.9] Multiple Orders**

Because of the effects of URESA or RURESAs (see §3.1), there may be multiple orders from different states or foreign countries regarding the same obligor and the same child. A state or foreign country that receives a request under UIFSA *and* that also has personal jurisdiction over both the obligor and the individual obligee is required to decide which of the multiple orders is the controlling order and must be recognized. The rules for making such a determination are set out in Fam C §5700.207.

If California is a responding state and has personal jurisdiction over both of the parties who are individuals, California must apply the following rules in determining which is the controlling order:

- If only one of the tribunals issuing an order has CEJ, that tribunal's order is the controlling order. Fam C §5700.207(b)(1).
- If more than one tribunal has CEJ, an order issued by the tribunal that sits in the current home state of the child is the controlling order. Fam C §5700.207(b)(2)(A).
- If an order has not been issued by the child's home state, the most recent order is the controlling order. Fam C §5700.207(b)(2)(B).

- If none of the issuing tribunals have CEJ, California must issue a support order, and that becomes the controlling order. Fam C §5700.207(b)(3).

The jurisdictional requirements are not satisfied if the enforcing state's child support agency is the only obligee present within the state.

Either the obligor, the obligee, or the support agency may request determination of which order is the controlling order and the request may be filed as registration for enforcement, a registration for modification, or as a separate proceeding. However, as noted, jurisdiction for this purpose is only satisfied if California has personal jurisdiction over both the obligor and the individual obligee. Fam C §5700.207(c). The requesting party must supply a copy of every support order in effect and the applicable record of payments and must give notice to every party affected by the determination. Fam C §5700.207(d).

The state that issued the controlling order as determined under the rules above has CEJ. Fam C §5700.207(e).

Once a court has determined which is the controlling order, or has issued a new controlling order, it must state in the order:

- The basis for determining the controlling order. Fam C §5700.207(f)(1).
- The amount of prospective support, if any. §5700.207(f)(2).
- The amount of consolidated arrears and accrued interest, if any, after all payments are credited under Fam C §5700.209.

Within 30 days of the court determining which order is controlling, the party or agency requesting determination must file a certified copy of the order with each tribunal that issued or registered an order. Fam C §5700.207(g). Failure to file it may lead to sanctions, but does not affect the validity or enforceability of the controlling order.

➤ **JUDICIAL TIP:** UIFSA does not resolve conflicting claims regarding arrears. This is left to the state on a case-by-case basis or to federal regulations. Nor does UIFSA resolve which of several orders for arrears is the controlling order. The finality of the order determining the controlling order may turn on other principles such as estoppel on a case-by-case basis. However, UIFSA does provide enough direction so that all states should have similar orders as to conflicting arrears and controlling orders. It does determine which state interest to charge on arrears, gives fairly clear guidelines on what state has jurisdiction to make an order and when that jurisdiction starts and stops, and what state determines emancipation.

A state responding to a request for enforcement of two or more orders in effect at the same time and for the same obligor but different obligees must enforce those orders in the same manner as if the orders had been issued by the responding state. Fam C §5700.208.

Any amounts collected and credited for a particular period under the support order of another state must be credited to any support orders issued by California for the same period. Fam C §5700.209. This statute is further recognition of UIFSA's application of the laws of the responding state to enforcement procedures, including enforcement by wage assignment sent to an employer from another state. Fam C §5700.303.

Under the provisions for registration for enforcement, generally the law of the issuing state or foreign country governs. Fam C §5700.604. With multiple orders, once a tribunal in this state or another state determines which is the controlling order and issues an order consolidating arrears (if any), the court in this state shall prospectively apply the laws of the state or foreign country issuing the controlling order, including its law on interest on arrears, on current and future support, and on consolidation of arrears. Fam C §5700.604(d).

An order that has been determined to be the controlling order, or a judgment for consolidated arrears (if any) must be recognized under UIFSA. Fam C §5700.206(h).

## **8. [§3.10] Duties of Initiating Tribunals**

An initiating tribunal's functions are primarily ministerial. If a California court has issued a support order, it may serve as an initiating tribunal to request that another state enforce the order so long as it remains controlling and has not been modified by another state under UIFSA, or enforce a money judgment for arrears of support and interest on the order accrued before a determination that an order of a tribunal of another state is the controlling order. Fam C §5700.206(a).

On the filing of a petition under UIFSA, the initiating tribunal must forward the petition and its accompanying documents to the responding tribunal or its appropriate support enforcement agency (Fam C §5700.304(a)(1)), or if the correct identity or venue of the responding tribunal is unknown, then to the responding state's information agency with a request that the documents be forwarded to the appropriate tribunal and that receipt be acknowledged (Fam C §5700.304(a)(2)).

If requested by the responding tribunal, a tribunal in this state shall issue a certificate or other document and make findings required by the law of the responding state. If the responding tribunal is a foreign country, upon request, the tribunal of this state shall specify the amount of support sought, convert that amount into an equivalent foreign currency amount under applicable official or market exchange rate as publicly reported, and provide other documents necessary to satisfy the requirements of the responding tribunal. Fam C §5700.304(b).

## **9. Duties and Powers of Responding Tribunals**

### **a. [§3.11] California as Responding Tribunal**

California may act as a responding state to establish, enforce or modify a child support order, or establish parentage, at the request of another state or foreign country. Fam C §§5700.203, 5700.402, 5700.601, 5700.610. A California court that has CEJ may also act as a responding tribunal to enforce its own order. Fam C §5700.206(b). Unless otherwise provided, the procedural and substantive law generally applicable to similar proceedings originating in this state are to be applied. Fam C §5700.303(1)–(2). So, for example, to establish parentage a California court must apply the UPA (Fam C §§7600 et seq). See also §3.13.

When a California court receives a petition or pleading to establish or modify support, it must file the petition or pleading and notify the petitioner where and when it was filed. Fam C §5700.305(a). Unless otherwise prohibited by law, a California court may issue, enforce, or modify a support order; determine a controlling support order; determine parentage; or make any other order specified in Fam C §5700.305(b)(1)–(12), including the granting of any other available remedy.

If a California court issues a support order as a responding tribunal, the court must include in the order itself, or in the documents accompanying the order, the calculations used as the basis for the support in the order. Fam C §5700.305(c). A responding tribunal that issues orders under UIFSA must send a copy of the order to the petitioner, respondent, and initiating tribunal, if any. Fam C §5700.305(e).

A California court may not condition the payment of support on compliance with provisions for visitation. Fam C §5700.305(d).

#### **b. [§3.12] Inappropriate Tribunal**

If a petition or comparable pleading is received by an inappropriate California tribunal, it must forward the pleadings to the appropriate tribunal in California or in another state and notify the petitioner where and when the pleading was sent. Fam C §5700.306. A petition or pleading received by the LCSA or superior court in an inappropriate county (without jurisdiction for trial), must be forwarded to the appropriate county or jurisdiction of another state without filing the pleadings, and notice must be given to the petitioner, the California Central Registry, and the child support agency of the appropriate tribunal where and when the pleadings were sent. Fam C §17404.2(a).

If, after the pleadings have been filed, after an order is entered by a California court, or after another state's order has been registered in a California county, it appears that the respondent is no longer a resident of that county, then on ex parte application by the LCSA or petitioner, the court must transfer the pleadings to the appropriate California court or the appropriate jurisdiction of another state. The court must also notify the petitioner, respondent, California Central Registry, and the LCSA of the receiving county where and when the pleadings were sent. The transfer requirements of the section are met with a transfer of certified copies of the documents. Fam C §17404.2(b)–(c).

### **10. Choice of Law**

#### **a. [§3.13] Generally Apply Forum Law**

Unless otherwise provided under UIFSA, a responding tribunal must apply its procedural and substantive law, including choice-of-law rules, and rules for determining and calculating support, that are applicable to similar proceedings initiated with the state. The state may also exercise all powers and provide all remedies that are available in those proceedings. Fam C §5700.303(a)–(b).

If California is requested to recognize and enforce a support order on the basis of comity, the court may apply the procedural and substantive provisions of Chapters 1 through 6 of UIFSA. Fam C §5700.105(b).

If California is exercising jurisdiction over a nonresident under law other than a UIFSA proceeding, or recognizing a foreign support order, California may receive evidence from outside the state under the provisions of Fam C §5700.316, communicate with another tribunal pursuant to Fam C §5700.317, and obtain discovery pursuant to Fam C §5700.318, regarding obtaining discovery through another state. In all other respects, California procedural and substantive laws must be applied. Fam C §5700.210. See also [§3.31](#) regarding foreign support orders.

The applicable governing law for registrations of out-of-state or foreign support orders are set forth in Fam C §5700.604 (for registration for enforcement of an order). See §§3.16–3.19 regarding registration of support orders.

Proceedings under the Hague Convention must follow the rules under Chapter 7 of UIFSA (Fam C §§5700.701 ff.). See §§3.23–3.24 regarding Hague Convention proceedings.

See also §§5.37–5.40 regarding tribal courts.

### **b. [§3.14] Special Evidence Rules**

Special rules of evidence apply to UIFSA proceedings (see Fam C §5700.316(a)–(j)):

- The physical presence of an individual nonresident party is not required. Fam C §5700.316(a). Participation by a petitioner in a UIFSA proceeding, whether in person, through a private attorney or through a support enforcement agency, does not confer personal jurisdiction in another proceeding, except under limited circumstances. Fam C §5700.314.
- Telephonic appearances, whether to testify under penalty of perjury or to be deposed, shall be permitted for all nonresident parties and witnesses. Fam C §5700.316(f). If DCSS is involved in and providing services, telephonic hearings shall be permitted (not just for nonresidents). Fam C §17404.3. Cal Rules of Ct 5.324 governs such telephone appearances. See also §§2.35–2.37.
- An affidavit or document submitted by a nonresident party or witness that substantially complies with federally mandated forms, or a document incorporated by reference into any of them, that would not otherwise be excluded under the hearsay rule, is admissible in evidence if given under penalty of perjury. Fam C §5700.316(b). To be admissible, declarations under penalty of perjury signed outside the State of California must be signed under penalty of perjury “under the laws of the State of California” pursuant to CCP §2915.5.
- A copy of the record of child support payments, certified by the custodian of record as a true copy of the original and forwarded to a responding tribunal, is evidence of the facts asserted in it and admissible to show whether payments were made. Fam C §5700.316(c).
- Copies of bills for genetic testing and prenatal and postnatal health care of the mother and child, if given to the adverse party at least 10 days before trial, are admissible to prove the amount of charges billed and that they were reasonable, necessary, and customary. Fam C §5700.316(d).
- Documentary evidence transmitted to the responding tribunal by telephone, telecopier, or other means that do not provide an original copy may not be excluded on an objection based on the means of transmission. Fam C §5700.316(e).
- If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, an adverse inference may be drawn from the refusal. Fam C §5700.316(g).
- The spousal privilege against disclosure of communications between spouses or the defense of immunity based on the relationship between a husband and wife or child and parent do not apply. Fam C §5700.316(h)–(i).

### c. [§3.15] Cooperation Between Courts

California courts are encouraged to communicate with a tribunal outside this state to facilitate decisions. Communication may be in a record, by telephone, or by other means available to obtain information concerning the laws of that state, the legal effect of a judgment, decree or order of the other tribunal, and the status of a proceeding in either state. A California court may furnish similar information to a tribunal outside this state. Fam C §5700.317.

California courts may request the assistance of a tribunal outside this state in obtaining discovery and, upon request, compel a person over whom it has jurisdiction to respond to a discovery order issued by a tribunal outside this state. Fam C §5700.318.

## 11. Registration of Out of State and Foreign Support Orders

### a. [§3.16] Purpose and General Procedures

Registration of a support order or income withholding order from another state or a foreign country is the first step to enforcement or support modification (and probably for determination of a controlling order). The registration process is the same for either purpose. Fam C §§5700.601, 5700.609. An order is registered once it is filed for registration in the appropriate court. Fam C §5700.603(a). A registered order of another state or a foreign country is enforceable in the same manner and is subject to the same procedures as a California order. Fam C §5700.603(b). However, it may not be modified if the issuing tribunal had jurisdiction, unless the UIFSA requirements for modification are met. Fam C §5700.603(c).

Another state's support order may be registered in California by sending to the appropriate California court a letter of transmittal, two copies (one certified) of all orders to be registered, and a sworn statement by the person requesting registration *or* a certified statement by the custodian of the records showing the amount of any arrearage. Fam C §5700.602(a)(1)–(3). Identifying information must also be provided on both the obligor and the obligee, including:

- Obligor name and, if known: address and Social Security Number (redacted to last 4 digits if filed with the court), name and address of any employer and any other source of income, and a description and location of any property in the state not exempt from execution (Fam C §5700.602(a)(4)); and
- Obligee (or person to be paid) name and address, unless such information is not allowed to be disclosed under Fam C §5700.312, and if applicable, the person to whom support payments are to be remitted. (Fam C §5700.602(a)(5)).

When a court receives a request for registration, it must file the order as an order of a tribunal of another state or a foreign support order, together with one copy of the documents and information, regardless of their form. Fam C §5700.602(b). A petition or pleading that seeks relief that must be brought affirmatively under California law, may be filed at the same time as the registration request or later, but it must specify the grounds for the remedy sought. Fam C §5700.602(c).

If two or more orders are in effect, the requesting party must furnish a copy of each support order, specify any alleged controlling order, specify any arrears, and notify all affected parties. A request for determination of which is the controlling order may be filed separately or with the registration and enforcement, or registration and modification request. Fam C §5700.601(d)–(e).

**b. [§3.17] Notice of Registration and Effect of Confirmation**

When an order is registered, the registering county must notify the nonregistering party and send that party a copy of the registered order and documents and any relevant information accompanying the order. Fam C §5700.605(a). The notice must contain the following information (Fam C §5700.605(b)):

- That a registered order is enforceable from the date of registration in the same manner as an order issued by a tribunal of this state.
- That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice unless the registered order is under Fam C §5700.707 (proceeding under Hague Convention).
- That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages.
- The amount of any alleged arrearages.

If the registering party asserts that two or more orders are in effect, the notice must also identify them and indicate which is alleged to be the controlling order, including any consolidated arrears, notify the nonregistering party of the right to a determination of which is the controlling order, state that the procedures for requesting a hearing to contest the validity also apply to the determination of which is the controlling order, and state the result of failing to object. Fam C §5700.605(c).

Confirmation of a registered support order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. Fam C §5700.608.

**c. [§3.18] Registration for Enforcement**

California may enforce a support order issued by another state that has been registered in the appropriate California court. Fam C §5700.601. When registered for enforcement, the law of the issuing state governs the nature, extent, amount, and duration of the current payments. The issuing state's laws also govern the computation and payment of arrearages and accrued interest and the existence and satisfaction of other obligations under the support order. Fam C §5700.604(a). If there is an issue regarding which of two or more statutes of limitations apply, the statute that imposes the longest limitation period applies. Fam C §5700.604(b).

As a responding tribunal, California's procedures and remedies are to be applied to enforce current support and collect arrears on an out of state or foreign order registered here. Fam C §5700.604(c). Where there are multiple orders, once either California or another tribunal determines which is the controlling order and issues an order consolidating any arrears, California must prospectively apply the law of the state or foreign country issuing the controlling order, including its law on interest on arrears, on current and future support, and on consolidated arrears. Fam C §5700.604(d).

When an income withholding order has been registered for enforcement, the support enforcement agency or the registering tribunal must notify the obligor's employer under Fam C §§5200 et seq. Fam C §5700.605(d).

A nonregistering party seeking to contest the validity or enforcement of a registered order must request a hearing within 20 days after receiving notice of the time required by Fam C §5700.605. The contesting party may seek an order to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being requested or the amount of any alleged arrearages. Fam C §5700.606(a). If a hearing is requested, the tribunal must schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing. Fam C §5700.606(c). If the nonregistering party fails to contest the validity or enforcement of the order in a timely manner, it is confirmed by operation of law. Fam C §5700.606(b).

The nonregistering party bears the burden of proving one or more of the following defenses (Fam C §5700.607(a); *Cima-Sorci v Sorci* (2017) 17 CA5th 875, 833–885, 225 CR3d 813; *Willmer v Willmer* (2006) 144 CA4th 951, 960, 51 CR3d 10):

- The issuing tribunal lacked personal jurisdiction over the contesting party.
- The order was obtained by fraud.
- The order has been vacated, suspended, or modified by a later order.
- The issuing tribunal has stayed the order pending appeal.
- There is a defense under the law of this state to the remedy sought.
- Full or partial payment has been made.
- The statute of limitation under Fam C §5700.604 precludes enforcement of some or all of the alleged arrearages.
- The alleged controlling order is not the controlling order.

If a party's parentage of a child has been previously determined, the party may not plead nonparentage as a defense. Fam C §5700.315; *County of Los Angeles v Youngblood* (2015) 243 CA4th 230, 196 CR3d 345 (trial court erred in ordering genetic test to challenge foreign support order registered in California because not relevant to any matter before the court in enforcement action under UIFSA).

Because an understatement of arrearages is not included as one of the defenses listed in Fam C §5700.607(a), a nonregistering obligee is not provided with an opportunity to object, and therefore is not precluded from objecting later. *de Leon v Jenkins* (2006) 143 CA4th 118, 126–128, 49 CR3d 145.

It is not a defense to the registration and enforcement of a support order issued by a court in a foreign country that the laws of that country differ from California law with respect to the calculation of the amount of support or the time period for which support is awarded. A foreign support order may be enforced in California “if the foreign country has laws and procedures that allow for recognition and enforcement of a California child support order....” *Cima-Sorci v Sorci* (2017) 17 CA5th 875, 888, 225 CR3d 813.

If a contesting party is successful in establishing a full or partial defense, a court may stay enforcement of the order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. Any uncontested portions of the order may be enforced. Fam C §5700.607(b). If the contesting party is not successful, the registering tribunal must issue an order confirming the registered order. Fam C §5700.607(c). An order that is

confirmed either after a contested hearing or by operation of law precludes any further contest of the order that could have been asserted at the time of registration. Fam C §5700.608.

For contest of a support order registered as a Convention support order, see §3.28.

#### **d. [§3.19] Registration for Modification**

A party or enforcement agency seeking to modify, or modify and enforce an out of state support order must register the order in the same manner provided in Fam C §§5700.601–570.608. The registering party may request modification of a support order either at the time of registration or later. The request must specify the grounds for modification. Fam C §5700.609. An order that was registered for modification may also be enforced in the state of registration, but a registered order may be modified only if the requirements of Fam C §5700.611 or §5700.613 are met. Fam C §5700.610.

In this situation, California courts must apply only specified chapters of UIFSA (Chapters 1, 2 & 6, *not* 3, 4, 5, 7 & 8), and are to apply the procedural and substantive law of this state for enforcement and modification. Fam C §5700.613(b); see also §3.7.

If Fam C §5700.613 does not apply, a California court may modify a support order from another state that is registered in California only if, after a noticed hearing, the court finds that (Fam C §5700.611(a)):

- No one (child, individual obligee, and obligor) resides in the issuing state, a nonresident petitioner seeks modification, and the respondent is subject to personal jurisdiction of the California court; or
- The child is a resident of California, or an individual party is subject to the personal jurisdiction of California, and all individual parties have filed consents in a record, in the issuing tribunal for the California court to modify the support order and assume CEJ.

Notwithstanding the registration provisions of Fam C §5700.201(b), California retains jurisdiction to modify an order issued by this state if one party resides in another state, and the other party resides outside the United States. Fam C §5700.611(f). In addition, unless it is a Convention order, if a foreign country lacks or refuses to exercise jurisdiction, a California court may assume jurisdiction to modify a foreign support order. Fam C §5700.615. See §3.30 if it is a Convention order.

Modification of a registered child support order is subject to the same requirements, procedures and defenses that apply to modification of an order issued in this state, and can be enforced in the same manner. Fam C §5700.611(b). A California court may not modify any aspect of a child support order that may not be modified under the law of the issuing state, including the duration of the support obligation. If two or more tribunals have issued support orders for the same obligor and child, the order that controls must be recognized under Fam C §5700.207 and would thus establish the aspects of the order which are nonmodifiable. Fam C §5700.611(c). See §§3.7–3.9 regarding when a court has CEJ and multiple orders.

If another state asserts modification jurisdiction over a California support order, California may enforce its own order as to arrears and interest accruing before the modification, may provide appropriate relief for violations of its orders that occurred before modification, and must recognize an order modifying California's original order if registered for enforcement. Fam C §5700.612.

Within 30 days after the modification of an order, the requesting party must file a certified copy of the modification order with the state that formerly had CEJ and with each tribunal in which the prior order had been registered if the party knows those tribunals. Failure to file certified copies with these states subjects the party to sanctions by the tribunal in which the issue of failure to file arises; however, such failure does not affect the validity or enforceability of the modified order of the new tribunal having CEJ. Fam C §5700.613.

California may act as an initiating state or responding state in a proceeding to determine parentage under UIFSA, URESA, or RURES. Fam C §5700.402.

## **12. Miscellaneous Provisions**

### **a. [§3.20] Special Nondisclosure Rules**

If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosing specific identifying information, that information must be sealed and may not be disclosed to the other party or the public. After a hearing the tribunal may order disclosure of information determined to be in the interest of justice. Fam C §5700.312.

- **JUDICIAL TIP:** This section does not require a party to obtain an order before using a confidential address on court pleadings. A new UIFSA federal form (OMB 0970-085 entitled “Personal Information Form for UIFSA §311”) was developed for use under Fam C §§5700.311–5700.312 for the purpose of protecting personal identifying information that is required when filing a petition. The form itself notes that it is to be filed with the tribunal, but not kept in a public access file. The information on the form may be disclosed to the parties in the case, unless there is an appropriate affidavit or finding, in which case the information must be sealed and may not be disclosed unless the court has made the appropriate determination. . See also discussion of confidentiality of information generally in [§§2.21–2.29](#).

### **b. [§3.21] Employment of Private Attorney**

A party may employ private counsel for representation in UIFSA proceedings. Fam C §5700.309.

### **c. [§3.22] Declaration of Reciprocating State Status**

The state Department of Child Support Services, in consultation with the Attorney General, may determine that a foreign country has established a reciprocal arrangement for child support with California. Fam C §5700.308(b).

A declaration of state reciprocity issued by the Attorney General on or before December 31, 2015, and a declaration issued pursuant to subdivision (b) of Section 5700.308, shall remain in full force and effect unless the declaration is (a) revoked or declared invalid by the Attorney General or by the other party to the reciprocity agreement; (b) superseded by a subsequent federal bilateral agreement with the other party; or (c) superseded by the other party’s ratification of or accession to the Hague Convention. Fam C §17407.5.

The Federal Republic of Germany is a reciprocating state as declared by the California Attorney General. *Willmer v Willmer* (2006) 144 CA4th 951, 957, 51 CR3d 10. Certain states in Mexico have also been the subject of declarations by the Attorney General.

### **B. [§3.23] Support Proceedings Under the Hague Convention**

Hague Convention orders are only one type of foreign support orders. A “foreign country” is a country, including a political subdivision thereof, other than the United States, and which has either (Fam C §5700.102(5)(A)–(D)):

- Been declared under U.S. law to be a reciprocating country;
- Established a reciprocal arrangement for child support with this state as provided in Fam C §5700.308;
- Enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under UIFSA; or
- Has the Hague Convention in force with respect to the United States.

This section deals only with support proceedings under the Convention.

- **JUDICIAL TIP:** The specific UIFSA provisions regarding support orders under the Hague Convention often refer to other more general UIFSA provisions, but then set forth exceptions, so care should be taken to apply the more specific provisions as identified in this section, where applicable. In addition, new countries continue to be added to the list of ratified countries under the Hague Convention. It is important to check if a country is indeed a Hague Convention country.

To find more detailed information, including a list of Hague Convention countries, you can go to the following websites:

- Office of Child Support Enforcement (OCSE) —International Page  
<https://www.acf.hhs.gov/css/partners/international>
- Hague Convention—Child Support Section  
<https://www.hcch.net/en/instruments/conventions/specialisedsections/child-support>

### **1. [§3.24] Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Convention)**

Chapter 7 of UIFSA (Fam C §§5700.701–5700.713) governs support proceedings under the Convention, and is controlling if inconsistent with Chapters 1 through 6 of the Act (Fam C §§5700.101 through 5700.616). Fam C §5700.702. The Department of Child Support Services is the agency designated by the United States central authority to perform specific functions under the Convention. Fam C §5700.703. DCSS must transmit and receive applications, and initiate or facilitate the institution of a proceeding regarding an application in a California tribunal. Fam C §5700.704(a). A record filed with a tribunal in this state must be in the original language, and if not in English, must be accompanied by an English translation. Fam C §5700.713. No security, bond, or any type of deposit can be required to guarantee payment of costs and expenses in Convention proceedings. Fam C §5700.704(d).

**a. [§3.25] Obligee's Proceedings**

The following support proceedings are available to an obligee under the Convention (Fam C §5700.704(b)):

- Recognition or recognition and enforcement of a foreign support order;
- Enforcement of a support order issued or recognized in this state;
- Establishment of a support order if there is no existing order, including, if necessary, determination of parentage;
- Establishment of a support order if recognition of a foreign support order is refused under Fam C §5700.708(b)(2), (4), or (9);
- Modification of a support order of a tribunal of this state; and
- Modification of a support order of a tribunal of another state or a foreign country.

**b. [§3.26] Obligor's Proceedings**

The following support proceedings are available under the Convention to an obligor against whom there is an existing support order (Fam C §5700.704(c)):

- Recognition of an order suspending or limiting enforcement of an existing support order of a tribunal of this state;
- Modification of a support order of a tribunal of this state; and
- Modification of a support order of a tribunal of another state or a foreign country.

An obligee or obligor petitioner may file a direct request seeking the establishment or modification of a support order or determination of parentage of a child (Fam C §5700.705(a)) or the recognition and enforcement of a support order or a support agreement (Fam C §5700.705(b)). If the obligor or obligee has benefitted from free legal assistance in the issuing country, then they are entitled, at least to the same extent, to benefit from any free legal assistance provided for by California law under the same circumstances (Fam C §5700.705(c)(2)). A petitioner filing a direct request is not entitled to assistance from DCSS. (Fam C §5700.705(d)). If California law provides for a more simplified, expeditious procedure regarding the recognition and enforcement of a foreign support order or agreement, then that law may be applied. (Fam C §5700.705(e)). If a California tribunal does not recognize and enforce a Convention support order in its entirety, it must enforce any severable part of the order. (Fam C §5700.709).

**c. [§3.27] Registration of a Convention Support Order**

A party who is an individual or a support enforcement agency seeking recognition of a Convention support order shall register the order in this state as provided in Fam C §§5700.601 et seq. Pursuant to Fam C §5700.706, notwithstanding Fam C §§5700.311 and 5700.602(a), a request for registration of a Convention support order must be accompanied by:

- A complete text of the support order or an abstract or extract of the support order drawn up by the issuing foreign tribunal, which may be in the form recommended by the Hague Conference on Private International Law;

- A record stating that the support order is enforceable in the issuing country;
- If the respondent did not appear and was not represented in the proceedings in the issuing country, a record attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard or that the respondent had proper notice of the support order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal;
- A record showing the amount of arrears, if any, and the date the amount was calculated;
- A record showing a requirement for automatic adjustment of the amount of support, if any, and the information necessary to make the appropriate calculations; and
- If necessary, a record showing the extent to which the applicant received free legal assistance in the issuing country.

A request for registration of a Convention support order may seek recognition and partial enforcement of the order. Fam C §5700.706(c). A tribunal of this state may vacate the registration of a Convention support order without the filing of a contest under Fam C §5700.707 only if, acting on its own motion, the tribunal finds that recognition and enforcement of the order would be manifestly incompatible with public policy. Fam C §5700.706(d).

The tribunal shall promptly notify the parties of the registration or the order vacating the registration of a Convention support order. Fam C §5700.706(e).

#### **d. [§3.28] Contest of a Registered Convention Order**

Both the timing for contesting a registered Convention order, as well as the grounds upon which a tribunal in this state can refuse to recognize or enforce such an order are different from other registrations under UIFSA generally. Pursuant to Fam C §5700.707(a), except as otherwise provided, Fam C §§5700.605 through 5700.608 apply to a contest of a registered Convention support order. However, a party contesting a registered Convention support order must file a contest no later than 30 days after notice of the registration, unless the contesting party does not reside in the United States, in which case the contest must be filed no later than 60 days after notice of the registration. Fam C §§5700.707(b). The order is enforceable if the non-registering party fails to contest the registered Convention support order by the above specified dates. Fam C §5700.707(c).

A contest of a registered Convention support order may be based only on the grounds outlined in §3.29 below. The contesting party bears the burden of proof. See Fam C §5700.707(d).

In a contest of a registered Convention support order, a tribunal of this state is bound by the findings of fact on which the foreign tribunal based its jurisdiction, and may not review the merits of the order. Fam C §5700.707(e). A tribunal of this state deciding a contest of a registered Convention support order shall promptly notify the parties of its decision. Fam C §5700.707(f). A challenge or appeal, if any, does not stay the enforcement of a Convention support order unless there are exceptional circumstances. Fam C §5700.707(g).

### **e. [§3.29] Grounds for Refusal for Recognition and Enforcement of a Registered Convention Order**

The following grounds are the only grounds on which a tribunal of this state may refuse recognition and enforcement of a registered Convention support order:

- Recognition and enforcement of the order is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard;
- The issuing tribunal lacked personal jurisdiction consistent with Fam C §5700.201;
- The order is not enforceable in the issuing country;
- The order was obtained by fraud in connection with a matter of procedure;
- A record transmitted in accordance with Fam C §5700.706 lacks authenticity or integrity;
- A proceeding between the same parties and having the same purpose is pending before a tribunal of this state and that proceeding was the first to be filed;
- The order is incompatible with a more recent support order involving the same parties and having the same purpose if the more recent support order is entitled to recognition and enforcement under this part in this state;
- Payment, to the extent alleged arrears have been paid in whole or in part;
- In a case in which the respondent neither appeared nor was represented in the proceeding in the issuing foreign country:
  - If the law of that country provides for prior notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or
  - If the law of that country does not provide for prior notice of the proceedings, the respondent did not have proper notice of the order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal; or
- The order was made in violation of Fam C §5700.711.

If a tribunal of this state does not recognize a Convention support order due to lack of personal jurisdiction, fraud or where the respondent failed to appear or was not represented in the proceeding in the foreign country, the tribunal may not dismiss the proceeding without allowing a reasonable time for a party to request the establishment of a new Convention support order, and the DCSS must take all appropriate measures to request a child-support order for the obligee if the application for recognition and enforcement was received under Fam C §5700.704. Fam C §5700.708(c).

If a tribunal of this state does not recognize and enforce a Convention order in its entirety, it shall enforce any severable part of the order. Fam C §5700.709.

### **f. [§3.30] Modification of a Convention Child Support Order**

A tribunal of this state may not modify a Convention child-support order if the obligee remains a resident of the foreign country where the support order was issued unless (Fam C §5700.711(a)):

- The obligee submits to the jurisdiction of a tribunal of this state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or
- The foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.

If a tribunal of this state does not modify a Convention child-support order because the order is not recognized in this state, the tribunal may not dismiss the proceeding without allowing a reasonable time for a party to request the establishment of a new Convention support order, and the DCSS must take all appropriate measures to request a child-support order for the obligee if the application for recognition and enforcement was received under Fam C §5700.704. Fam C §5700.711(b).

### **g. [§3.31] Foreign Support Agreements**

A foreign support agreement registered in this state upon application or direct request for recognition and enforcement must be recognized unless it is vacated or there is a refusal to recognize and enforce it by a tribunal in this state. Fam C §5700.710.

The application or direct request must be accompanied by a complete text of the foreign support agreement, and a record stating that the foreign support agreement is enforceable as an order of support in the issuing country. Fam C §5700.710(b).

A tribunal of this state may vacate the registration of a foreign support agreement on its own motion, only if the tribunal finds that recognition and enforcement would be manifestly incompatible with public policy. Fam C §5700.710(c).

In a contest of a foreign support agreement, the tribunal may refuse recognition and enforcement of the agreement if it finds any of the following (Fam C §5700.710(d)):

- Recognition and enforcement of the agreement is manifestly incompatible with public policy;
- The agreement was obtained by fraud or falsification;
- The agreement is incompatible with a support order involving the same parties and having the same purpose in this state, another state, or a foreign country if the support order is entitled to recognition and enforcement under this act in this state; or
- The record submitted with the application or direct request for recognition and enforcement lacks authenticity or integrity.

The proceeding for recognition and enforcement of a foreign support agreement must be suspended during the pendency of a challenge to or appeal of the agreement before a tribunal of another state or a foreign country. Fam C §5700.710(e).

## **II. REGISTRATION OF ORDERS FROM OTHER CALIFORNIA COUNTIES (INTRASTATE)**

### **A. Overview**

#### **1. [§3.32] Introduction**

People often move to and from different counties within California. Rather than having to move entire cases through a change in venue process, the legislature developed a system

whereby a support order, or earnings withholding order, or both, can be registered and enforced in a different county than the one in which the case or order originated. Fam C §§5600–5602. This can include support orders made in different types of cases, *e.g.*, whether from a dissolution action, a petition to establish custody and support, a UPA action, or a domestic violence action. The system was intended to provide an orderly way to enforce support, and to prevent conflicting support orders by giving one court the authority to both modify and enforce an order if proper procedures were followed.

## 2. [§3.33] Who May Register

Either the local child support agency (LCSA) or the obligee may register a support order obtained in another California county. Fam C §5600(a).

## 3. [§3.34] Venue

A support order may be registered in (Fam C §5600(b)):

- The obligor’s county of residence,
- The obligee’s county of residence,
- The county where the child who is the subject of the order resides, or
- Any county where the obligor has income, assets, or other property.

## B. Intercounty Procedures

### 1. Procedure for Registration

#### a. [§3.35] Registration by LCSA

An LCSA may register a support order from another county when it is responsible for the enforcement of the order under Fam C §17400. It may use the procedures of either Fam C §5601 or Fam C §5602. Fam C §5601(a).

The LCSA may register an order under Fam C §5601 by filing all of the following documents in the agency’s county (Fam C §5601(b)):

- An endorsed file copy or a copy of an endorsed file copy of the most recent support order. Fam C §5601(a)(1).
- A statement of arrearages, including an accounting of the amounts ordered and paid each month and any added costs, fees, and interest. Fam C §5601(a)(2).
- A statement of registration by the agency showing the following (see form FL-650):
  - The agency’s post office address.
  - The obligor’s last-known place of residence or post office address.
  - The DMV’s listing of the obligor’s most recent address, if known.
  - A list of states and California counties in which the order and any modifications are registered. Fam C §5601(a)(3).

The filing of the documents above constitutes the registration. Fam C §5601(b).

The agency must serve the documents on the obligor promptly after registration. Service must comply with the requirements of CCP §1013 or be completed in any other manner as provided by law. Fam C §5601(c).

- **JUDICIAL TIP:** Now that all counties and LCSAs have transitioned onto their new statewide computer system, by which LCSAs have access to all information from all other counties, the state DCSS has implemented a new policy that they will not register the order just because there has been a move by a party to another county. DCSS has created the concept of a “managing county,” which may or may not be the county in which the child support order was last entered. Unless and until there is an actual registration, the court that last had jurisdiction is where any modification motion should be filed, notwithstanding what county within DCSS is the “managing county.” This policy may create some confusion, especially with self-represented litigants and when a party has multiple cases, as to the appropriate jurisdiction for filing a motion for modification in a particular case. See [§§5.4, 5.34](#).

#### **b. [§3.36] Registration by Obligee**

An obligee may register a support order by filing all the documents listed under Fam C §5601(a), except that the obligee must prepare the verified statement of registration showing all of the following (Fam C §5602(a); see form FL-440):

- The obligee’s mailing address.
- The obligor’s last-known place of residence or mailing address.
- A list of states and California counties in which the order and any modifications have been registered.

The obligee’s mailing address may be different from a home address due to the prohibition against disclosure of identifying information provided under the Domestic Violence Prevention Act. Fam C §§6200 et seq.

The filing of the required documents constitutes the registration. Fam C §5602(b). The documents must be served on the obligor promptly after registration. Service must comply with the requirements of CCP §1013 or be completed in any other manner as provided by law. Fam C §5601(c).

#### **c. [§3.37] Duties of Court Clerk**

The clerk must file the documents without fees or costs. Fam C §5602(b).

On registration by a LCSA, the clerk must forward notice of registration to the courts in all other counties or states that issued the original order or modifications of the order. Fam C §5601(e); see form FL-651.

On registration by an obligee, the clerk must promptly send notice of the registration to the obligor with a copy of the registered support order and the obligee’s mailing address. Fam C §5602(c); see form FL-570. The documents must be sent using any form of mail requiring a return receipt from the addressee alone. The clerk must provide proof that the obligor personally received the notice of registration by mail or other method of service. A return receipt signed by the obligor is satisfactory proof. Fam C §5602(c).

#### **d. [§3.38] Jurisdiction for Further Proceedings**

Upon registration under Fam C §5601, the statute is explicit that “[n]o further proceedings regarding the obligor’s support obligations shall be filed in other counties.” Fam C §5601(e). Registration thus, essentially, has the effect of vesting the court in which the order has been registered with venue and ongoing exclusive jurisdiction.

- **JUDICIAL TIP:** Courts differ in their treatment and consideration of orders that modify an order registered in a sister county. Some courts treat the order as issued in excess of the authority of the court and therefore void, while other courts merely treat the subsequent order as voidable. If it is discovered that an order has been registered in another county, the better practice is to decline to rule on the pending motion and refer the moving party to the county where the order is registered or, if the request is to set aside the underlying judgment, to the county that made the original judgment.

### **2. Motion to Vacate Registration**

#### **a. [§3.39] Timing and Hearing**

An obligor has 20 days after service of the notice of registration of a California support order to file a motion to vacate the registration or ask for other relief. Fam C §5603(a); see form FL-575. If the obligor fails to file a motion within 20 days, the order and all accompanying documents are confirmed. Fam C §5603(a).

The obligor must serve the motion personally or by mail on both the LCSA and the obligee’s private attorney or the obligee if self-represented. Fam C §5603(a).

Notice of the hearing must be served at least 15 days before the hearing, with standard extensions for service by mail. Fam C §5603(a); see CCP §1013(a).

There can be no joinder of actions, coordination of actions, or cross-complaints. The hearing is strictly limited to claims and defenses dealing with the obligor’s identity, the validity of the underlying California support order, or the accuracy of the obligee’s statement of the support arrears unless that amount has been previously established by a judgment or order. Fam C §5603(a).

#### **b. [§3.40] Stay of Enforcement**

If the obligor shows, and the court finds, that an appeal is pending or that a stay of execution has been granted, and the obligor has furnished security for payment of the order, the court must stay enforcement of the order until (1) the appeal is concluded, (2) the time for appeal has expired, or (3) the order is vacated. Fam C §5603(b).

If the obligor shows, and the court finds, any grounds for staying a California support order, the court must stay enforcement of the order for an appropriate time period if the obligor furnishes security for payment of support. Fam C §5603(b).

#### **c. [§3.41] Obligor’s Defenses**

The obligor may only present defenses that would be available to him or her as a defense in an action to enforce a support judgment. Fam C §5603(b).

If parentage was previously decided by another state whether by administrative or judicial process or by voluntary acknowledgment procedures, that determination must be given full faith and credit and has the same effect as a California parentage determination. Fam C §5604.

Subject to the conditions discussed below, the court has the discretion to consider the *equities* of the situation in the case before it. *Kenneth G. v Suzanne H.* (1998) 62 CA4th 853, 861, 72 CR2d 525; *Marriage of Trainotti* (1989) 212 CA3d 1072, 1075, 261 CR 36; *Marriage of Utigard* (1981) 126 CA3d 133, 140, 178 CR 546.

*Laches.* In an action to enforce child support, the respondent may not raise, and the court may not consider, the defense of laches except as to any portion of a judgment owed to the state. Fam C §291(d). Family Code §291(d) is the legislative response to pre-2003 cases that recognized laches as a defense to a support judgment against an obligor who is an individual.

*Estoppel by concealment.* If the custodial parent actively concealed the child while the child was a minor, if the subject child is an adult at the time of the arrearages action, and if the arrearages are not owed to the county for public assistance reimbursement or to any other governmental agency or public trustee, the obligee parent may be equitably stopped from collecting child support that accrued during the months of active concealment. *Marriage of Damico* (1994) 7 C4th 673, 685, 29 CR2d 787; *Marriage of Comer* (1996) 14 C4th 504, 510, 516, 59 CR2d 155.



# Chapter 4

## SUPPORT ENFORCEMENT

### I. [§4.1] SCOPE OF CHAPTER

### II. CONTEMPT AND OTHER CRIMINAL ENFORCEMENT

- A. Overview of Contempt
  - 1. [§4.2] Introduction
  - 2. [§4.3] General Authority for Contempt
  - 3. [§4.4] Orders Enforceable by Contempt
  - 4. [§4.5] Arrears
  - 5. [§4.6] Welfare Reimbursement
  - 6. Nature of Contempt Proceeding
    - a. [§4.7] Criminal vs. Civil Contempt
    - b. [§4.8] Mixed Relief
  - 7. [§4.9] Due Process Requirements
  - 8. [§4.10] Effect of Bankruptcy Stay
- B. Contempt to Enforce Child and Family Support
  - 1. Elements and Proof
    - a. [§4.11] Prima Facie Case
    - b. [§4.12] Lawful Order
    - c. [§4.13] Knowledge of Order
    - d. [§4.14] Noncompliance With Order
    - e. [§4.15] Affirmative Defense of Inability to Pay
  - 2. Initiating Contempt Proceeding
    - a. [§4.16] Pleadings
    - b. [§4.17] Multiple Counts
    - c. [§4.18] Statute of Limitation
    - d. [§4.19] Pleadings Frame Issues and Jurisdiction
  - 3. [§4.20] Service of Contempt Action
  - 4. [§4.21] Responses to Charges
    - a. [§4.22] Answer
    - b. [§4.23] Motion for Discharge
  - 5. First Appearance
    - a. [§4.24] Arraignment
    - b. [§4.25] Failure to Appear
    - c. [§4.26] Right to Counsel
    - d. [§4.27] Indigent Citee
    - e. [§4.28] Right to Represent Self
  - 6. Taking a Plea
    - a. [§4.29] In General
    - b. [§4.30] Not Guilty Plea—Setting Trial Date
    - c. [§4.31] Guilty or Nolo Contendere Plea
    - d. [§4.32] Time for Sentencing
  - 7. Plea Bargain—Probation

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- a. [\[§4.33\]](#) In General
  - b. [\[§4.34\]](#) Authority and Time to Accept Plea
  - c. [\[§4.35\]](#) Typical Plea Bargain
  8. Contempt Trial
    - a. [\[§4.36\]](#) In General
    - b. [\[§4.37\]](#) Time for Trial
    - c. [\[§4.38\]](#) Discovery Rights
    - d. [\[§4.39\]](#) Authority of Child Support Commissioners
    - e. [\[§4.40\]](#) Right to Jury Trial
    - f. [\[§4.41\]](#) Standard of Proof
  9. Presentation of Evidence
    - a. [\[§4.42\]](#) Proof of Elements
    - b. [\[§4.43\]](#) Charging Affidavit
    - c. [\[§4.44\]](#) Personal Testimony
    - d. [\[§4.45\]](#) Financial Records
    - e. [\[§4.46\]](#) Charged Party Need Not Testify
  10. [\[§4.47\]](#) Findings
  11. Sentencing
    - a. [\[§4.48\]](#) Required Sentences
    - b. [\[§4.49\]](#) Attorney's Fees
    - c. [\[§4.50\]](#) Time for Sentencing
  12. [\[§4.51\]](#) Judicial Review
  - C. Other Contempts
    1. [\[§4.52\]](#) Employer Contempts
      - a. [\[§4.53\]](#) Failure to Withhold or Forward Wages
      - b. [\[§4.54\]](#) Health Insurance Coverage Assignment or NMSN
    2. [\[§4.55\]](#) Job Training and Seek-Work Orders
  - D. Probation Revocation
    1. [\[§4.56\]](#) In General
    2. [\[§4.57\]](#) Authority
    3. [\[§4.58\]](#) Two-Step Process
    4. [\[§4.59\]](#) Due Process Rights
    5. [\[§4.60\]](#) Timeliness of Motion
    6. [\[§4.61\]](#) Initiating Formal Proceedings
    7. [\[§4.62\]](#) Multiple Procedures Available
    8. [\[§4.63\]](#) Arraignment
    9. [\[§4.64\]](#) Summary Revocation
    10. [\[§4.65\]](#) Time for Formal Hearing
    11. [\[§4.66\]](#) Formal Hearing
      - a. [\[§4.67\]](#) Relaxed Rules of Evidence
      - b. [\[§4.68\]](#) No Criminal Discovery
      - c. [\[§4.69\]](#) Burden of Proof
      - d. [\[§4.70\]](#) Possible Outcomes
    12. [\[§4.71\]](#) Written Findings

E. [§4.72] Criminal Prosecution for Willful Failure to Support

### III. CIVIL ENFORCEMENT

A. Earnings Assignment Order (Wage Garnishment)

1. [§4.73] Included With Support Order
2. [§4.74] Stay or Termination of Earnings Assignment Order
3. Motion to Quash Earnings Assignment Order
  - a. [§4.75] Grounds
  - b. [§4.76] Procedure

B. [§4.77] Need-Based Benefits Exempt

C. [§4.78] Derivative Benefits

D. Liens

1. Real Property Liens

- a. [§4.79] Creation of Lien
- b. [§4.80] Property Subject to Lien
- c. [§4.81] Amount of Lien
- d. [§4.82] Duration of Lien and Effect of Transfer
- e. [§4.83] Priorities of Liens
- f. [§4.84] Subordination
- g. [§4.85] Recording Substitution of Payee
- h. [§4.86] Satisfaction of Judgment
- i. [§4.87] Release of Lien
- j. [§4.88] Interstate Liens

E. [§4.89] State Disbursement Unit

F. Judgment Debtor Exams

1. [§4.90] Order Requiring Debtor's Appearance
2. [§4.91] Service of Order Creates Lien on Property
3. [§4.92] Judgment Debtor's Claim of Exemption
4. [§4.93] Privileges
5. Person Fails to Appear for Examination
  - a. [§4.94] Issuance of Bench Warrant and Contempt Order
  - b. [§4.95] Imposition of Sanctions

G. [§4.96] Seek-Work Orders

H. Writs of Execution

1. [§4.97] In General
2. [§4.98] Issuance
3. Enforcement
  - a. [§4.99] Turnover Orders
  - b. [§4.100] Levy on Personal Property in Private Place
4. Order to Recall or Quash Improper Writs
  - a. [§4.101] Bases
  - b. [§4.102] Motion to Quash Writ
  - c. [§4.103] Motion to Quash Levy
  - d. [§4.104] Who May File
  - e. [§4.105] Costs

I. Abstract of Judgment

1. [§4.106] In General
2. [§4.107] Sister State Judgments
3. [§4.108] Order for Release of Improper Lien
- J. [§4.109] QDRO for Support
- K. [§4.110] Health Insurance Coverage Assignment (HICA) and National Medical Support Notice (NMSN)
- L. [§4.111] Enforcement Tools Unique to DCSS
- M. Bankruptcy
  1. [§4.112] Effect of Discharge
  2. [§4.113] Automatic Stay and Exceptions
- N. [§4.114] Child Support Security Deposit
- O. [§4.115] Private Child Support Collectors
- P. [§4.116] Independent Actions
- Q. [§4.117] Indian Parties or Indian Property

#### **IV. Defenses**

- A. Exemptions to Enforcement of Money Judgments
  1. [§4.118] Scope and Application
  2. [§4.119] Exemptions
  3. [§4.120] Enforcement Against Public and Private Retirement Plans
  4. [§4.121] Federal Benefit Payment Exemptions
  5. [§4.122] Amount of Exemptions
- B. Guidelines for Determining Exemption
  1. [§4.123] Who May Claim Exemption
  2. [§4.124] Time Limit to Claim Exemption
  3. [§4.125] Relief Under CCP §473(b)
  4. [§4.126] Filing of Claim of Exemption
  5. [§4.127] Notice of Opposition
  6. [§4.128] Setting Hearing
  7. [§4.129] Disposition of Property Pending Hearing
  8. [§4.130] Determining Claim Based on Pleadings
  9. [§4.131] Earliest Time When Exemption Applies
  10. [§4.132] Exemptions When Judgment Debtor Is Married
  11. [§4.133] Use of Exempt Property to Satisfy Support Judgment
  12. [§4.134] Need-Based Exemptions
  13. [§4.135] Tracing Exempt Funds
  14. [§4.136] Order on Claim of Exemption and Appeal
  15. [§4.137] Recovery of Costs of Levy
- C. [§4.138] No Limitations Period on Support Enforcement
- D. Collateral Attack (Void Judgments and Orders)
  1. [§4.139] Nature of Collateral Attack
  2. [§4.140] Domestic vs. Foreign Judgments
  3. Grounds for Collateral Attack
    - a. [§4.141] Lack of Subject Matter Jurisdiction
    - b. [§4.142] Constitutionally Defective Notice

- c. [§4.143] Defective Personal Jurisdiction
- d. [§4.144] Nonjurisdictional Errors
- 4. [§4.145] Res Judicata Limitation on Standing
- E. [§4.146] Contempt Bar to Enforcement
- F. Equitable Offset
  - 1. [§4.147] Offsetting Judgments
  - 2. [§4.148] Equitable Offset Against Child Support
- G. [§4.149] Laches as Defense to Amount Owed to State
- H. [§4.150] Waiver and Estoppel

## **V. SETTING ASIDE JUDGMENTS AND ORDERS**

- A. [§4.151] Scope
- B. [§4.152] General Civil Remedies
  - 1. [§4.153] Mistake, Inadvertence, Surprise, and Excusable Neglect
  - 2. [§4.154] Attorney Mistake
  - 3. [§4.155] Service of Process Issues
    - a. [§4.156] Defective Service
    - b. [§4.157] Lack of Actual Notice
  - 4. [§4.158] Extrinsic Fraud or Mistake
- C. Family Code Remedies
  - 1. [§4.159] Setting Aside Presumed Income Judgment
  - 2. [§4.160] Mistaken Identity
  - 3. Grounds Beyond CCP §473
    - a. [§4.161] Support Orders
    - b. [§4.162] Dissolution, Nullity, or Legal Separation Cases
  - 4. Parentage
    - a. [§4.163] Introduction
    - b. [§4.164] Motion to Set Aside Voluntary Declaration Within 2 Years of Birth
    - c. [§4.165] Motion to Set Aside Voluntary Declaration Under CCP §473
    - d. [§4.166] Motion to Set Aside Voluntary Declaration by Presumed Parent Under Fam C §7612(d)
    - e. Motion to Set Aside Parentage Judgment (Paternity Disestablishment)
      - (1) [§4.167] Availability
      - (2) [§4.168] Motion Procedures
      - (3) [§4.169] Determining Motion
    - f. [§4.170] Other Attacks on Parentage Judgment
      - (1) [§4.171] Motion to Set Aside Paternity Stipulation
      - (2) [§4.172] Direct and Indirect Attacks on Parentage Judgment
      - (3) [§4.173] Equitable Grounds for Relief From Judgment
- D. [§4.174] Violation of Servicemembers Civil Relief Act

## **VI. DETERMINING ARREARS**

- A. [§4.175] Introduction
- B. [§4.176] Public Policy and General Principles
  - 1. [§4.177] Right to Support Cannot Be Waived by Agreement
  - 2. [§4.178] Parents Have Equal Duty to Support Their Children
  - 3. [§4.179] Priorities and Provisions Regarding Payment of Support

4. Limitations on Court's Authority
  - a. [§4.180] No Retroactive Modifications of Support Order or Accrued Arrearages, Including Add-Ons
  - b. [§4.181] Limited Authority to Set Arrears Retroactively or Stay Enforcement Activity
5. [§4.182] Arrears and Interest Are Owed Until Paid
6. [§4.183] Duration of California Support Orders
- C. Motion to Determine Arrears
  1. [§4.184] Standing
  2. [§4.185] Forms and Showing
- D. Common Issues
  1. Waiver or Compromise of Arrears
    - a. [§4.186] By Parties
    - b. [§4.187] By DCSS
  2. Estoppel
    - a. [§4.188] General Principles
    - b. [§4.189] Defense of Estoppel in Support Actions
  3. [§4.190] Laches
  4. [§4.191] No Offset by Payment of Other Business Debt
  5. [§4.192] Incarceration
  6. [§4.193] Direct Care and Support
  7. [§4.194] Minor Child Moves Out of Custodial Party's Home
  8. [§4.195] Child Concealment as Defense
  9. [§4.196] Hold Harmless Agreement

## I. [§4.1] SCOPE OF CHAPTER

This chapter covers civil and criminal methods of enforcing support, setting aside support or parentage judgments or orders, and determining arrears in cases filed in both family law courts and in Title IV-D courts.

## II. CONTEMPT AND OTHER CRIMINAL ENFORCEMENT

### A. Overview of Contempt

#### 1. [§4.2] Introduction

The court may generally use its contempt power to enforce orders made in family law proceedings. See §4.3. A parent who has knowledge of and fails to pay a lawful child support order is deemed in contempt of court and may be ordered to perform community service or be imprisoned, or both. *Moss v Superior Court (Ortiz)* (1998) 17 C4th 396, 422, 71 CR2d 215.

This section generally covers contempts and other criminal enforcement matters that come before the court concerning violations of support obligations, as well as some support enforcement activities of the DCSS. The discussion focuses primarily on contempts brought under CCP §§1209 and 1209.5.

For a checklist of contempt procedures, see [Appendix G](#).

## 2. [§4.3] General Authority for Contempt

The authority to pursue a contempt action in connection with a family law proceeding arises from the following statutes:

- Fam C §290—a judgment or order made or entered under the Family Code may be enforced by contempt.
  - CCP §1209(a)(5)—contempts of the court’s authority include “[d]isobedience of any lawful judgment, order or process of the court.” This is the primary authority for contempt in a family law proceeding (*e.g.*, visitation violations), other than for child support.
  - CCP §1209.5—contempt for noncompliance with an order for support. This is the primary authority for contempt for failing to obey a child support order.
  - Fam C §4500—a support order made, entered, or enforceable in California is enforceable under the Family Code, whether or not the order was made or entered under the Family Code.
  - Pen C §166(a)(4)—willful disobedience of the terms of any lawfully issued process or court order or out-of-state court order, including orders pending trial. This is the authority for a “true” criminal contempt: a misdemeanor prosecution, where the citee is entitled to a jury trial and, if found guilty, may be sentenced to up to 6 months or 1 year in county jail, ordered to pay a fine of \$1000, plus penalty assessments, or both.
- ➡ JUDICIAL TIP: Penal Code §166(a)(4) is rarely utilized by DCSS for child support violations. It is primarily used for violations of Domestic Violence Restraining Orders in family law cases.

## 3. [§4.4] Orders Enforceable by Contempt

The following court orders are enforceable by contempt:

- Current child support. CCP §1209.5.
- Family support. *People v Dilday* (1993) 20 CA4th Supp 1, 3, 25 CR2d 386.
- Spousal support. *Mossman v Superior Court* (Mossman) (1972) 22 CA3d 706, 712, 99 CR 638 (citee must raise inability to pay as a defense); *Sorell v Superior Court* (Kieser) (1967) 248 CA2d 157, 161, 56 CR 222.
- Orders for the payment of necessary attorney’s fees and costs. *In re Hendricks* (1970) 5 CA3d 793, 796, 85 CR 220.
- Arrears. Fam C §150 (support includes past due support or arrearage); see [§4.5](#).
- Contempts against employers who fail to obey orders directed to them to enforce court orders against their employees (*e.g.*, wage assignments, health insurance assignments). Fam C §§3768(b), 5241(c); see [§4.51](#).
- Job training and seek work orders. *Moss v Superior Court* (Ortiz) (1998) 17 C4th 396, 420, 423, 71 CR2d 215; see [§4.55](#).

The following orders are not enforceable by contempt:

- Debts. See Cal Const art I, §10; *People v Smith* (2000) 81 CA4th 630, 642, 96 CR2d 856.
- Contractual obligations not merged into the judgment. *Plummer v Superior Court* (1942) 20 C2d 158, 164, 124 P2d 5 (nonmerged provisions of marital settlement agreement).

#### 4. [§4.5] Arrears

Arrears in support payments are enforceable by contempt because support includes past due support or arrearages. Fam C §150. An order for an arrears payment is considered a *separate and distinct order* from an ongoing support order. For example, a monthly order for \$300 current (ongoing) support and \$100 toward arrearages is actually two orders. Two counts of contempt can be charged each month for nonpayment.

Arrears payment orders, however, are treated differently than support payment orders. For example, orders for arrears payments do not require the court to make an “ability to pay” finding first as it does for other monetary support orders. An order for *an amount to be paid* toward liquidating any arrearage is required as part of the earnings assignment order required to be made under Fam C §5230. A payment to liquidate the arrears must be meaningful. See *Marriage of Ramer* (1986) 187 CA3d 263, 274, 231 CR 647, superseded by statute on other ground as stated in *Marriage of Romero* (2002) 99 CA4th 1436, 1440 n3 (error to permit parent to satisfy \$10,500 arrearage at \$100/month).

- **JUDICIAL TIP:** If the order to pay arrears is set without regard to the ability to pay, then the permissive inference of “ability to pay” (as with the setting of a current guideline order) is not available when seeking contempt under CCP §1209. The ability to pay would have to be proven in the case in chief. Compare §4.15. Additionally, it is unclear whether arrears payment orders are considered a “support order” within the definition of CCP §1209.5 (for purposes of a prima facie case). See §4.11.

#### 5. [§4.6] Welfare Reimbursement

Welfare reimbursement (also known as past support obligation) is defined as support owed to a governmental agency for a period before the effective date of an order for support. This is in contrast to arrearages, which is the accrual of missed payments under an order for support.

Child support is an integrated issue and includes amounts due counties for reimbursement of public assistance or otherwise under their child support enforcement obligations. See CCP §1218(c); Fam C §§150, 17402. Counties, through their local child support agencies, may enforce such obligations in the same manner as a custodial parent, including enforcement by contempt. *Monterey County v Banuelos* (2000) 82 CA4th 1299, 1305, 98 CR2d 710.

### 6. Nature of Contempt Proceeding

#### a. [§4.7] Criminal vs. Civil Contempt

A contempt proceeding is usually a criminal proceeding that may subject the contemnor to imprisonment or fine. Thus, the rules of criminal procedure apply. Whether it is a civil or criminal contempt depends on the penalties imposed on the contemnor. Criminal penalties cannot be imposed on a person who is denied criminal due process protections. *Hicks v Feiock*

(1988) 485 US 624, 632, 108 S Ct 1423, 99 L Ed 2d 721; *International Union, United Mine Workers of Am. v Bagwell* (1994) 512 US 821, 114 S Ct 2552, 129 L Ed 2d 642.

A contempt is criminal, or punitive, in nature if the contemnor is subject to be (*Hicks v Feiock, supra*, 485 US at 632; *International Union, United Mine Workers of Am. v Bagwell, supra*, 512 US at 828–829; see *In re Cassil* (1995) 37 CA4th 1081, 1087, 44 CR2d 267):

- Imprisoned for a set, unconditional period of time; or
- Ordered to pay a fine to the court.

Any enforcement of unpaid child support by means of a contempt action is criminal in nature because the possible penalties include jail. *County of Santa Clara v Superior Court* (Rodriguez) (1992) 2 CA4th 1686, 1693, 5 CR2d 7.

A contempt is civil, or remedial, in nature if the contemnor is subject to be (*Hicks v Feiock, supra*, 485 US at 632–633; *International Union, United Mine Workers of Am. v Bagwell, supra*, 512 US at 828–830):

- Ordered imprisoned only until he or she performs an act ordered by the court (“conditional sentence” or “determinate sentence with a purge clause”);
- Ordered to pay a fine to the court unless he or she performs an act required by the court’s order (“conditional fine”); or
- Ordered to pay a “compensatory fine” to the other party.

#### **b. [§4.8] Mixed Relief**

In a “mixed relief” proceeding, when both civil and criminal penalties are imposed, the criminal feature of the order is dominant and fixes its character. Thus, the contemnor must be afforded all the constitutional protections. *Hicks v Feiock* (1988) 485 US 624, 638 n10, 108 S Ct 1423, 99 L Ed 2d 721.

- **JUDICIAL TIP:** The proceedings brought by a party may sometimes be referred to as a civil contempt or quasi-criminal because they are brought under the Code of Civil Procedure, but they are not truly “civil contempts” as defined above. Nor are such proceedings “quasi-criminal.” This term should be discouraged because it is inaccurate and misleading considering the citee, if convicted, will not be sent to a “quasi-jail.” They are criminal contempt proceedings.

Where the threat of contempt is having the opposite effect (*i.e.*, inflaming the situation), the court has the option, upon agreement of the parties and before the case goes down the path of full contempt proceedings with arraignment, to order the matter be held in abeyance (*i.e.*, not proceed) and then set over some months to see if the matter can be settled otherwise. If the case does not resolve, then the matter proceeds on arraignment and beyond at the following hearing.

#### **7. [§4.9] Due Process Requirements**

When the potential penalty for contempt proceedings includes the potential loss of liberty, the proceedings should be treated as criminal matters. Hence, criminal due process procedures and rules apply in the contempt proceeding. *Hicks v Feiock* (1988) 485 US 624, 632–633, 108 S Ct 1423, 99 L Ed 2d 721; *International Union, United Mine Workers of Am. v Bagwell* (1994)

512 US 821, 114 S Ct 2552, 129 L Ed 2d 642. The citee is entitled to the following rights and protections:

- *Notice of charge.* The pleading must inform the citee about the charge and the time and place for the court hearing.
- *Opportunity to be heard.* The citee is entitled to a full hearing and must be allowed to testify; to call, see, hear, and cross-examine witnesses; to have witnesses subpoenaed to testify on his or her behalf; and to introduce evidence in his or her defense.
- *Right to counsel.* The citee has a right to representation by a qualified attorney at all stages of the proceedings. The attorney may be of the citee's own choosing, or the court must appoint counsel to represent the citee if the citee is unable to afford counsel.
- *Speedy trial.* A trial must be held within 30 days of the arraignment if the citee is in custody, or within 45 days if the citee is not in custody, unless the citee waives time. Pen C §1382(a)(3).
- *Testimonial privilege.* The citee is entitled to exercise the Fifth Amendment privilege not to be called as a witness and can decline to answer specific questions claiming the privilege against self-incrimination.
- *Criminal burden of proof.* The citee is entitled to have the prima facie elements of contempt proven beyond a reasonable doubt.
- *Right to a jury trial.* The citee has no right to a jury trial unless the court can consider a possible sentence of more than 180 days (e.g., multiple counts with an aggregate sentence that exceeds 6 months). As a practical matter, the LCSA generally tries to avoid the possibility of a jury trial when pleading multiple counts.
- *Double jeopardy.* The citee may not be subject to duplicate punishment or duplicate prosecution for the same criminal offense.

## 8. [§4.10] Effect of Bankruptcy Stay

Generally, the filing of a bankruptcy petition stays any type of formal or informal action against the debtor or property of the estate. 11 USC §362(a). This is called the automatic stay and applies to all entities, including governmental units, such as the LCSA. 11 USC §101(27).

Actions taken in violation of a stay are void. Willful violations will subject the creditor to the contempt powers of the Bankruptcy Court that may include civil penalties for actual damages, costs, attorney's fees, and punitive damages. See 11 USC §362(k). Punitive damages, however, may not be assessed against a governmental agency. 11 USC §106(a)(3).

In contrast to civil actions, criminal actions are generally not stayed. 11 USC §362(b)(1); see *People v Gruntz* (1994) 29 CA4th 412, 420, 35 CR2d 55. Contempt actions brought under CCP §1209 or §1209.5 could be criminal or civil in nature. See §4.7. If the action is civil in nature, it is coercive by definition and would be in violation of the automatic stay, unless it is directed to the collection of support from non-estate property. See *In re Beaoza* (Bankr SDNY 2002) 271 BR 46, 51. If the action is criminal in nature because the intent is to punish and not to coerce payment from estate property, the action falls within the criminal prosecution exception.

For further discussion of exceptions to the automatic stay, see §4.113.

## **B. Contempt to Enforce Child and Family Support**

### **1. Elements and Proof**

#### **a. [§4.11] Prima Facie Case**

The elements of a prima facie case for contempt of a child or family support order are (CCP §1209.5):

- A lawful (valid) order of the court;
- Citee had knowledge of the order; and
- Citee did not comply with the order.

#### **b. [§4.12] Lawful Order**

The charging affidavit must identify the underlying order by date of entry and type. For purposes of sustaining a prima facie case, the court can presume validity unless the order is void on its face. The citee may challenge the validity of the order, either as an affirmative defense in the answer or by motion to discharge the contempt citation. Hogoboom & King, Cal Practice Guide: Family Law (The Rutter Group 2019) ¶18:172; see also 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §7 (5th ed 2008).

A party may request the court to take judicial notice of an order or judgment contained in the court's file. On proper request, the court must take judicial notice of records in its file. Evid C §453. The court may also take judicial notice of records in its file on its own motion. Evid C §452(d).

#### **c. [§4.13] Knowledge of Order**

The charging affidavit must set forth facts showing the citee's knowledge of the underlying order. This is a jurisdictional prerequisite to a valid contempt adjudication. *In re Ivey* (2000) 85 CA4th 793, 804, 102 CR2d 447; *Freeman v Superior Court* (1955) 44 C2d 533, 537, 282 P2d 857.

The citee's knowledge can be shown directly by any of the following methods:

- Personal service of the order on the citee. If personal service of the order is by a registered process server, the filing of a properly executed proof of service is prima facie evidence that the service occurred, which creates a permissive inference. Evid C §647.
- The citee's presence in court at the time the order was made.
- The citee signing a stipulation on which the order is based.

It is not necessary to show that the citee was served with a copy of the order or was familiar with all of its terms if it is shown that he or she had knowledge of the existence of the order and that portion of it that the citee is alleged to have violated. *In re Sigesmund* (1961) 193 CA2d 219, 14 CR 221. Thus, it may be possible to show knowledge indirectly through the citee's conduct, such as:

- Prior payments, either voluntary or by wage assignment;
- Contact by the citee with the custodial parent or LCSA regarding the order;
- Contact by the citee regarding the enforcement of the arrearages, *i.e.*, license suspension, passport denial, or other enforcement mechanism; or

- Affirmation of the order by the citee in the form of a new order for arrears payments.

Finally, it may be possible to show knowledge by reasonable inference, such as the citee's attorney has knowledge of order (presence in courtroom or being served with order), which creates a permissive inference that the citee had knowledge of the order. Such a reasonable inference is sufficient to sustain a contempt in the absence of evidence overcoming the inference. *In re Ivey, supra*, 85 CA4th at 802.

#### **d. [§4.14] Noncompliance With Order**

To complete the prima facie case of contempt, the charging party must allege and prove facts showing noncompliance with the order. Noncompliance with monetary orders must be alleged by showing the total amount ordered, dates due, amounts paid, and amounts due. Each violation of a monthly obligation must be itemized separately. CCP §1218.5.

Noncompliance with monetary orders is usually established by:

- Personal testimony of the custodial parent or LCSA family support officer or accounting personnel or any combination of them; or
- Official records of the LCSA regarding payment history. These records may be admitted over a hearsay objection without live testimony. Evid C §1280.

#### **e. [§4.15] Affirmative Defense of Inability to Pay**

Code of Civil Procedure §1209.5 statutorily removes ability to pay as an element of the charge of contempt for failure to pay support, even with the passage of time. Thus, ability to pay is not an element of contempt, but rather an affirmative defense to be proven by the citee by a preponderance of the evidence. *Moss v Superior Court (Ortiz)* (1998) 17 C4th 396, 425, 71 CR2d 215; see *Hicks v Feiock* (1988) 485 US 624, 629, 108 S Ct 1423, 99 L Ed 2d 721. This also applies to contempts for nonpayment of spousal support, family support, or court-ordered attorney's fees. *In re Ivey* (2000) 85 CA4th 793, 801, 102 CR2d 447.

A citee can be found in contempt for violating a child support order when the inability to pay is the result of willful failure to seek and accept available employment that is commensurate with the parent's skills and ability. *Moss v Superior Court (Ortiz), supra*, 17 C4th at 401.

In contempt proceedings brought under Pen C §166(a)(4) for willful nonpayment of support, ability to pay is handled in the same way as contempt under CCP §1209.5—it is an affirmative defense, not an element of the contempt. See *People v Dilday* (1993) 20 CA4th Supp 1, 4 n3, 25 CR2d 386; see Pen C §166.5 (suspend contempt proceedings by posting bond).

- **JUDICIAL TIP:** In contempt proceedings brought under CCP §1209, which are proceedings other than for the failure to pay child, family, spousal support, or attorney's fees, or under Pen C §166(a)(4) for willful violation of a court order other than for payment of support, ability to comply is an element of contempt that must be proven beyond a reasonable doubt.

## **2. Initiating Contempt Proceeding**

### **a. [§4.16] Pleadings**

The contempt proceeding must be initiated by use of the mandatory Judicial Council forms Order to Show Cause and Affidavit for Contempt (form FL-410) and Affidavit of Facts Constituting Contempt (Financial and Injunctive Orders) (form FL-411). CCP §1211(b). Failure to use these forms is grounds to dismiss the action.

### **b. [§4.17] Multiple Counts**

If the alleged violation is for failure to pay child, family, or spousal support, only one count per month can be charged. For example, if one-half of the payment is due on the first of the month and one-half is due on the 15th of the month, only one count can be filed for failure to make both payments. CCP §1218.5. However, there can be multiple counts of contempt charged each month if there are multiple “types” of orders each month. For example, if there is an order for child support and an order for spousal support, this could be charged as two counts per month. A party is not precluded from bringing a request for an order re contempt for months of unpaid support that was not charged in a prior contempt action because each month is a divisible act of contempt and there is no continuing course of conduct that has to be charged simultaneously. *Marriage of Rice & Eaton* (2012) 204 CA4th 1073, 1082, 139 CR3d 518.

### **c. [§4.18] Statute of Limitation**

The statute of limitation for commencing a contempt action for the nonpayment of child, family, or spousal support is (CCP §1218.5(b)):

- Three years from the due date of the payment for alleged nonpayment.
- Two years from the date of alleged violations of other Family Code orders.

A contempt cause of action for nonpayment of support may be broken down into separate “counts” for each month that payment was not made in full. Thus, the fact that the obligor stopped (or fell short in) payments over 3 years ago is not fatal to a contempt remedy: each month within the 3-year period for which payments were in default is separately punishable as separate counts of contempt. CCP §1218.5(a); *Moss v Superior Court* (Ortiz) (1998) 17 C4th 396, 403, 71 CR2d 215.

Unless the order otherwise specifies, temporary (pendente lite) child or spousal support orders are not enforceable during any period in which the parties have “reconciled and are living together.” Fam C §3602.

### **d. [§4.19] Pleadings Frame Issues and Jurisdiction**

The order to show cause (OSC) and supporting affidavit setting forth the specifics of the alleged contemptuous conduct frames the issues before the court. Jurisdiction to adjudicate contempt only exists when the charging affidavit alleges evidentiary facts showing a prima facie case. CCP §1211; *Moss v Superior Court* (Ortiz) (1998) 17 C4th 396, 404, 71 CR2d 215; *Fabricant v Superior Court* (1980) 104 CA3d 905, 916, 163 CR 894.

A deficient charging affidavit may be amended at any time without a continuance unless the court determines that a continuance is required to avoid prejudice to the citee. CCP §1211.5(b).

Although the affidavit frames the contempt proceedings, it does not constitute evidence unless it is offered and actually received into evidence. *Collins v Superior Court* (1957) 150 CA2d 354, 364, 310 P2d 103. If the affidavit is offered and a hearsay objection is made, however, the objection must be sustained.

### 3. [§4.20] Service of Contempt Action

The time limit and service requirements for contempt are as follows:

- *Service completed 16 days before hearing.* The OSC and affidavit for contempt (conformed copies) must be served on the citee at least 16 court days before the hearing. CCP §1005(b).
- *Personal service.* The OSC acts as a summons, *i.e.*, an original pleading in bringing the contempt action, to appear in court on a certain day. The citee must be served personally with the OSC; otherwise, the court lacks jurisdiction to proceed. *Cedars-Sinai Imaging Med. Group v Superior Court* (Moore) (2000) 83 CA4th 1281, 1286, 100 CR2d 320; see also CCP §§1015, 1016.

A general appearance at the hearing by the citee can constitute a waiver of any defect in the notice, as well as in the service itself. *Leonis v Superior Court* (1952) 38 C2d 527, 531, 241 P2d 253.

If personal service is impossible due to concealment, alternative service methods may be available. *Shibley v Superior Court* (1927) 202 C 738, 742, 262 P 332 (service on attorney of record). To invoke this exception, the charging party must submit an affidavit or declaration to the court alleging specific facts showing reasonable efforts to locate the citee and the efforts taken to attempt service. *Albrecht v Superior Court* (1982) 132 CA3d 612, 619, 183 CR 417.

### 4. [§4.21] Responses to Charges

No responsive pleadings are required. The citee may, however, answer the charges on the merits or move for a discharge on jurisdictional grounds without answering.

#### a. [§4.22] Answer

In response to the charge, and before the hearing, the citee may file an opposing affidavit or declaration, questioning the adequacy of the charging affidavit, or raising a sufficient excuse or justification in defense. The charging affidavit, together with the opposing affidavit, frames the issues to be tried in the proceeding. *Freeman v Superior Court* (1955) 44 C2d 533, 536, 282 P2d 857; *Morelli v Superior Court* (Berry) (1968) 262 CA2d 262, 266, 68 CR 572.

#### b. [§4.23] Motion for Discharge

If it appears that the court is without jurisdiction to proceed, the charged party may move for discharge. This motion may also be called a motion to dismiss or a motion to quash the order to show cause, and it has substantially the same function as a demurrer to the complaint in a civil action. *Taylor v Superior Court* (1942) 20 C2d 244, 246, 125 P2d 1. Such a motion may be made orally at the hearing, without notice.

## 5. First Appearance

### a. [§4.24] Arraignment

The citee's first appearance, as in any criminal action, is at the arraignment on the charges. See a sample arraignment script in California Judges Benchguide 52: Misdemeanor Arraignment §52.29 (Cal CJER).

The physical presence of the charged party is not required, and appearance can be made through counsel. Pen C §§977, 1429.

- **JUDICIAL TIP:** The best practice is to order the citee to be present personally at each hearing, including the arraignment. This provides an opportunity to settle the matter without setting further court hearings and ensures that the court maintains personal jurisdiction over the citee. Further, the citee will better appreciate the severity of the situation and the possible consequences, which serve as motivation to follow the court orders.

Where the threat of contempt is having the opposite effect (*i.e.*, inflaming the situation), the court has the option, upon agreement of the parties and before the case goes down the path of full contempt proceedings with arraignment, to order the matter be held in abeyance (*i.e.*, not proceed) and then set over some months to see if the matter can be settled otherwise. If the case does not resolve, then the matter proceeds on arraignment and beyond at the following hearing.

### b. [§4.25] Failure to Appear

If the charged party was served, but still does not appear through counsel or otherwise, the court should issue a civil bench warrant/body attachment for the citee's arrest. The bench warrant must specify a bail amount. CCP §§1212, 1213, and 1220.

If counsel appears without the client, the court should issue and hold (*i.e.*, stay service) a civil bench warrant/body attachment in order to secure appearance at any trial that is set.

### c. [§4.26] Right to Counsel

In a contempt action that is criminal in nature, as defined in §4.7 above, the alleged contemnor has a right to be represented by counsel at all stages of the proceeding, including the arraignment. Thus, if the citee requests counsel after being advised of his or her rights, the arraignment must be continued to allow the citee to obtain counsel. *In re Shelley* (1961) 197 CA2d 199, 202, 16 CR 916; *County of Santa Clara v Superior Court* (Rodriguez) (1992) 2 CA4th 1686, 1692–1693, 5 CR2d 7.

If the contempt is civil in nature, the due process clause does not automatically require the provision of counsel to the citee when the opposing parent or other custodian (to whom the support funds are owed) is not represented by counsel and the state provides alternative procedural safeguards (*e.g.*, adequate notice of the importance of ability to pay, and fair opportunity to present and to dispute relevant information and court findings). *Turner v Rogers* (2011) 131 S Ct 2507, 2520, 180 L Ed 2d 452. The United States Supreme Court in *Turner* explicitly stated that they were not addressing civil contempt proceedings when the underlying child support payment was owed to the state, *e.g.*, for reimbursement of welfare funds, when the

government was likely to have counsel, nor were they addressing what due process requires in an unusually complex case.

- **JUDICIAL TIP:** If the citee appears without counsel and wishes to be represented, the best practice is to delay asking the citee to enter a plea until appearance with counsel, as the right to counsel includes the arraignment.

#### **d. [§4.27] Indigent Citee**

A citee who is indigent has the right to court-appointed counsel, as long as there is a possibility that the proceeding will result in imprisonment. *County of Santa Clara v Superior Court* (Rodriguez) (1992) 2 CA4th 1686, 1693–1694, 5 CR2d 7.

A determination of indigency is based on a financial declaration that should be filed under seal. See form MC-210.

The court must inform the citee before appointing counsel that the citee may be ordered to reimburse the county for the cost. Pen C §987.8(f). The court can reevaluate the citee's present ability to pay after the proceedings and may then require the citee to pay all or a portion of the cost. Pen C §987.8(b)–(c).

#### **e. [§4.28] Right to Represent Self**

The citee has a right under the Sixth Amendment to self-representation. *Faretta v California* (1975) 422 US 806, 813, 95 S Ct 2525, 45 L Ed 2d 562. The court may, however, deny a request for self-representation when the citee is unable or unwilling to abide by the rules of procedure and court rules. *McKaskle v Wiggins* (1984) 465 US 168, 184, 104 S Ct 944, 79 L Ed 2d 944.

### **6. Taking a Plea**

#### **a. [§4.29] In General**

The citee can plead one of the following to the charges of contempt: guilty, not guilty, or nolo contendere. Pen C §1016. If the citee refuses to answer a plea, a plea of not guilty is entered by the court. Pen C §1024.

#### **b. [§4.30] Not Guilty Plea—Setting Trial Date**

After a plea of not guilty, the matter should be set for trial and the citee ordered to appear at that trial. If the citee pleads not guilty and does not waive time for trial, a trial must be held within 30 days of the arraignment if the citee is in custody, or within 45 days if the citee is not in custody. Otherwise, the action must be dismissed. Pen C §1382(a)(3).

- **JUDICIAL TIP:** If there is a waiver of time, the court may defer setting a trial date to save valuable trial slots on the court's calendar and set the matter for a status conference. This allows the parties one more opportunity to reach a plea bargain or other negotiated settlement or disposition. If a plea bargain or other disposition is not reached at the status conference, then the matter should be set for trial.

### c. [§4.31] Guilty or Nolo Contendre Plea

A plea of guilty is more than a confession that admits that the accused did various acts; it is itself a conviction. Nothing remains but to give judgment and determine punishment. *Boykin v Alabama* (1969) 395 US 238, 242, 89 S Ct 1709, 23 L Ed 2d 274.

The following federal constitutional rights are involved and must be waived on the taking and entering of a guilty plea (*Boykin, supra*, 395 US at 243):

- The privilege against compulsory self-incrimination guaranteed by the Fifth Amendment.
- The right to trial by jury although generally not an issue in family contempts.
- The right to confront one's accusers.
- The ability to present evidence.

The court must make sure that the accused has a full understanding of what the guilty plea means and of its consequences, including what rights are being waived—all of which should be done on the record.

A plea of nolo contendere is treated procedurally the same as a plea of guilty.

### d. [§4.32] Time for Sentencing

If the citee pleads guilty to all or some of the counts through a plea bargain, the citee has a right to have a separate time set for sentencing. Unless time for sentencing is waived on the record or in writing, the court, after a guilty plea, must appoint a time for pronouncing judgment. The time must not be less than 6 hours, nor more than 5 days, after the plea or verdict. Pen C §1449.

The court may extend the time for sentencing for not more than 20 court days if probation is considered, or for not more than 90 additional days on the citee's request. Pen C §1449.

## 7. Plea Bargain—Probation

### a. [§4.33] In General

Most often, child support contempt matters are settled through a plea bargain in an effort to give the citee an incentive to comply with existing orders. The plea bargain generally includes a pronounced sentence of jail time, the execution of which (sometimes the imposition of which) is suspended or stayed, and the citee is placed on informal summary court probation conditioned on compliance with existing support orders. The punishment for contempt is discussed in §4.48. For a first offense, the contemnor must be ordered to perform community service of up to 120 hours, or to be imprisoned for up to 120 hours (5 days), for each count of contempt. CCP §1218(c)(1).

### b. [§4.34] Authority and Time to Accept Plea

It is within the court's discretion to approve or reject a negotiated plea. The court, however, may not arbitrarily refuse to consider a plea negotiation. *People v Smith* (1971) 22 CA3d 25, 29, 99 CR 171.

The United States Supreme Court in *Hicks v Feiock* (1988) 485 US 624, 637 n8, 108 S Ct 1423, 99 L Ed 2d 721, allowed a grant of probation. See CCP §128 (court authority to compel obedience to its orders); Pen C §1203b (authority to suspend execution of sentence and grant

conditional sentence in misdemeanor or infraction case without referring case to probation officer).

There is no set time for negotiating a plea bargain. It may take place at arraignment, but usually takes place sometime before the date the case is set for hearing, such as at a settlement conference hearing date.

### c. [§4.35] Typical Plea Bargain

A typical plea bargain that the court will be asked to approve is one that may induce future compliance, as follows:

- The citee pleads guilty to less than the full number of the contempt counts charged (remainder dismissed either with or without prejudice).
- The maximum sentence is imposed and then execution of sentence is suspended. (The citee must waive time for sentencing if done at same time as acceptance of guilty plea. See §4.50).
- The citee is placed on informal court probation for a period not exceeding 3 years (Pen C §1203a), under conditions specified on the record (1 year is typical for the first time).
- The conditions of probation are generally that the citee comply with all court orders and pay support timely and in full and set an arrears payment.
- A compliance review hearing is set for every 90 days (or 120 or 180 days or as specified) through the period of probation.
- The citee is ordered to be personally present at all review hearings.

➤ **JUDICIAL TIP:** Some courts will allow the parties to mutually agree (or in Title IV-D cases authorize the LCSA attorney) to excuse the appearance at a particular review hearing if before the hearing there has been full compliance. The court will still have jurisdiction so long as the contemnor was ordered to be present at each of the hearings, unless excused. At the conclusion of the review period, if probation has been successfully completed and when, for example, the imposition of the sentence was stayed pending completion of probation, then the court may be asked to discharge the OSC.

## 8. Contempt Trial

### a. [§4.36] In General

The contempt trial is generally indistinguishable from an ordinary trial on which there is a question of fact, with one exception: the citee is not sworn at the outset of the hearing, due to the right not to testify. On request, the citee may call witnesses or testify. See *Reifler v Superior Court* (1974) 39 CA3d 479, 484, 114 CR 356.

### b. [§4.37] Time for Trial

A trial must be held within 30 days of the arraignment if the citee is in custody, or within 45 days if the citee is not in custody, unless the citee waives time. Pen C §1382(a)(3). If the citee

withdraws a general time waiver in open court, a new trial date must be set within 30 days of the withdrawal. Pen C §1382(a)(3)(A).

### c. [§4.38] Discovery Rights

Generally, because the proceedings are criminal with criminal due process protections applicable, the citee is entitled to *criminal* due process discovery rights. Many of these rights have been embodied into Pen C §1054.1.

- ☛ JUDICIAL TIP: Some judges believe that not all criminal discovery rights apply. There is no direct case on point. Civil discovery procedures would generally not apply in these matters, particularly because the time frames would violate the right to a speedy trial should the citee choose to exercise it, and in view of the right against self-incrimination.

Regardless of whether the court is following Pen C §1054.1, the citee has the following *due process* discovery rights:

- *Evidence favorable to the accused.* The prosecution's suppression of evidence favorable to an accused violates due process when the evidence is material either to guilt or punishment, irrespective of the prosecution's good faith or bad faith. *Brady v Maryland* (1963) 373 US 83, 86, 83 S Ct 1194, 10 L Ed 2d 215. However, evidence is material for *Brady* purposes only if a reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S. v Bagley* (1985) 473 US 667, 682, 105 S Ct 3375, 87 L Ed 2d 481.
- *Evidence relating to the credibility of prosecution witnesses.* The prosecution must disclose evidence relating to the credibility of the prosecution witnesses, such as prior convictions of crimes of moral turpitude, to the defendant. *People v Pinholster* (1992) 1 C4th 865, 4 CR2d 765, overruled on other grounds by 49 C4th 405, 111 CR3d 589.

Generally, a criminal defendant does not have a fundamental due process right to pretrial interviews or depositions. *People v Municipal Court* (Runyan) (1978) 20 C3d 523, 530, 143 CR 609.

- ☛ JUDICIAL TIP: Suggested best practice for disclosure is to follow Pen C §§1054 et seq, which sets forth material required to be disclosed by the prosecuting attorney. However, to the extent Pen C §1054.1 requires the disclosure of the witness' addresses, it is suggested that the address of the custodial party (CP) not be disclosed based on Fam C §17212. If the citee or counsel insist on the CP's address, they can request a court order under either Pen C §1054.5 or Fam C §17212(c)(6). For further discussion of confidentiality and disclosure of DCSS records, see §5.44.

### d. [§4.39] Authority of Child Support Commissioners

Generally, commissioners do not have authority to determine contempt unless, on the parties' stipulation, they hear the matter as a judge pro tem. *In re Frye* (1983) 150 CA3d 407, 409–410, 197 CR 755. However, Fam C §4251 provides that Title IV-D child support commissioners act as temporary judges unless an objection is made. If a party objects to a commissioner acting as a temporary judge, the commissioner may hear the matter and make findings of fact and a recommended order. Within 10 days, a judge must ratify the recommended order unless a party objects to the order or the order is in error. In either case, the judge must

hear the matter de novo within 10 court days. See *County of Orange v Smith* (2002) 96 CA4th 955, 961, 117 CR2d 336.

Before the start of the hearing, the parties must be advised that the matter is being heard by a commissioner acting as a temporary judge unless the party objects. Fam C §4251(b). Failure to properly advise could result in the ensuing order being attacked as void. See *In re Frye, supra*, 150 CA3d at 409.

- **JUDICIAL TIP:** If an objection to the commissioner is made under Fam C §4251 in a contempt proceeding, the best practice is to have the matter transferred to a judge before the contempt trial to promote court efficiency (*e.g.*, obviate the need for two hearings when objections are likely due to criminal nature of proceedings).

#### **e. [§4.40] Right to Jury Trial**

The charged party is not entitled to a jury trial in a contempt proceeding under CCP §§1209 et seq. The alleged conduct is a violation of a court's order or authority, not punishment for a crime by the "people." As such, the court decides the case, not a jury. See *Bridges v Superior Court* (1939) 14 C2d 464, 473, 94 P2d 983 rev'd on other grounds in 314 US 252; *Pacific Tel. & Tel. Co. v Superior Court* (1968) 265 CA2d 370, 375, 72 CR 177.

At least one court has held that if the charged party may be sentenced to more than 180 days in jail (*e.g.*, multiple counts with a potential aggregate sentence that exceeds 6 months), the right to a jury trial is guaranteed by the United States Constitution and any waiver of that right must be express. If the court tries the contempt charges without a jury and the charged party does not expressly waive the right to a jury trial, the maximum sentence the court may impose is 180 days. *In re Kreitman* (1995) 40 CA4th 750, 753, 47 CR2d 595.

#### **f. [§4.41] Standard of Proof**

The court may convict only on proof of contempt, by competent evidence, beyond a reasonable doubt—the standard of proof required for conviction of a crime. *In re Coleman* (1974) 12 C3d 568, 572, 116 CR 381; *In re Witherspoon* (1984) 162 CA3d 1000, 1001, 209 CR 67.

### **9. Presentation of Evidence**

#### **a. [§4.42] Proof of Elements**

Proof will be needed for each of the required elements (see §4.11):

- Prior lawful order;
- Knowledge of the order; and
- Noncompliance with the order.

#### **b. [§4.43] Charging Affidavit**

The charging affidavit is hearsay evidence and is inadmissible over objection. Evid C §§1200(a), 1200(b). The affidavit may, however, be received as competent evidence on request, if the charged party makes no objection. See Evid C §353.

### c. [§4.44] Personal Testimony

If the charging affidavit cannot be introduced, personal testimony will be required. Technically, the direct examination should be conducted by the court. CCP §1217. In practice, the court allows counsel for the aggrieved person to conduct the direct examination. The charged party is entitled to cross-examine. Evid C §773(a).

### d. [§4.45] Financial Records

Although the need to prove ability to pay as part of the prima facie case for support or monetary contempts no longer exists, records will be subpoenaed to establish financial ability to pay in order to defeat a defense of inability to pay.

In Title IV-D cases *all* support payments are to be paid through the State Disbursement Unit (SDU), whereas in non-IV-D cases, *only* payments made by employer wage garnishments are processed through the SDU. The SDU keeps track of all payments it receives. At present there are differing opinions on how these records are admissible. DCSS's announced policy (CCL 07-01) is that these records may be admitted without further foundation as "official records." Evid C §664; see *Bhatt v Department of Health Servs.* (2005) 133 CA4th 923, 928–930, 35 CR3d 335 (reports prepared by fiscal intermediary qualify as official records under Evid C §1280). This policy has not yet been reviewed by an appellate court. Many disagree with this policy as the SDU records are not compiled and maintained by a governmental agency but by a contractor. Absent testimony of an employee or custodian of the records of the SDU, the court cannot take judicial notice of or find sufficient evidence to show that the record or report was prepared in such a manner as to assure its trustworthiness. The other option for admission of these payment records is to follow the procedure for subpoena duces tecum of business records contained in Evid C §1560, in which case, if the proper procedures are followed, the records are admissible into evidence.

A source of information that may be used to determine which records, if any, should be subpoenaed is the citee's credit report. Paying a creditor in a given month when the citee did not pay his or her court-ordered support goes to showing that the citee has the ability to pay. See *Hasbun v County of Los Angeles* (9th Cir 2003) 323 F3d 801, 805 (LCSA need not comply with certification requirements, including notice to consumer, when seeking to enforce an existing child support order).

- **JUDICIAL TIP:** In order to overcome a hearsay objection, the citor will need the actual subpoenaed records from the creditor, not just the credit report.

### e. [§4.46] Charged Party Need Not Testify

The charged party may refuse to be called as a witness. This privilege is not waived by filing an answer to the affidavit for the order to show cause. *In re Witherspoon* (1984) 162 CA3d 1000, 1002, 209 CR 67; *Crittenden v Superior Court* (1964) 225 CA2d 101, 105, 36 CR 903. An answer is not evidence and can be objected to as hearsay.

Evidence Code §776(a), which provides that a party may be called and examined by any adverse party, does not apply. *Oliver v Superior Court* (1961) 197 CA2d 237, 240, 17 CR 474; see also Evid C §930.

Also, the citee may not be compelled to give self-incriminating testimony. *In re Witherspoon, supra*, 162 CA3d at 1002; see Evid C §940; *In re Sigismund* (1961) 193 CA2d 219, 224, 14 CR 221.

Once the charged party testifies regarding the inability to pay, however, the party waives the self-incrimination privilege and can be cross-examined on the issue.

## 10. [§4.47] Findings

In contempt adjudications, the trial court is required to make findings with particularity and specificity. *In re Mancini* (1963) 215 CA2d 54, 56, 29 CR 796.

## 11. Sentencing

### a. [§4.48] Required Sentences

In any court action in which a party is found in contempt of court for failure to comply with an order under the Family Code, the court must order the following (CCP §1218(c)(1)–(3)):

- On a first finding of contempt, the contemnor must be ordered to:
  - Perform community service of up to 120 hours, or
  - Be imprisoned for up to 120 hours (5 days) for each count of contempt.
- On a second finding of contempt, the contemnor must be ordered to:
  - Perform community service of up to 120 hours, and
  - Be imprisoned for up to 120 hours (5 days) for each count of contempt.
- On a third or any subsequent finding of contempt, the contemnor must be ordered to:
  - Serve a term of imprisonment of up to 240 hours (10 days);
  - Perform community service of up to 240 hours, for each count of contempt; and
  - Pay an administrative fee, not to exceed the actual cost of the contemnor’s administration and supervision while assigned to a community service program.

➤ **JUDICIAL TIP:** If the court is planning to place the contemnor on probation at sentencing, the court has the authority to suspend the *execution* of the sentence once it is pronounced (*e.g.*, state the sentence to be imposed, and then state on the record “execution of the sentence is suspended,” also known as ESS), or to suspend the *imposition* of the sentence (*e.g.*, no sentence is imposed, and then state on the record “imposition of the sentence is suspended,” also known as ISS). Utilizing ESS versus ISS can sometimes make the difference as to whether the case results in a negotiated plea bargain. See §4.33. Depending on the particular sentence entered, however, different procedures are required on any alleged probation violation. See §4.70.

### b. [§4.49] Attorney’s Fees

Reasonable attorney’s fees and costs incurred by the party who initiated the contempt proceeding may also be awarded. CCP §1218(a).

### c. [§4.50] Time for Sentencing

On conviction on any or all of the counts, the contemnor has a right to have a separate time set for sentencing. Unless time for sentencing is waived on the record or in writing, after a finding or verdict of guilty, the court must appoint a time for pronouncing judgment. The time must not be less than 6 hours, nor more than 5 days, after the verdict. Pen C §1449.

The court may extend the time for sentencing for not more than 20 court days if probation is considered, or for up to 90 additional days on the contemnor's request. Pen C §1449.

## 12. [§4.51] Judicial Review

The judgment and orders of the court or judge in contempt cases are “final and conclusive.” CCP §1222. These judgments and orders are explicitly excluded from the statute listing appealable orders and judgments of the superior court. CCP §904.1(a)(1)(B). Thus, the contempt judgment is not appealable.

A party convicted of contempt that is final may obtain review only by petitioning an appellate court for an appropriate extraordinary writ. CCP §904.1(a). Usually the proper writ is a writ of certiorari; however, sometimes a writ of habeas corpus may be appropriate. *People v Turner* (1850) 1 C 152, 156; *In re Kreitman* (1995) 40 CA4th 750, 756, 47 CR2d 595 (writ of habeas corpus issued).

If the writ of certiorari—also known as the writ of review—is used, the issuing court may require the trial court to stay further proceedings in the matter to be reviewed. CCP §§1071, 1072.

Once the order of commitment is entered, there will be no further proceedings in the trial court. Unless the trial court has stayed execution, the order will be executed forthwith. In that event, the convicted party should petition for the writ of habeas corpus.

The convicted party's right to review is not affected by his or her compliance with the order in question after being convicted of contempt. *Wilson v Superior Court* (1948) 31 C2d 458, 459, 189 P2d 266.

## C. Other Contempts

### 1. [§4.52] Employer Contempts

Typical situations that may lead to contempt proceedings against an obligor's employer include:

- Failure to honor an earnings assignment order by withholding wages. Fam §§5233, 5241(c).
- Failure to remit payments in a timely manner. Fam C §§5235(c), 5241(c).
- Failure to comply with a health insurance order or National Medical Support Notice (NMSN). Fam C §3768.

#### a. [§4.53] Failure to Withhold or Forward Wages

An employer can be charged with contempt for a willful failure to either withhold the appropriate amount or timely remit payments under a valid earnings assignment order. Fam C §5241(c).

In addition to the punishment under CCP §1218 generally for contempt (*e.g.*, up to \$1000 fine, up to 5 days imprisonment, or both), an employer faces the following:

- Liability for underlying support amount plus interest. Fam C §5241(a).
- Civil penalty for multiple failures. Fam C §5241(d).

If an employer withholds support as required by assignment order, the obligor cannot be held in contempt or subject to criminal prosecution for nonpayment, such as when the employer fails to remit the amount withheld. Fam C §5241(b).

- **JUDICIAL TIP:** The vast majority of cases involving employer contempts result in the employer paying the money. However, what if the employer does not comply— who goes to jail? The best practice is to impose a fine, unless a specific individual is identified who had notice of the order, had a duty to comply with the order, and willfully violated the order, such as the owner of a small business or payroll manager of a larger business. The specific elements must be proved about that individual beyond a reasonable doubt. The same holds true for employer violations of health insurance coverage orders (see §4.54).

#### **b. [§4.54] Health Insurance Coverage Assignment or NMSN**

In addition to the punishment under CCP §1218 generally for contempt (up to \$1000 fine, up to 5 days imprisonment, or both), an employer or other health insurance provider is liable for underlying health care services costs, *i.e.*, the amount incurred in health care services that would otherwise have been covered under the insurance policy but for the conduct of the employer or other person that was contrary to the assignment order. Fam C §3768(a).

### **2. [§4.55] Job Training and Seek-Work Orders**

Orders made in child or family support proceedings that require a parent to participate in job training, vocational rehabilitation, or work placement programs (Fam C §3558), or require an unemployed parent who has defaulted in support payments to submit to periodic proof of applications for employment (Fam C §4505), are enforceable by contempt. *Moss v Superior Court* (Ortiz) (1998) 17 C4th 396, 420, 423, 71 CR2d 215. See §1.59 for further discussion on seek-work orders.

## **D. Probation Revocation**

### **1. [§4.56] In General**

This section provides a general overview of the probation revocation process in the context of support proceedings. At any time during the probationary period, when a probationer is in violation of the terms of the probation, it is possible to proceed with a probation revocation hearing. It is an evidentiary hearing where evidence is presented on the issue of violation of probation terms. Pen C §1203.3(a).

- **JUDICIAL TIP:** In all cases, judicial officers need to be aware that the SDU (see §4.89) distributes all child support collections among all cases involving an obligor, whether subject to a probation order or not. This may cause an obligor with multiple cases to be

in violation of the terms of the probation order due to a circumstance beyond the obligor's control. Care should be taken to determine if this is the situation. In Title IV-D court, under CSS Letter 06-21, the LCSA will not file a violation of probation in these circumstances.

For a checklist of probation revocation procedures, see [Appendix H](#). For in-depth coverage of this topic and scripts for all phases of the proceedings, see California Judges Benchguide 84: Probation Revocation (Cal CJER).

## 2. [§4.57] Authority

The United States Supreme Court has given its cursory approval to grants of probation in contempt cases. See *Hicks v Feiock* (1988) 485 US 624, 637 n8, 108 S Ct 1423, 99 L Ed 2d 721, cited in *In re Feiock* (1989) 215 CA3d 141, 145 n5, 263 CR 437, disapproved on other grounds in *Moss v Superior Court (Ortiz)* (1998) 17 C4th 396, 428, 71 CR2d 215; see also Pen C §1203.3(a). Thus, it follows that if the court has authority to grant probation, it has the authority to revoke and modify it. This authority appears to emanate from the inherent powers of the court to enforce its orders. CCP §128.

## 3. [§4.58] Two-Step Process

Normally, probation revocations involve a two-step process (*People v Coleman* (1975) 13 C3d 867, 894, 120 CR 384):

- *Pre-revocation determination*. Probation is summarily revoked based on a judge's finding of probable cause in the pre-revocation decision.
- *Revocation hearing*. The formal revocation hearing itself, which is also referred to as an evidentiary hearing.

A single unitary hearing, however, will usually suffice to serve the purpose of due process safeguards (13 C3d at 894), especially if the probationer is not arrested based on the pre-revocation decision.

## 4. [§4.59] Due Process Rights

As in any matter when an individual's right to liberty is in jeopardy, the probationer does have certain due process rights that must be observed. At the revocation hearing, however, the probationer is not entitled to the full panoply of rights normally afforded to a defendant charged with a crime. The probationer is entitled to minimum due process as follows (*People v Vickers* (1972) 8 C3d 451, 105 CR 305):

- Written notice of the claimed violations;
- Disclosure of the evidence against the probationer;
- An opportunity to be heard in person and to present witnesses and documentary evidence;
- The right to be represented by counsel;
- The right to remain silent;
- The right to confront and cross-examine adverse witnesses;
- A neutral and detached hearing officer; and

- A written statement of reasons for revocation of probation.

### 5. [§4.60] Timeliness of Motion

The motion to revoke must be made before the end of the term of probation. A summary revocation order, however, tolls the running of the term of probation, allowing the court to sentence after the original time of probation expired. *People v Mosley* (1988) 198 CA3d 1167, 1175 n1, 244 CR 264.

The pleadings to revoke probation must be filed and served within a reasonable time after the violation. *People v Young* (1991) 228 CA3d 171, 181, 278 CR 784. Additionally, the probationer needs to be served with the pleadings at least 21 days before the hearing if using an OSC. The probationer should have at least enough time to investigate and prepare against the specific allegation. *People v Mosley, supra*, 198 CA3d at 1174.

### 6. [§4.61] Initiating Formal Proceedings

Probation revocation proceedings can be initiated at any time during the probationary period by giving notice to the probationer.

A probationer may waive written notice when orally advised by the court of the alleged violations. If the probationer waives written notice, the court should have the record specify the date of the original conviction, the date the probationer was placed on probation, the terms of probation, and the nature of the alleged violations. *In re Moss* (1985) 175 CA3d 913, 929, 221 CR 645.

### 7. [§4.62] Multiple Procedures Available

The two procedures suggested below may vary depending on whether there are probation review hearings. The procedures should not limit other procedures utilized by a party, the LCSA or court, as long as the process conforms with the probationer's due process rights. The distinction between the two procedures centers around the absconding probationer and the authority of the court to issue a bench warrant before probation is terminated.

- *Review hearings.* If probation review hearings are being utilized and the probationer is present, the court may order the probationer to appear at a date certain. The LCSA, or party seeking revocation would then have to prepare either a petition or notice of motion (NOM) or RFO to revoke probation. The NOM or RFO would use the same date that the probationer was ordered to appear.
- *No review hearings.* If a review hearing was not set, an order to show cause (OSC) or petition to revoke probation may be filed and served on the probationer personally in the same manner as service for an OSC for contempt. If the probationer fails to appear at the hearing, the court may issue a bench warrant, based on CCP §1212 and the revocation OSC being analogous to a contempt OSC.

### 8. [§4.63] Arraignment

At the first appearance on the revocation hearing, the court will make a judicial determination whether probable cause exists to revoke. In order to proceed with the revocation

hearing, the court must have reason to believe (probable cause) that a violation of probation has occurred. *People v Coleman* (1975) 13 C3d 867, 889, 120 CR 384. If probable cause is found, the court will arraign the defendant, and the probationer admits or denies the violation of probation (VOP).

If the probationer admits the VOP, the court can order that the previously suspended sentence or judgment is in full force and effect and that the probationer is remanded or delivered over to the proper detention facility to serve the sentence. In order for the court to accept the probationer's admission of VOP, the probationer must be advised of due process rights, and those rights must be knowingly waived.

If the probationer denies the VOP, a formal revocation hearing date is set. The probationer is entitled to counsel, or court-appointed counsel if indigent, and may request a continuance of the arraignment to obtain counsel.

Alternatively, a plea bargain can be reached. A plea bargain at this stage is usually a "revoke and reinstate" of the existing probation terms with a new period. However, new probation terms could be added. See §4.70.

- **JUDICIAL TIP:** This latter alternative can often be the most efficient course for all parties, especially when the violation was one missed payment (when otherwise there is substantial compliance), and there is simply a need for extended monitoring.

## 9. [§4.64] Summary Revocation

When the court finds sufficient probable cause to support a probation violation and "revokes probation," it is called a summary revocation to distinguish it from the formal revocation order that occurs after the formal revocation hearing. This task is accomplished at the probation review hearing, at the "arraignment" for the revocation hearing, on a noticed motion, or, if necessary, through an ex parte request. Usually an offer of proof or the filing of a declaration setting forth facts constituting probable cause is required.

Summary revocation allows the court to retain jurisdiction over the probationer because it tolls the running of the probationary period. *People v Vickers* (1972) 8 C3d 451, 460, 105 CR 305.

Summary revocation is only a temporary suspension; it does not terminate the terms and conditions of the probation grant. *People v Barkins* (1978) 81 CA3d 30, 33, 145 CR 926.

## 10. [§4.65] Time for Formal Hearing

On arraignment, the court must set a hearing date within a reasonable time. Although there is no statute specifying what constitutes reasonable time, case law indicates that 2 to 3 months is not unreasonable. *Morrissey v Brewer* (1972) 408 US 471, 485, 92 S Ct 2593, 33 L Ed 2d 484 (2-month delay not unreasonable); *People v Buford* (1974) 42 CA3d 975, 980, 117 CR 333 (hearing in felony case 21 days after revocation petition filed not unreasonable); *In re Williams* (1974) 36 CA3d 649, 653, 111 CR 870 (almost 3-month delay following filing of parole revocation petition not unreasonable).

## 11. [§4.66] Formal Hearing

### a. [§4.67] Relaxed Rules of Evidence

The rules of evidence are relaxed to allow the admission of hearsay, illegally seized evidence, and evidence of crimes not resulting in convictions. *People v Maki* (1985) 39 C3d 707, 714, 217 CR 676.

### b. [§4.68] No Criminal Discovery

The reciprocal discovery provisions do not apply to a probation revocation hearing because a probation revocation proceeding is not a criminal trial within the meaning of Pen C §1054. *Jones v Superior Court* (2004) 115 CA4th 48, 61, 8 CR3d 687.

### c. [§4.69] Burden of Proof

The moving party has the burden to prove by a preponderance of evidence (not beyond a reasonable doubt) that the probationer violated a term of probation. *People v Rodriguez* (1990) 51 C3d 437, 441, 272 CR 613.

### d. [§4.70] Possible Outcomes

After a finding of a violation of probation, the court has the following options:

- *Revoke probation and order sentence executed.* On formal revocation, the court can order that the previously suspended execution of the sentence or judgment be put in full force and effect, and that the probationer be remanded into custody and delivered over to the proper detention facility to serve his or her sentence. If the imposition of sentence was suspended, then the court must first follow the appropriate sentencing procedures. The court does not have jurisdiction to reduce the previously imposed sentence once it revokes probation although it could execute part of the sentence and stay the other part. *People v Howard* (1997) 16 C4th 1081, 1095, 68 CR2d 870.
- *Reinstate probation on the same terms and conditions.* *People v Medina* (2001) 89 CA4th 318, 322, 106 CR2d 895.
- *Reinstate probation and impose new conditions.* If warranted, the court may impose new conditions that it feels appropriate, such as additional community service, additional term of probation, or jail time when the sentence was already imposed and only execution of sentence was suspended.

The maximum length of probation is 3 years. Pen C §1203a. The time probation is tolled is not counted for this purpose. If the court revokes and reinstates probation, a new 3-year period is possible. *In re Hamm* (1982) 133 CA3d 60, 66, 183 CR 626.

- **JUDICIAL TIP:** An appropriate and effective outcome depends on the facts and circumstances of each case. In some cases, a remand into custody to serve a portion of the sentence previously imposed (to serve 5 days out of 30), along with an order for release and reinstatement of probation on specified terms, can be a very effective “wake-up call” for probationers who fail to comply with the court’s summary probation terms.

## 12. [§4.71] Written Findings

Written findings are generally required. See *Morrissey v Brewer* (1972) 408 US 471, 92 S Ct 2593, 33 L Ed 2d 484; *People v Vickers* (1972) 8 C3d 451, 457–458, 105 CR 305. However, one appellate court has found that such findings are unnecessary when the court has stated its reasons on the record and these reasons are in the transcript. *People v Ruiz* (1975) 53 CA3d 715, 718, 125 CR 886.

## E. [§4.72] Criminal Prosecution for Willful Failure to Support

A parent's willful failure to support a minor child by failing to "furnish necessary clothing, food, shelter or medical attendance or other remedial care" to the child without lawful excuse is a misdemeanor. A conviction is punishable by a fine of up to \$2000, plus penalty assessments, or imprisonment for up to 1 year in county jail or both. Pen C §270.

A parent is not relieved from the criminal liability for such omission merely because the other parent of such child is legally entitled to the custody of the child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so. Pen C §270.

Proof of abandonment or desertion of a child by the parent, or the parent's omission to furnish necessary food, clothing, shelter, or medical attendance or other remedial care for a child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter, or medical attendance or other remedial care is willful and without lawful excuse. Pen C §270.

The court, in determining the parent's ability to support a child, must consider all income, including social insurance benefits and gifts. Pen C §270.

The provisions of Pen C §270 are applicable whether the parents of such child are or were ever married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned. Pen C §270.

## III. CIVIL ENFORCEMENT

*Note: Most of the civil enforcement remedies in this section can occur in either the regular family law court or in the Title IV-D court. Where the remedy is unique to Title IV-D proceedings, it will be noted briefly in this chapter, with appropriate section references given to Chapter 5.*

*Given the authority of DCSS and services it provides, along with the unique nature of the LCSA as a party in Title IV-D proceedings, a parent can separately take steps to enforce an order in a IV-D court, but has to give notice and seek the consent of the LCSA before doing so. (See §5.35).*

*Courts should be aware that cases can go back and forth between a regular family law court and a Title IV-D court multiple times, depending upon whether DCSS is providing services. (See §5.3). When DCSS stops providing services (e.g., "closes its case") the LCSA will stop all of its enforcement activity.*

## A. Earnings Assignment Order (Wage Garnishment)

### 1. [§4.73] Included With Support Order

Whenever a support order is established or modified, the court must include an earnings assignment order for support in the order. The order must direct the obligor's employer to pay the obligee (payable through the State Disbursement Unit; see §4.89) a portion of the obligor's earnings sufficient to pay the following amounts (Fam C §5230(a)(1)):

- The current support amount, and
- An amount to be paid toward liquidating any arrearage.

*Note:* All payments must be directed using Judicial Council form FL-195, Income Withholding Order, to be payable to the SDU (unless the support order was made before January 1, 1994). For use instructions, see Judicial Council form FL-196, Income Withholding Order—Instructions.

The obligor's subsequent payment of arrearages does not relieve the court of its duty to issue the order. Fam C §5272.

Except for collected tax intercept monies (see §5.61), monies collected are to be allocated first to current child support, and then to arrears principal (if any), and finally to arrears interest (if any). CCP §695.221. This is a major shift from prior law and will assist in lessening the pace of arrearages from accumulating due to interest charges.

### 2. [§4.74] Stay or Termination of Earnings Assignment Order

The service of an earnings assignment order may be stayed only if the court makes a finding of good cause, or if an appropriate alternative arrangement exists. Fam C §5260.

A finding of "good cause" requires that all the following conditions exist:

- A written explanation by the court of why the stay would be in the child's best interests. Fam C §5260(b)(1)(A).
- A history of uninterrupted, full, and timely payment of support by the obligor, not through an assignment order or other mandatory process, that was ordered during the previous 12 months. Fam C §5260(b)(1)(B). A payment is timely if received within 5 days after the due date. Fam C §5220.
- The obligor owes no arrearage for prior support. Fam C §5260(b)(1)(C).
- The court finds by clear and convincing evidence that service of the assignment order would cause extraordinary hardship on the obligor. Whenever possible, the court must specify a date on which any stay ordered for this reason will automatically terminate. Fam C §5260(b)(1)(D).

An alternative arrangement for staying the service of the earnings assignment order requires a written agreement by the parties that provides for payment of support. Fam C §5260(b)(2). The agreement may not preclude the obligee from seeking a termination of the stay under Fam C §5261 if the agreement is violated. The local child support agency must concur with the agreement if support is ordered to be paid through DCSS. Fam C §5260(b)(2).

A stay that has been ordered on the service of an assignment order terminates on any of the following (Fam C §5261(a), (b)):

- On the filing of a declaration by the obligee, under penalty of perjury, that the obligor is in arrears in payment of any portion of the support;
- If requested by the local child support agency or the obligor; or
- If requested by any obligee who can establish that good cause to stay service (as defined by Fam C §5260, discussed above) no longer exists.

On a noticed motion, the court must also terminate the service of an assignment order if past due support is paid in full, including any interest due, and if any of the following conditions exist (Fam C §5240(a)(1)–(7)):

- Death or remarriage of spouse who is owed support (spousal support);
- Death or emancipation of child who is owed support (child support);
- Court determines that there is good cause, as defined in Fam C §5260, to terminate the assignment order. This provision does not apply if there has been more than one application for an assignment order;
- Obligor meets the conditions of an alternative arrangement under Fam C §5260(b)(2) and a wage assignment has not been previously terminated and subsequently initiated;
- There is no longer a current order for support;
- Termination of the stay of an assignment order under Fam C §5261 was improper, but only if that termination was based on failure to make timely payments; or
- Employer or agency designated to provide services under Title IV-D or the SDU is unable to deliver payment for a period of 6 months due to the failure of the obligee to notify that employer or agency or the SDU of a change in the obligee's address.

Termination of an earnings assignment order can also be accomplished through an ex parte request for relief. Fam C §5240(b). Such ex parte relief is not available, however, in the circumstances described in Fam C §5240(a)(3), (4). There is a mandatory Judicial Council form for use for ex parte relief surrounding the issuance, modification or termination of an earnings assignment order. See form FL-430.

### **3. Motion to Quash Earnings Assignment Order**

#### **a. [§4.75] Grounds**

The obligor may move to quash an earnings assignment order for support on the following grounds (Fam C §5270(a), (b)):

- The order incorrectly states an amount of current or overdue support ordered;
- The alleged obligor is not the obligor from whom support is due; or
- The amount to be withheld exceeds that allowable under federal law under 15 USC §1673(b), which is from 50 to 65 percent of “disposable earnings,” as defined in 15 USC §1672(b), depending on what persons the obligor is supporting and when the arrearage accrued.

For information on need-based exemptions, see [§4.134](#).

Other grounds may exist to grant a motion to quash under the court's authority to fashion an appropriate remedy through the exercise of its inherent equitable and supervisory powers.

*Marriage of Johnson-Wilkes & Wilkes* (1996) 48 CA4th 1569, 56 CR2d 323 (service of earnings assignment order for support on exempt income).

*Note:* Subsequent service of an assignment order on a new employer does not entitle the obligor to move to quash the order on any grounds previously raised (when the order was served on the prior employer), or on any grounds that the obligor could have but failed to raise at the time of the earlier service. Fam C §5270(d).

#### **b. [§4.76] Procedure**

A noticed motion to quash an earnings assignment order must be filed with the issuing court within 10 days after the employer's delivery of the copy of the assignment order to the obligor. Fam C §5271(a). The obligor must state under oath the ground on which the motion to quash is made. Fam C §5270(c).

The clerk must set a hearing between 15 and 20 days after receipt of the notice of motion. Fam C §5271(b).

Service on the obligee must be done personally or by first-class mail (postage prepaid), not less than 10 days before the hearing. Fam C §5271(c). Another 5 days' notice is required if mailed. CCP §1013(a).

If the amount of the current support or arrearage is in error, or the amount exceeds federal or state limits, the appropriate remedy is to modify the order to reflect the correct or allowable amount, not to vacate the assignment order. Fam C §5272.

#### **B. [§4.77] Need-Based Benefits Exempt**

Any public benefits that are awarded based on need, also known as "need-based" benefits (*e.g.*, Temporary Assistance for Needy Families (TANF), SSI, GA or general assistance, VA need-based), are exempt from attachment or execution. Fam C §4058(c).

#### **C. [§4.78] Derivative Benefits**

The children of an obligor receiving certain Social Security benefits, Railroad Retirement Act benefits, or VA benefits may be eligible for derivative benefits based on the supporting person's disability. The custodial party or other child support obligee (the social services agency in foster care cases) must apply for derivative benefits within 30 days of receiving notification of possible eligibility. Fam C §4504(a).

Any sums received by the child on account of the obligor's disability must be credited (if they were not considered in setting support) toward the obligor's support obligation, first toward the current month's ongoing support, then toward interest on arrears, then arrears. Fam C §4504(b). See *Marriage of Hall & Frencher* (2016) 247 CA4th 23, 201 CR3d 769; *Y.H. v M.H.* (2018) 25 CA5th 300, 235 CR3d 663.

If the custodial party refuses to apply for, or fails to cooperate with, the appropriate agency for the derivative benefits, the obligor's derivative benefits are credited toward the amount ordered by the court to be paid for that month. The credit is in the amount of payment that the child would have received that month had an application been completed, if the noncustodial parent provides evidence to the local child support agency indicating the amount the child would have received. The credit for those payments continues until the child would no longer be

eligible for those benefits or the order for child support for the child is no longer in effect, whichever occurs first. Fam C §4504(c).

For a chart outlining use of various benefits and programs for child support, see [Appendix D](#).

- **JUDICIAL TIP:** When dealing with any support setting, arrears determination or enforcement issues, if an obligor is receiving SSDI or certain VA benefits, an inquiry is appropriate as to whether derivative benefits are being, or were received.

## D. Liens

### 1. Real Property Liens

#### a. [§4.79] Creation of Lien

A real property lien against an obligor's real property interests is created by recording, with the county recorder, an abstract of judgment, a notice of support judgment, a certified copy of the order or money judgment, or a federal Notice of Lien. CCP §697.320. Recording the lien prevents an obligor from selling, transferring, or refinancing real property in the county where it is recorded until the lien is extinguished. See, e.g., *Cal-Western Reconveyance Corp. v Reed* (2007) 152 CA4th 1308, 1314–1316, 62 CR3d 244.

DCSS and the LCSA may use digital or digitized electronic records to transmit, file, and record a lien record. See Fam C §17523.5.

#### b. [§4.80] Property Subject to Lien

The lien attaches to all real property interests of the obligor in the county where the lien is recorded. CCP §697.340(a).

Examples of real property interests included are present or future interests, vested or contingent interests, and legal or equitable interests. CCP §697.340(a).

Examples of interests not included are rental payments, interest of a trust beneficiary, a leasehold estate with unexpired term of less than 2 years, or real property that is subject to an attachment lien in favor of the creditor and was transferred before judgment. CCP §697.340(a).

If an obligor later acquires any other interest in real property in the county where the real property lien is recorded, the lien will likewise attach to the obligor's interest in the later-acquired property at the time of acquisition. CCP §697.340(b).

#### c. [§4.81] Amount of Lien

The lien is for the amount of matured installments, plus any accrued interest and costs as they are added to the judgment or order, less the amount of any sums paid toward the judgment or order. The lien does not become a lien for any installment until it becomes due and payable under the terms of the judgment or order. CCP §697.350(c).

If the support order amount subsequently increases or decreases, the lien extends to the judgment or order as modified without having to record another abstract of support judgment, but priority for any additional amount (where support increases) dates from the time the modification is effective. CCP §697.360(d).

#### d. [§4.82] Duration of Lien and Effect of Transfer

The lien is effective during the period that the support judgment or order remains enforceable. CCP §697.320(b). A support order or judgment (child, family, spousal support, reimbursement), including accrued interest and penalties, is enforceable until it is paid in full. Fam C §§291(a), 4502. Thus, a lien on real property will stay in effect until all support obligations arising under the judgment or order are paid in full or otherwise satisfied.

If the lien is not satisfied or extinguished before a transfer or encumbrance of the obligor's interest in the property, then that real property interest remains subject to the lien, in the amount of the lien at the time of such transfer or encumbrance, plus any interest subsequently accruing on that amount. CCP §697.390. See *Guess v Bernhardson* (2015) 242 CA4th 820, 195 CR3d 349 (when property subject to spousal support lien is encumbered and subsequently transferred as part of nonjudicial foreclosure sale, the amount of lien is determined as amount of spousal support that is mature and owing at time property is encumbered, not amount of support owing at time property was transferred as part of foreclosure sale). The lien amount will not include any installments that mature after the date of transfer or encumbrance, or any interest on unmaturing installments. CCP §697.390.

If the obligor holds interest in real property as a joint tenant, or as community property with rights of survivorship, and the obligor subsequently dies, the obligor's interest is extinguished and title passes to the surviving tenant free and clear from any encumbrance created by the prior recorded lien. *Tenhet v Boswell* (1976) 18 C3d 150, 159, 133 CR 10; *Grothe v Cortlandt Corp.* (1992) 11 CA4th 1313, 1317–1318, 15 CR2d 38.

#### e. [§4.83] Priorities of Liens

The priority for payment on multiple or competing liens on the same property is determined by CCP §697.380. Generally, priorities depend on various factors, such as the dates the liens were created and the types of underlying judgments or orders that created the liens.

#### f. [§4.84] Subordination

Subordination refers to the establishment of priority between different existing liens, encumbrances, interests, and claims on the same parcel of land by agreement. The support obligee (or in Title IV-D proceedings, the LCSA) may subordinate a child, family, or spousal support lien to another lien encumbrance, claim, or interest on all or a part of the real property subject to the support lien, such as when a refinancing occurs. CCP §697.370(a)(2).

- **JUDICIAL TIP:** The court does not usually get involved in this issue, but may see it in connection with an arrearage determination. Typically, the support obligee (or in Title IV-D proceedings the LCSA) will only subordinate the support lien when the obligor is not receiving any monies on close of escrow. If an obligor is taking out equity, or other loans are being paid as a result of the refinancing, subordination of the support lien is generally not allowed. Sometimes, however, in nonaid cases, the other parent may be willing to accept a lump-sum amount of less than the total amount owed that can be negotiated as part of a subordination request.

### **g. [§4.85] Recording Substitution of Payee**

A substitution of payee provides notice that payments made under a support judgment or order should be made to a particular individual or Title IV-D agency other than what was originally specified in the judgment or order. Fam C §4506.2. See §5.3.

When the LCSA intervenes to enforce some or all of the obligations arising under the judgment or order for support, the LCSA is authorized to *file and record* a substitution of payee, if a judgment or abstract of judgment has previously been recorded under CCP §697.320 by the obligee or by a different governmental agency. Fam C §4506.2(a). The LCSA is also authorized to *file and record* a substitution of payee when it ceases enforcement of a support obligation at the request of the support obligee. Fam C §4506.2(b). By recording a substitution of payee, the named party in the substitution becomes the payee or assignee of record on the recorded lien. Prior court approval is not needed for the filing and recording under this section. Fam C §4506.2(e). A recorded substitution of payee does not affect the priorities created by earlier recordings of abstract of support judgments, notice of support judgments, or certified copies of judgments or orders for support. Fam C §4506.2(d).

### **h. [§4.86] Satisfaction of Judgment**

If an obligor's support obligation has been satisfied, in whole or in part, from escrow proceeds or otherwise, the judgment creditor or the LCSA must comply with CCP §§724.030 et seq, 724.110 et seq, and 724.210 et seq. These sections essentially require the judgment creditor or the LCSA to file with the court, and serve the support obligor or person making the demand, either a *full satisfaction* of judgment, a *partial satisfaction* of judgment, or a *matured installment satisfaction* of judgment, and to timely respond to a title or escrow company request for a demand made due to a recorded lien. CCP §697.360(e).

*Full satisfaction.* Execution of a full satisfaction of judgment is required when the judgment creditor or the LCSA has recorded an abstract or notice of support judgment or a certified copy of the support judgment or order; all support arrears have been paid in full; and all children subject to the support order or judgment have emancipated, been adopted away from the obligor, or are deceased. CCP §724.010.

*Partial satisfaction.* A partial satisfaction of judgment is a commonly misused term. It basically means that a specified number of dollars has been paid toward the amount owing on the judgment. The partial satisfaction of judgment itself must specifically state the dollar amount received in partial satisfaction. The judgment creditor or the LCSA must execute a partial satisfaction of judgment when it has recorded an abstract of support judgment, a notice of support judgment, or a certified copy of the judgment or order for support; all support arrears have been paid in full; and all children subject to the support order have not emancipated, but there is no order for current support. CCP §724.120.

*Matured installment satisfaction.* The satisfaction of judgment on matured installments is the most commonly used type of satisfaction of judgment. It means that all installments due and owing, plus any accrued interest and costs, have been paid through the date specified on the satisfaction. CCP §724.210. The judgment creditor or the LCSA must execute a satisfaction of judgment on matured installments when all support arrears have been paid in full and some or all of the children subject to the support order have not reached emancipation.

### **i. [§4.87] Release of Lien**

A release of judgment lien (CCP §697.370(a)) means that the real property interests of the obligor in the county where the release is recorded are no longer encumbered by the lien. It is commonly used and recorded when the judgment creditor or the LCSA is no longer claiming any interest in the real property of the obligor in the county where the release is recorded. Recording a release of judgment lien does not:

- Mean the support judgment or order has been satisfied;
- Affect the amount of support owed by obligor, presently or in the future; or
- Prevent the judgment creditor or the LCSA from subsequently recording another real property lien in the same county where the lien was previously released.

A partial release of lien means a release with respect to a particular piece of property, but not to all real property interests held by an obligor in the particular county where the lien is recorded. In determining whether to give a partial release, the judgment creditor or the LCSA may consider such things as:

- The type of transaction involved;
- The obligor's equity in that property;
- The obligor's other income or assets available to satisfy the lien; or
- The obligor's ability to obtain a loan to satisfy any remaining arrears.

The legal description of the particular piece of property being released must be stated on the Release of Lien. CCP §697.370(b).

### **j. [§4.88] Interstate Liens**

The Notice of Lien is a federal form used to create a lien on real property owned by an obligor in states outside of California. 42 USC §652(a)(11)(B). The form must be recorded in the specific county or jurisdiction where the property is located, and requires the specific legal description of the property, although the lien should likewise attach to all real property interests of the obligor in the county or jurisdiction where it is recorded. CCP §697.320(a).

## **E. [§4.89] State Disbursement Unit**

Since 2006, all child support orders paid by wage assignment in California—both DCSS and non-DCSS (*i.e.*, IV-D and non-IV-D) orders—are sent to a single location called the State Disbursement Unit (SDU). Payments by wage assignment are no longer allowed to be sent directly to the DCSS/LCSA or support obligee. See [§4.73](#). It is a payment pass-through mechanism in all cases. When DCSS is not involved (non-IV-D cases), the only services the support obligee receives are collection, disbursement, record-keeping, and limited customer service. When DCSS is involved in enforcing a support order, the support obligee receives the full range of enforcement services (including license suspensions).

As a part of this process, any child support order issued or modified must include a provision requiring the support obligor and obligee to:

- Notify the other parent or the agency named in the order (if it requires payment through an agency designated under Title IV-D) of the name and address of his or her current employer (Fam C §4014(a)); and
- File with the court, within 10 days of the court order, certain specified location and identification information, subject to applicable confidentiality provisions. Fam C §4014(b). Form FL-191 (Child Support Case Registry Form) must be used. The court has the responsibility of processing the FL-191 forms under Cal Rules of Ct 5.330; the forms are sent to the SDU and may not be stored in the court's file. When DCSS is enforcing, the parties do not have to file form FL-191 (DCSS will take care of the reporting). Fam C §4014(c).

➤ **JUDICIAL TIP:** The failure to submit or fully complete necessary information on form FL-191 in regular family law cases can cause delays in receiving support payments or other problems leading to arrears disputes down the road. Whenever possible, especially if the court or the family law facilitator's office helps prepare the order, getting form FL-191 filled out at the same time as the court hearing and filing of the order is beneficial to all.

## F. Judgment Debtor Exams

### 1. [§4.90] Order Requiring Debtor's Appearance

An obligee or DCSS ("creditor") may apply for an order requiring the obligor ("debtor") to appear before the court or a court-appointed referee, at a specified time and place, to furnish information about the debtor's property and future employment prospects to aid in enforcing the money judgment. CCP §708.110(a) and accompanying Law Revision Commission Comment.

A court must issue the order on the creditor's ex parte application (or by motion if required by the court or by court rule), as long as the creditor has not caused the debtor to be examined during the preceding 120 days. CCP §708.110(b), (c). The creditor may obtain an order of examination even if the debtor has been required to respond to written interrogatories under CCP §708.020 within the 120-day period. Comment to CCP §708.110.

If the debtor has been examined during the preceding 120 days, the court may issue the order only if the creditor establishes good cause for the order. CCP §708.110(c). Examples of "good cause" might include:

- Efforts by the debtor to conceal, dissipate, waste, or transfer assets;
- Incomplete, unintelligible, vague, evasive, or untruthful responses by the debtor to prior discovery requests;
- Evidence of a material change in the debtor's financial status; or
- Evidence of the debtor's intent to flee the jurisdiction.

An examination proceeding is an alternative to proceeding against the debtor's property by levy under a writ of execution. It may precede issuance of a writ and service of a notice of levy on the debtor or a third person. *Imperial Bank v Pim Elect., Inc.* (1995) 33 CA4th 540, 549–550, 39 CR2d 432. One of the advantages of the examination procedure is the availability of a turnover order requiring the debtor or a third person to deliver the identified assets to the levying officer. Because this order (1) may require delivery of property directly to the creditor, (2)

creates a lien on the property subject to it, and (3) is enforceable by contempt, it may be far more effective than levying on property under a writ of execution. 33 CA4th at 549–550.

Although these examinations often occur informally in the hallway outside the courtroom or in an adjacent room or in a nearby local office, they are public proceedings under CCP §124. *Nebel v Sulak* (1999) 73 CA4th 1363, 1368–1370, 87 CR2d 385 (injunction prohibiting public member from observing judgment debtor examinations conducted by a particular individual was improper in light of evidence that he was quietly observing and not engaging in harassing or interfering conduct).

The Judicial Council has approved for the application and order optional form EJ-125, Application and Order for Appearance and Examination. The order must contain the following statement (CCP §708.110(e)):

NOTICE TO JUDGMENT DEBTOR. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.

## **2. [§4.91] Service of Order Creates Lien on Property**

The judgment creditor must personally serve a copy of the order on the judgment debtor not less than 10 days before the date set for the examination. Service must be made in the manner specified by CCP §415.10 for service of a summons and complaint. CCP §708.110(d).

Service of the order creates a lien on the debtor's personal property for 1 year from the date of the order unless extended or terminated by the court. CCP §708.110(d). Courts frequently extend liens beyond the 1-year period, particularly on a showing that the creditor has been unable to satisfy the judgment due to the debtor's concealment or transfer of assets. It is unlikely that a court would terminate a lien before the 1-year period except when the judgment has been satisfied in full.

The lien may not be enforced beyond the time for enforcement of the judgment. Comment to CCP §708.110. The lien attaches whether or not the property is described in the application for the order in sufficient detail to be reasonably identifiable. In the case of an order for examination directed to a third person, the property must be adequately identified for the lien to attach. *Imperial Bank v Pim Elect., Inc.* (1995) 33 CA4th 540, 553, 39 CR2d 432. The lien continues notwithstanding the transfer or encumbrance of the property, unless the transfer or encumbrance is made to a person listed in CCP §697.740. A listed person includes someone who acquires an interest in the property for reasonably equivalent value without knowledge of the lien, a buyer or lessee in the ordinary course of business, or a holder in due course of a negotiable instrument. CCP §§697.910(a), 697.920.

## **3. [§4.92] Judgment Debtor's Claim of Exemption**

Code of Civil Procedure §708.120(d) sets forth the procedure for claiming and determining whether property is exempt from the enforcement of a money judgment in an examination proceeding involving a third person. Code of Civil Procedure §708.110, governing a judgment debtor's own examination proceeding, does not describe the procedure to be used by the debtor in claiming an exemption in that proceeding. One appellate court has held that although a debtor

might file a claim of exemption at any time after receiving notice of the examination, no waiver of the right to claim an exemption should occur from the failure to do so until, at the earliest, the judgment creditor seeks a turnover order, identifying the property sought to be turned over to a levying officer. *Imperial Bank v Pim Elect., Inc.* (1995) 33 CA4th 540, 553, 39 CR2d 432.

- **JUDICIAL TIP:** When an exemption issue arises, the court may consider staying any execution at the examination proceeding, and then setting a hearing on the claim of exemption on the law and motion calendar within 10 days.

#### **4. [§4.93] Privileges**

Despite the broad scope of inquiry permitted at the debtor examination, the debtor is usually entitled to assert the same privileges that a witness at trial may assert as a basis for refusing to answer questions or respond to requests for information. *Hooser v Superior Court* (Ray) (2000) 84 CA4th 997, 1002, 101 CR2d 341 (assertion of attorney-client privilege by attorney-debtor).

The privilege against self-incrimination applies in judgment debtor proceedings. A court may compel the witness to answer only if it clearly appears that the proposed testimony cannot possibly have a tendency to incriminate the witness. The court must conduct a particularized inquiry, deciding whether the privilege is well-founded in connection with each specific area that the questioning party seeks to explore. *Marriage of Sachs* (2002) 95 CA4th 1144, 1150–1151, 116 CR2d 273. In *Sachs*, the court held that a child-support payor may not invoke his Fifth Amendment privilege in a debtor examination on the ground that answering questions about financial information could subject him to contempt proceedings.

The marital privilege afforded by Evid C §970 does not apply in an examination proceeding. CCP §708.130(b).

#### **5. Person Fails to Appear for Examination**

##### **a. [§4.94] Issuance of Bench Warrant and Contempt Order**

If an order requiring a person to appear for an examination was served by a sheriff, marshal, person specially appointed by the court in the order, or a registered process server, and the person fails to appear, the court may issue (1) a warrant to have the person brought before the court to explain the failure to appear and may punish the person for contempt or (2) an arrest warrant under CCP §1993. CCP §708.170(a)(1).

The court will most likely issue a bench warrant, with bail set at the amount of the arrears owed or some other appropriate amount (*e.g.*, \$500, \$1000), when a person fails to appear for an examination.

- **JUDICIAL TIP:** Some courts will place a hold or stay on the bench warrant, *i.e.*, order that it not be released until a subsequent hearing date, notice of which the DCSS or creditor's counsel is required to give to the debtor. If the debtor appears at that hearing, the court recalls the order for the warrant. If the debtor does not appear, the court releases or lifts the stay for service of the warrant on the debtor. This saves time and law enforcement resources when all that was needed to get the debtor to come in was a notice that the warrant had been ordered.

A court's general contempt power under CCP §§1209–1222 is not limited by examination provisions for contempt. CCP §708.170 and Comment.

For more discussion of civil bench warrants, see [§2.38](#).

### **b. [§4.95] Imposition of Sanctions**

If the failure to appear was without good cause, the court must award the judgment creditor reasonable attorney's fees incurred in the examination proceeding, if requested. Any award against the judgment debtor must be added to and becomes a part of the principal amount of the judgment. CCP §708.170(a)(2). A court may not impose sanctions against an attorney under CCP §708.170(a)(2), but only against the person who failed to appear. *Eby v Chaskin* (1996) 47 CA4th 1045, 1049, 55 CR2d 517.

This provision does not limit any right to attorney's fees the parties may have by contract or statute. Comment to CCP §708.170. For example, when the statutory requirements are met (notice and an opportunity to respond), a court may impose sanctions against the person who failed to appear or against that person's attorney or both under CCP §128.5 or §128.7 when the attorney advised or participated in the person's failure to appear. *Marriage of Adams* (1997) 52 CA4th 911, 914–916, 60 CR2d 811; *Eby v Chaskin, supra*, 47 CA4th at 1048–1049. A court may also impose a monetary sanction against the person who failed to appear or that person's attorney, or both, under CCP §§2023.010 et seq for misuse of the discovery process, or under CCP §177.5 for the failure to comply with a lawful court order without good cause. *First City Props., Inc. v MacAdam* (1996) 49 CA4th 507, 515–516, 56 CR2d 680.

### **G. [§4.96] Seek-Work Orders**

The court may require a parent to participate in job training, vocational rehabilitation, or work placement programs (Fam C §3558), or require an unemployed parent who has defaulted in support payments to submit to periodic proof of applications for employment (Fam C §4505(a)). These are often referred to as “seek-work orders” or “work search orders.” The parent subject to the order must document regular participation so the court may make a finding of good-faith attempts at job training and placement. Fam C §3558. See further discussion in [§1.59](#) and [Appendix C](#) for example of seek-work order.

### **H. Writs of Execution**

#### **1. [§4.97] In General**

Support judgments and orders are enforceable by writ of execution without prior court approval. Fam C §5100.

#### **2. [§4.98] Issuance**

If the judgment is conditional or a question arises as to the judgment creditor's right to enforce the judgment, a motion for an order directing the issuance of the writ may be brought. *Marriage of Farner* (1989) 216 CA3d 1370, 1376–1377, 265 CR 531.

Further, if a support order or other installment type judgment or order is sought to be enforced, an application for a judgment could be brought to establish an arrearage amount as of a

specific date. These motions may be brought ex parte, but the court has the discretion to require that they be brought by a noticed motion.

The writ must be issued in the judgment debtor's name as listed on the judgment. If the judgment creditor wishes to include additional names for the judgment debtor, an affidavit of identity must be obtained from the court. CCP §680.135. The court will approve the affidavit of identity if it determines that the affidavit states sufficient facts to identify additional names used by the debtor.

### **3. Enforcement**

#### **a. [§4.99] Turnover Orders**

If a writ of execution is issued, on the judgment creditor's ex parte application (or noticed motion if the court directs or court rule requires), the court may issue a turnover order to aid in execution, directing the judgment debtor to transfer either or both of the following to the levying officer:

- Possession of the property sought to be levied on by taking it into custody. CCP §699.040(a)(1).
- Possession of documentary evidence of title to the property of or a debt owed to the judgment debtor that is sought to be levied on. The order may be served when the property or debt is levied on or thereafter. CCP §699.040(a)(2).

#### **b. [§4.100] Levy on Personal Property in Private Place**

The judgment creditor may make an ex parte application (or noticed motion if the court directs or court rule requires) for an order directing the levying officer to seize personal property that is located in a private place of the judgment debtor, irrespective of whether a writ of execution has been issued or a demand made. Both the property and the place where it can be found must be described with particularity. CCP §699.030(b). The creditor must establish that there is probable cause to believe that the property is located in the place described. CCP §699.030(b). If the application is granted, the court can order the debtor to pay the creditor's costs and attorney's fees incurred to obtain delivery of the property. CCP §699.030(a).

### **4. Order to Recall or Quash Improper Writs**

#### **a. [§4.101] Bases**

The court has the inherent equitable power to control the proceedings before it. Thus, the court may recall or quash a writ of execution improperly or inadvertently issued or vacate a levy of execution already effected. *Evans v Superior Court* (1942) 20 C2d 186, 187–188, 124 P2d 820. Such an order is appropriate on any of the following grounds:

- The judgment is not enforceable by execution, or a statute barred levy under a writ of execution. *Evans v Superior Court, supra*, 20 C2d at 187–188.
- The debt is already paid or the judgment is already satisfied. *Meyer v Meyer* (1952) 115 CA2d 48, 49, 251 P2d 335; *Marriage of Chapman* (1988) 205 CA3d 253, 259, 252 CR 359.
- The judgment was vacated. *Stegge v Wilkerson* (1961) 189 CA2d 1, 5, 10 CR 867.

- The writ failed to account for a legitimate setoff against the payment due. *Marriage of Peet* (1978) 84 CA3d 974, 977, 149 CR 108.
- The judgment was satisfied by an agreement or “substituted” performance. *Colby v Colby* (1954) 127 CA2d 602, 605–606, 274 P2d 417; *Jackson v Jackson* (1975) 51 CA3d 363, 368, 124 CR 101; *Marriage of Okum* (1987) 195 CA3d 176, 183–184, 240 CR 458; *Marriage of Trainotti* (1989) 212 CA3d 1072, 261 CR 36.
- A voluntary and intelligent waiver of benefits under the order sought to be enforced. *Marriage of Paboojian* (1987) 189 CA3d 1434, 1437–1438, 235 CR 65.
- Estoppel to enforce the judgment or order. This requires proof that (1) the party to be estopped (obligee/judgment creditor) knew the facts, (2) the debtor was ignorant of the true facts, (3) the creditor intended the conduct be acted on or acted in a manner that the debtor had a right to believe it so intended, and (4) the debtor detrimentally relied on the conduct. *Marriage of Thompson* (1996) 41 CA4th 1049, 1060–1062, 48 CR2d 882; *County of Orange v Carl D.* (1999) 76 CA4th 429, 438–440, 90 CR2d 440; see [§§4.188–4.189](#).
- No amount is owing because the order on which execution is sought was terminated. *Marriage of Glasser* (1986) 181 CA3d 149, 226, 226 CR 229.
- The judgment is conditional, requiring a judicial determination as to whether the creditor is entitled to enforce it. *Adams v Bell* (1933) 219 C 503, 505, 27 P2d 757; *Marriage of Farner* (1989) 216 CA3d 1370, 1376–1377, 265 CR 531.
- The creditor falsely represented the amount due from the debtor. *Hunter v Hunter* (1959) 170 CA2d 576, 582–583, 339 P2d 247.
- The judgment is void. *Jones v World Life Research Inst.* (1976) 60 CA3d 836, 840, 131 CR 674.
- The wrong person has been named in the writ.
- The judgment debtor has filed a petition in bankruptcy before issuance of the writ.
- The debtor has a final judgment against the creditor that will completely offset the amount due on the judgment. *Note*: This is not an appropriate ground in all situations.

A levy on property that is exempt from execution is not a reason for recalling the writ. *Vest v Superior Court* (Astikan) (1956) 140 CA2d 91, 93, 294 P2d 988.

#### **b. [§4.102] Motion to Quash Writ**

The moving party has the burden of establishing facts justifying an order quashing the writ. *Lohman v Lohman* (1946) 29 C2d 144, 150, 173 P2d 657; *Slevats v Feustal* (1963) 213 CA2d 113, 119, 28 CR 517. When a court issues an order recalling or quashing a writ of execution, any levy under the writ is automatically canceled, and any title to the property vested in the levying officer by the levy is defeated. *Hulse v Davis* (1927) 200 C 316, 318, 253 P 136. All rights and proceedings based on a writ that has been quashed fall with it. *Moreno v Mihelis* (1962) 207 CA2d 449, 451, 24 CR 582.

### c. [§4.103] Motion to Quash Levy

When the officer has already levied on the property, the debtor may file a motion to quash the levy rather than recall or quash the writ. *United Taxpayers Co. v City & County of San Francisco* (1927) 202 C 264, 265–266, 259 P 1101. When a motion to recall or quash an improperly issued writ is not an adequate remedy (e.g., sale or collection and payment under the writ have been completed), the court may afford equitable relief. *Salveter v Salveter* (1936) 11 CA2d 335, 337, 53 P2d 381. Most courts would grant such relief only when the facts are compelling and the basis for relief involves the judgment’s validity, and not a procedural defect in issuance of the writ.

### d. [§4.104] Who May File

A motion to recall or quash a writ of execution may only be filed by a party to the action unless the judgment on which it is issued or the writ itself is void on its face. In such cases, the motion may be filed by a subsequent purchaser at an execution sale of property levied on under the writ, a lien holder, or an execution or judgment creditor. *Vest v Superior Court* (Astikan) (1956) 140 CA2d 91, 93, 294 P2d 988.

### e. [§4.105] Costs

A motion to quash a writ of execution is a special proceeding; thus a court must allow costs to the prevailing party under CCP §1032(a). *Van Denburgh v Goodfellow* (1941) 19 C2d 217, 225, 120 P2d 20.

## I. Abstract of Judgment

### 1. [§4.106] In General

A judgment lien may be created on the judgment debtor’s real property by recording an abstract of the support judgment with the county recorder. CCP §697.320(a). Like the writ of execution, the abstract is issued by the clerk.

Separate from the abstract certified by the clerk, any LCSA enforcing a support obligation may record a notice of support judgment, which has the same force and effect as an abstract of judgment certified by the court clerk. Fam C §4506(c).

### 2. [§4.107] Sister State Judgments

Support liens must be given full faith and credit across state lines. 42 USC §666(a)(4). However, recording a sister state judgment for support does not directly give rise to a judgment lien on the debtor’s real property located in California. The judgment creditor must first file an application under the Uniform Interstate Family Support Act (UIFSA) (Fam C §§5700.101 et seq) requesting entry of a California judgment based on the sister state judgment, and then record an abstract of the new California judgment to create the lien. *Kahn v Berman* (1988) 198 CA3d 1499, 1505, 244 CR 575. For more discussion of UIFSA, see [Chapter 3](#).

### 3. [§4.108] Order for Release of Improper Lien

When a recorded abstract of a money judgment creates a judgment lien on the property of a person who is not the judgment debtor and the judgment creditor fails to release the lien after

proper demand, that individual may file a noticed motion with the court for an order releasing the judgment lien. The court may also award damages, a \$100 penalty, and reasonable attorney's fees to the erroneously named property owner. CCP §697.410. The judgment debtor's spouse may not use this procedure to release a lien on the parties' community property. Comment to CCP §697.410.

#### **J. [§4.109] QDRO for Support**

An order assigning retirement benefits for child or spousal support is enforceable against a plan governed by the Employee Retirement Income Security Act (ERISA) only if it satisfies federal law requirements for a Qualified Domestic Relations Order (QDRO). 29 USC §1056(d)(3).

Notwithstanding the statutory mandate for use of the federal child support income withholding form (the standard Wage Assignment form), the federal form is not a QDRO and thus will not be effective to bind an ERISA-governed pension plan. Instead, an "earnings assignment" order for support to be served on an ERISA plan must be in the form of a QDRO for Support. See 42 USC §666(c)(3) (expedited child support collection procedures prescribed by federal law, including income withholding, do not supersede QDRO requirements when ERISA plan is involved).

The Judicial Council has approved an optional Qualified Domestic Relations Order for Support (form FL-460) that satisfies QDRO requirements. A separate Statement of Confidential Information (form FL-461) can be attached to the QDRO to provide the plan with the participant's Social Security Number (and Social Security Number of a spousal support alternate payee). This information will be required by the plan for tax reporting purposes but, to maintain confidentiality, should not be filed with the QDRO.

See [§4.120](#) below regarding limitations on enforcement against a private retirement plan.

#### **K. [§4.110] Health Insurance Coverage Assignment (HICA) and National Medical Support Notice (NMSN)**

In any case in which an order for current child support is made, the court shall require that health insurance coverage for the supported child be maintained by either or both parents if that insurance is available at no cost or at a reasonable cost to the parent. Fam C §3751(a)(2). Once a court order for support has been made, an application can be made for the court to order the employer of the obligor to enroll the support child in the health plan available to the obligor, known as a "health insurance coverage assignment" (HICA) order. Fam C §§3760 et seq. The application procedures are set for in Fam C §3761. The order shall issue unless the court makes a finding of good cause to not issue it (good cause includes the same conditions listed for quashing or terminating the HICA, as noted below). Fam C §3762. In Title IV-D cases only, the LCSA is required to serve and file a NMSN notice in lieu of a HICA, which operates in the same way as the HICA. Fam C §3773.

A motion to quash or terminate may be brought on any of the following grounds (Fam C §§3765(a), 3773(d)):

- No order to maintain health insurance has been issued.
- The amount of premium, or increased premium, is unreasonable (too high).

- The alleged obligor is not the obligor ordered to provide coverage.
- The child is or will be otherwise provided health care coverage.
- The employer's choice of coverage is inappropriate.

☛ **JUDICIAL TIP:** If the motion to quash or terminate is on grounds of unreasonableness of cost, then the obligor should be cautioned that there is a continuing obligation to look for and obtain appropriate low cost or no cost insurance for the children.

In Title IV-D cases, DCSS issued a statewide policy letter (CSS Letter 11-01) stating that as of January 1, 2011, “reasonable” is rebuttably presumed to be not more than 5 percent of the obligor's gross income (*i.e.*, looking at cost to add coverage for child(ren) subject to the support order). The same policy letter additionally provides that health insurance shall be presumed unreasonable if the obligor is entitled to a low-income adjustment. While the LCSA will not research costs, an obligor can provide information to the LCSA and possibly get the NMSN notice terminated without going to court. The court ultimately has jurisdiction to determine the issue of unreasonableness.

#### **L. [§4.111] Enforcement Tools Unique to DCSS**

There are a number of enforcement mechanisms available to DCSS only, which are specifically authorized by statute. These unique enforcement tools are briefly mentioned here because it can be important for a regular family law court to know, for example, if there are any barriers to certain employment opportunities (lack of license), or travel restrictions (passport denied), as well as to understand automatic deductions that may be occurring (garnishments of benefits), and automatic seizures (bank levies and tax refund intercepts), which can in turn affect a court's determination regarding arrears, and at what level an individual can afford to pay towards arrears.

If a litigant has multiple child support cases, one of which is being handled by DCSS, *i.e.*, DCSS is “involved”, and one which is not, knowing about these enforcement mechanisms may also provide the court a clue as to when a referral to the family law facilitator may be needed for further assistance.

Each of the following enforcement tools are discussed in more detail in [Chapter 5](#), which deals with Title IV-D proceedings.

- **Levy:** DCSS has the ability to submit “delinquent” obligors to the Franchise Tax Board's bank levy Financial Institution Data Match (FIDM) program for the purpose of collecting delinquent support. It is generally done on an automated basis, and there are different exemption rules depending upon an obligor's status of compliance with court orders. For further details on the threshold requirements of who gets submitted, the exemption process, as well as enforcing a lien by levy, see [§5.56](#).
- **Personal Property Lien:** DCSS may perfect a personal property lien that is created by operation of law for any obligor that is delinquent in the payment of support. For further details, see [§5.59](#).
- **Tax Refund Intercept:** DCSS can intercept both state and federal tax refunds. If arrears are owed to the state (*e.g.*, for aid reimbursement versus non-welfare arrears), then the monies taken are generally kept and applied to those arrears first. For further details see [§5.61](#).

- License Suspension: DCSS can submit for suspension certain state-issued licenses to various licensing boards, including the California DMV. Such reporting for suspension often occurs automatically if an obligor fails to keep up with court ordered support. For further details on this topic, including information for obtaining a release, see §5.62.
- Passports: DCSS can submit the names of obligors who owe a certain amount of arrears to the Secretary of State to have an individual's passport denied. The statute does not specifically give the state court jurisdiction to release a passport; DCSS has issued instructions relating to certain exemptions and an administrative release. For further details on this topic, see §5.64.
- State Disability, Unemployment and Workers' Compensation Benefits: DCSS can garnish up to 25 percent of an individual's benefits, including benefits for state disability, unemployment, and/or workers' compensation. This is usually done on an automated basis. For further details on this topic, see §5.65.
- Social Security: DCSS can garnish varying percentages of different types of Social Security benefits. The amount that can be garnished depends not only upon the type of benefit, but whether the support amount owed is for current support or arrears. Supplemental Security Income (SSI) may not be garnished or used for any support purposes. For further details on this topic, see §5.66.

## M. Bankruptcy

### 1. [§4.112] Effect of Discharge

“Domestic support obligations” are entitled to greater preferential treatment in bankruptcy. This encompasses virtually all support obligations and obligations in the nature of support, whether assigned or unassigned, and all debts reasonably related to the establishment and enforcement of support. Thus, a discharge in bankruptcy does not free the debtor from an obligation under a judgment to pay spousal support or child support, assigned or unassigned. 11 USC §523(a)(5). The characterization of an obligation as support or property division depends on its intended function and is based on federal bankruptcy law, not state law. *In re Phegley* (BAP 8th Cir 2011) 443 BR 154, 157–158.

Interest accruing on non-dischargeable child and spousal support obligations after filing of a bankruptcy petition is also non-dischargeable. *In re Foross* (BAP 9th Cir 1999) 242 BR 692.

### 2. [§4.113] Automatic Stay and Exceptions

The filing of a bankruptcy petition imposes an automatic stay on activities of creditors relating to establishment, enforcement, or collection of debts. 11 USC §362(a).

There are, however, exceptions from the stay applicable to support proceedings:

- The prosecution of a criminal action (contempt under Pen C §270). 11 USC §362(b)(1). But the exception generally does not apply to purely civil contempts (*e.g.*, CCP §1219(a)). See §4.10.
- The establishment of paternity. 11 USC §362(b)(2)(A)(i).

- The establishment or modification of an order for domestic support obligations. 11 USC §362(b)(2)(A)(ii). See also CSS Letter 12-02 regarding enforcement actions when the obligor has filed for bankruptcy.
- The collection of a domestic support obligation from property that is not property of the estate. 11 USC §362(b)(2)(B).
- The withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute. 11 USC §362(b)(2)(C).
- The withholding, suspension, or restriction of a driver's license or professional, occupational, or recreational license under state law as specified in the Social Security Act (SSA) (42 USC §666(a)(16)). 11 USC §362(b)(2)(D).
- The reporting of overdue support owed by a parent to any consumer reporting agency as specified in the SSA (42 USC §666(a)(7)). 11 USC §362(b)(2)(E).
- The interception of a tax refund as specified in the SSA (42 USC §§664, 666(a)(3)) or in analogous state law. 11 USC §362(b)(2)(F). This section allows the interception even if the refund was property of the estate, unlike the general section allowing the collection of a domestic support obligation from non-estate property. 11 USC §362(b)(2)(B).

The enforcement of a medical obligation, as specified under Title IV of the Social Security Act (42 USC §§601 et seq). 11 USC §362(b)(2)(G).

#### **N. [§4.114] Child Support Security Deposit**

Upon a showing of good cause, courts have the authority to require an obligor to give reasonable security for the payment of child support. Fam C §4012. This can be done by way of an order for a parent to deposit up to 1 year's child support. Fam C §§4560 et seq. As an extraordinary remedy, in cases of bad faith failure to pay support, the court can also order the obligor to deposit other assets to secure future child support payments. Fam C §§4600 et seq.

#### **O. [§4.115] Private Child Support Collectors**

A child support obligee may contract with a private child support collector to collect court-ordered support from a child support obligor. A "private child support collector" means any individual, corporation, attorney, nonprofit organization, or other nongovernmental entity who is engaged by an obligee to collect child support, and includes any private, nongovernmental attorney whose business is substantially comprised (50 percent or more) of the collection or enforcement of child support. The term excludes any attorney who addresses issues of ongoing child support or child support arrearages in the course of (Fam C §5610):

- An action to establish parentage or a child support obligation,
- A proceeding under the Domestic Violation Prevention Act (Fam C §§6200 et seq),
- A proceeding for dissolution or nullity of marriage or legal separation, or
- A postjudgment or modification proceedings related to any of those actions.

Family Code §§5611–5616 establish many detailed guidelines governing the agreement and actions of a private child support collector, including the following selected requirements:

- The contract must include statements that the collector is not a governmental entity, that governmental entities provide child support collection and enforcement services free of charge, that the collector collects only money owed to the obligor and not support assigned to the state or county due to the receipt of CalWORKs or Temporary Assistance to Needy Families (TANF), and that the obligee will notify the collector if he or she starts to receive program benefits from CalWORKs or TANF. Fam C §5611(a)(8), (9), (14).
- The private collector must establish a direct deposit account with the state disbursement unit (SDU) and notify DCSS when the SDU disburses funds to the account if a portion constitutes an obligor's fee. Fam C §5614(a)(2).
- Before commencing collection activities, the private collector must give written notice of any collection contract to the LCSA enforcing the obligee's support order, or the LCSA for the county where the obligee resides when the contract is signed. Fam C §5614(a)(6).
- Every court order, or court-approved agreement, for child support issued or entered on or after January 1, 2010, must include a separate money judgment owed by the obligor to pay a fee (not to exceed 33⅓ percent of the total arrears nor 50 percent of a private collector's fee) for collection efforts undertaken by a private collector. The judgment must jointly be in favor of the collector and support obligee. Fam C §5616(a). If the order makes the obligor responsible for collection fees and costs, fees deducted by a private collector may not be credited against arrearages, interest on arrearages, or any other money the obligor owes to the obligee. Fam C §5616(b). See, *e.g.*, governmental forms FL-625, Stipulation and Order; FL-630, Judgment Regarding Parental Obligations; FL-687, Order After Hearing.

#### **P. [§4.116] Independent Actions**

When services are being provided by DCSS (DCSS is “involved”), the LCSA typically determines what actions are needed to provide the services requested or required by law. A parent who has requested or is receiving support enforcement services is allowed to take independent action (*e.g.*, to modify or to enforce a support order) but must first follow certain notice and consent requirements. Fam C §17404(f)(1)–(2).

For a more detailed discussion, see [§5.35](#).

#### **Q. [§4.117] Indian Parties or Indian 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 CA4th 527, 60 CR2d 667). 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). The Bureau of Indian Affairs may, however,

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).

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 §§5700.101 et seq) mandates full faith and credit for tribal court spousal support orders by defining “state” (at Fam C §5700.102(26) to include “an Indian tribe.” However, not all Indian tribes have adopted UIFSA, so care needs to be taken when the court is facing an enforcement issue as to what federal and state laws apply. (Example: as of this publication, California’s largest tribe, the Yurok tribe, has not adopted UIFSA.)

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* (6th ed 2015)).

As more tribes qualify for having their own tribal Title IV-D court, another source to check in terms of authority to enforce, or determining the validity of an enforcement action is to look at the underlying contract or memorandum of understanding (MOU) entered into between the state DCSS and the individual tribe. So for example, while generally a tribal employer is not required to honor any state-issued wage assignment or garnishment orders, a tribe may have agreed to honor them in an executed MOU as part of the process in becoming a tribal IV-D court.

For information on the case transfer process between California courts and tribal courts, see [§§5.37–5.40](#).

## IV. Defenses

### A. Exemptions to Enforcement of Money Judgments

#### 1. [§4.118] Scope and Application

Certain types of property of the judgment debtor are not subject to the enforcement of a money judgment against the debtor. Some are exempt automatically without making a claim of exemption. CCP §§703.030(b), 704.210. For other types of property, the judgment debtor must make an affirmative claim of exemption after a levy has been made. If property not subject to enforcement of a money judgment has been levied on or applied in any manner to satisfy the judgment, it may be released by the claim of exemption procedure. CCP §695.040; see [§§4.123 et seq.](#)

The exemptions in the Enforcement of Judgments Law or any other statute apply to all procedures for the enforcement of a money judgment, not just execution, except as otherwise provided by statute. CCP §703.010(a) and Comment; *Imperial Bank v Pim Elect., Inc.* (1995) 33 CA4th 540, 548, 39 CR2d 432. Exemptions are entirely statutory and may not be enlarged by the courts. *Vineyard v Sisson* (1990) 223 CA3d 931, 938, 272 CR 914. A court should construe the exemption statutes, so far as practicable, to the benefit of the judgment debtor. *Schwartzman v Wilshinsky* (1996) 50 CA4th 619, 630, 57 CR2d 790.

Family Code §5103(b) authorizes a levy for child and spousal support on an obligor’s right to payment of benefits from an employee benefit plan, including retirement benefits, as ERISA

does not preclude levy for family support purposes. *Marriage of Lamoure* (2011) 198 CA4th 807, 822, 132 CR3d 1.

## 2. [§4.119] Exemptions

The following exemptions from the enforcement of judgments are authorized by statute:

- Household furnishings, appliances, provisions, wearing apparel, and other personal effects; items of extraordinary value. CCP §704.020.
- Jewelry, heirlooms, and works of art. CCP §704.040.
- Motor vehicles; equity and proceeds of sale or insurance. CCP §704.010.
- Health aids; prosthetic and orthopedic appliances. CCP §704.050.
- Paid earnings; earnings withholding order; wage assignment for support. CCP §704.070.
- Business and professional licenses. CCP §695.060.
- Personal property necessary to and used in exercise of trade, business, or profession. CCP §704.060.
- Vacation credits. CCP §704.113.
- Life insurance policies. CCP §704.100.
- Public retirement benefits; return of contributions from public entity. CCP §704.110.
- Private retirement benefits. CCP §704.115; but see *Marriage of Lamoure* (2011) 198 CA4th 807, 822, 132 CR3d 1.
- Social Security and public benefits in deposit accounts. CCP §704.080.
- Unemployment insurance and compensation funds; child support judgments. CCP §704.120.
- Disability or health insurance benefits. CCP §704.130.
- Workers' compensation claim or award; temporary benefits. CCP §704.160.
- Personal injury causes of action, damages, or settlement; exception; periodic payment. CCP §704.140.
- Wrongful death causes of action, damages, or settlement; periodic payments. CCP §704.150.
- Family and cemetery plots. CCP §704.200.
- Financial aid for attending institution of higher education. CCP §704.190.
- Social services aid. CCP §704.170.
- Service of earnings assignment orders for support on public entity. CCP §704.114.
- Funds of debtor inmate in correctional institute. CCP §704.090.
- Material for repair or improvement of residence. CCP §704.030.
- Relocation benefits. CCP §704.180.
- Homesteads and declared homesteads. CCP §§704.710 et seq, 704.910 et seq.

Internal Revenue Code §529 educational savings accounts are not exempt from levy for satisfaction of a judgment. *O'Brian v AMBS Diagnostics, LLC* (2016) 246 CA4th 942, 201 CR3d 305.

Except as otherwise provided by statute, the exemptions apply to a judgment for child, family, or spousal support. See CCP §703.070; see also *Marriage of Lamoure, supra*, 198 CA4th at 822. Property that is not subject to enforcement of a money judgment is exempt without making a claim. CCP §704.210.

A list of exemptions under both California and federal statutes is set forth in Judicial Council form EJ-155, Exemptions From the Enforcement of Judgments. It is available on the California Courts website at <https://www.courts.ca.gov/documents/ej155.pdf>.

- JUDICIAL TIP: Additional types of property are exempt from levy under a writ of execution but may be reached by other enforcement methods.

### 3. [§4.120] Enforcement Against Public and Private Retirement Plans

Where an amount held by a public entity or private retirement plan as described in CCP §§704.110(b) and 704.115(b) becomes payable to a person and is sought to be applied to the satisfaction of a judgment for support against that person, the amount is exempt only to the extent that the court determines under CCP §703.070(c). See CCP §§704.110(b), (c) and 704.115(b), (c). CCP §703.070(c) requires that the judgment creditor file a noticed motion to determine the extent to which the exempt property can be applied to the satisfaction of the judgment. “In making this determination, the court shall take into account the needs of the judgment creditor, the needs of the judgment debtor and all the persons the judgment debtor is required to support, and all other relevant circumstances. The court shall effectuate its determination by an order specifying the extent to which the otherwise exempt property is to be applied to the satisfaction of the judgment.”

Accordingly, unless there is a written stipulation signed by the judgment debtor, an order or QDRO may only be approved by the court after the procedures set forth above are followed. They should not be processed ex parte without notice.

### 4. [§4.121] Federal Benefit Payment Exemptions

Judicial Council form EJ-155 lists a number of federal benefit payments that may be exempt, including Civil Service Retirement Benefits (5 USC §8346), Military Retirement Benefits (10 USC §1440), Railroad Retirement Benefits (45 USC §231m), Longshore and Harbor Workers' Compensation or Benefits (33 USC §916), and Veterans' Benefits (38 USC §5301).

### 5. [§4.122] Amount of Exemptions

The Judicial Council has published a list of the current dollar amounts of the exemptions provided in CCP §703.140(b) and §§704.010 et seq. CCP §703.150(e); See form EJ-156. It is available on the California Courts website at <https://www.courts.ca.gov/documents/ej156.pdf>. Commissioners should keep a copy of this form on the bench for quick reference.

The exemption amounts listed on the form are effective for 3 years, beginning April 1, 2013. CCP §703.150(a). They are adjusted at 3-year intervals. CCP §703.150(b). Adjustments are based on changes in the annual California Consumer Price Index for All Urban Consumers at

<https://www.dir.ca.gov/oprl/CAPriceIndex.htm>, and are subject to legislative approval. CCP §703.150(c), (d). They do not apply to cases that began before the date of the adjustment, subject to any contrary rule applicable under the Bankruptcy Code. CCP §703.150(f); see also CCP §703.050(a) (applicable exemption amount is amount in effect when judgment creditor's lien was created or when earliest lien in series of overlapping liens was created).

When DCSS has issued a withhold order on the bank account of a debtor owing delinquent child support, and funds in the debtor's account are eligible for protection under several exempting provisions, the total amount protected is not determined by adding together, or "stacking," the multiple exemptions; rather, the debtor's funds are protected only up to the amount excluded under the largest of the individual exemptions. 96 Ops Cal Atty Gen 59 (2013).

## **B. Guidelines for Determining Exemption**

### **1. [§4.123] Who May Claim Exemption**

The judgment debtor or a person acting on the debtor's behalf may claim the exemption. CCP §703.020(b)(1).

If community property is sought for the satisfaction of the judgment, either the judgment debtor or debtor's spouse may claim an exemption whether or not the spouse is also a judgment debtor under the judgment. CCP §703.020(b)(2).

A purported contractual or other prior waiver of any statutory exemptions, other than a waiver by failure to claim an exemption that must be claimed or otherwise made at the time enforcement is sought, is void as against public policy. CCP §703.040.

### **2. [§4.124] Time Limit to Claim Exemption**

Any exemption for property described in any statute as exempt must be claimed within the time and in the manner prescribed by the applicable enforcement procedure. Otherwise, the exemption is waived and the property is subject to enforcement of the money judgment. CCP §703.030(a); *Imperial Bank v Pim Elect., Inc.* (1995) 33 CA4th 540, 548–549, 39 CR2d 432.

The procedures for claiming an exemption are set forth in CCP §§703.510–703.610, except a homestead exemption that is governed by CCP §§704.710–704.850. If the judgment creditor is attempting to reach the property by a procedure other than levy under a writ (*e.g.*, by examination proceeding under CCP §708.120), a court hearing is required. The court may determine any exemption claims at that time or later on noticed motion. Comment to CCP §703.030.

### **3. [§4.125] Relief Under CCP §473(b)**

The court has authority under CCP §473(b) to relieve the judgment debtor from a failure to timely or properly claim an exemption based on his or her mistake, inadvertence, surprise, or excusable neglect. CCP §703.030(c). In determining whether to grant relief, the court considers the same factors as on any CCP §473(b) motion (timeliness of motion, sufficiency of the allegations of mistake, inadvertence, surprise, or excusable neglect, and prejudice to the judgment creditor). Many courts require the debtor to pay attorney's fees and costs incurred by the creditor as a result of the delay, as a condition for granting relief.

#### **4. [§4.126] Filing of Claim of Exemption**

Any claim of exemption must be executed under oath, contain specified information, and be filed with the levying officer within 10 days after the judgment debtor is served with a notice of levy on the property. CCP §703.520(a), (b). It is filed on form EJ-160, Claim of Exemption (Enforcement of Judgment). A claim of exemption from wage garnishment is filed on form WG-006, Claim of Exemption (Wage Garnishment).

If the property is claimed to be statutorily exempt as necessary for the support of the debtor and the debtor's spouse and dependents, the claim of exemption must include a financial statement also executed under oath and containing specified information. CCP §703.530(a)–(c). It is filed on form EJ-165, Financial Statement. A court properly denies a claim that is not supported by a financial statement. *Schwartzman v Wilshinsky* (1996) 50 CA4th 619, 627, 57 CR2d 790.

#### **5. [§4.127] Notice of Opposition**

The judgment creditor has 10 days after service of the notice of claim of exemption to file with the court a notice of opposition and a notice of motion for an order determining the claim. CCP §703.550. The opposition notice must be executed under oath and must allege, and contain a statement of facts to support, either that (1) the property is not exempt, or (2) the equity in the property claimed to be exempt exceeds the amount provided by the applicable exemption. CCP §703.560(a), (b). The appropriate form is form FL-677, Notice of Opposition and Notice of Motion on Claim of Exemption.

Copies of the opposition notice and motion must be filed with the levying officer during this 10-day time limit. On their receipt, the levying officer must file the claim of exemption with the court. If copies are not filed with the levying officer within the 10-day time limit, the officer must immediately release the property to the extent it is claimed to be exempt. CCP §703.550. The 10-day time limit is extended under CCP §684.120(b) when notice of the claim of exemption is served on the judgment creditor by mail. Comment to CCP §703.550.

#### **6. [§4.128] Setting Hearing**

The hearing on the motion for an order determining the claim of exemption must be held no later than 30 days from the date the motion is filed with the court. The court may continue the hearing date for good cause. CCP §703.570(a).

Not less than 10 days before the hearing, the judgment creditor must serve a notice of the hearing and a copy of the notice of opposition to the claim of exemption on the claimant and on the judgment debtor if other than the claimant. Service may be made personally or by mail (CCP §703.570(b)), but if served by mail, an additional period of notice is required under CCP §684.120(b). Comment to CCP §703.570.

#### **7. [§4.129] Disposition of Property Pending Hearing**

At any time while the exemption proceeding is pending, a court may, on its own motion or the motion of the judgment creditor or claimant, make such orders for the disposition of the property as may be proper under the circumstances. CCP §703.610(b). For example, a court might issue an order:

- Prohibiting the transfer of the property.

- Prohibiting the commission of waste on the property.
- Appointing a receiver to manage the property.
- Requiring the proceeds of any sale of the property to be held in escrow pending the court's resolution of competing claims to the proceeds.
- Requiring the property to be listed for sale with a qualified, neutral broker.
- Requiring the completion of a pending sale of the property.
- Requiring any income from the property to be paid to the judgment creditor.

A court might, for example, sua sponte make an order to dispose of the property when the levying officer notifies the court of circumstances warranting the order, such as when the property is perishable or likely to diminish in value before the hearing. See CCP §699.070. The court may modify or vacate such an order at any time during the pendency of the exemption proceedings on such terms as are just. CCP §703.610(b). Unless provided by statute, a levying officer may not release, sell, or otherwise dispose of property for which an exemption is claimed until an appeal is waived, the time for an appeal has expired, or a final determination of the exemption is made. CCP §703.610(a).

#### **8. [§4.130] Determining Claim Based on Pleadings**

The claim of exemption and notice of opposition to the claim constitute the pleadings. The court may permit amendments to the claim or notice in the interest of justice. CCP §703.580(a). The claimant has the burden of proof at the hearing. CCP §703.580(b). The claim is deemed controverted by the notice of opposition, and the court must receive both in evidence.

If no other evidence is offered, the court may determine the matter on the claim and the notice if satisfied that sufficient facts are shown in these pleadings. If not satisfied, the court must order the hearing continued for the production of other oral or documentary evidence. CCP §703.580(c). The court must accept the claimant's factual assertions as true if the judgment creditor does not controvert them. *Schwartzman v Wilshinsky* (1996) 50 CA4th 619, 628 n5, 57 CR2d 790. Many courts find that the proof submitted by the parties is often inadequate, as parties frequently appear in pro per and are uncertain as to what evidence is required. If so, the court may find it necessary to direct one or both parties to submit additional proof (a more complete declaration or documents to support assertions made in a prior declaration, such as financial statements, pay stubs, 1099/W-2 forms). Originals should be submitted.

#### **9. [§4.131] Earliest Time When Exemption Applies**

In general, a court determines if property is exempt based on the circumstances existing at the earliest of the following times (CCP §703.100(a)):

- The time of levy on the property;
- The time court proceedings were begun to apply the property to satisfy the money judgment; or
- The time an attachment or execution lien is created.

A court has the discretion to consider any of the following changes that have occurred between any of these times and the time of the hearing on the claim of exemption (CCP §703.100(b)):

- A change in the use of the property if the exemption is based on use and the property was used for an exempt purpose at the time of (a) the levy, (b) the commencement of the enforcement proceedings, or (c) the creation of the lien, but the property is used for a nonexempt purpose at the time of the hearing;
- A change in the value of the property if the exemption is based on value; or
- A change in the financial circumstances of the judgment debtor and the debtor's spouse and dependents if the exemption is based on their needs.

Whether property is exempt and any exemption amount is determined by applying the exemption statutes in effect at the time the judgment creditor's lien was created or, if the creditor has a series of overlapping liens, at the time the earliest lien was created. CCP §703.050(a). When a statute is amended to increase the exemption amount after the date the judgment lien was created but before the date of execution, the amount of the exemption is limited to that provided by the statute before the amendment. *Berhanu v Metzger* (1992) 12 CA4th 445, 447, 15 CR2d 191.

For a levy of execution, the procedures to follow in claiming and determining exemptions, and paying exemption proceeds, are governed by the law in effect at the time the levy is made on the property. The procedures to follow in levying on, selling, or releasing the property are also governed by the law in effect at the time of the levy. CCP §703.050(c).

#### **10. [§4.132] Exemptions When Judgment Debtor Is Married**

The statutory exemptions apply to all property of the judgment debtor that is subject to enforcement of a money judgment, including the interest of the debtor's spouse in the parties' community property. The fact that one or both spouses are judgment debtors or that the property is separate or community does not increase or reduce the number or amount of the exemptions. When the exemption is limited to a specified maximum dollar amount, the two spouses together are entitled to one exemption limited to this specified maximum, unless the particular exemption statute provides otherwise. CCP §703.110(a).

A number of exemption statutes specifically provide for a separate exemption for each spouse or for an exemption in a greater amount for a married couple, for example:

- The exemption for personal property used in a trade, business, or profession. CCP §704.060.
- The exemption for the loan value of unmaturing life insurance, endowment, and annuity policies. CCP §704.100.
- The exemption for deposit accounts in which Social Security payments or specified public benefits are directly deposited. CCP §704.080.
- The exemption for materials for repair or improvements of the debtor's dwelling. CCP §704.030.
- The homestead exemption for the debtor's dwelling. CCP §704.730(b).

If the same exemption is claimed by the judgment debtor and the spouse for different property, and only one exemption is allowed, the court must apply the exemption as the spouses agree. If the spouses cannot agree, the court has discretion to determine how to apply the exemption. CCP §703.110(c). In exercising this discretion, the court might consider the following:

- How to apply the exemption to maximize the benefit or minimize the detriment to the community property;
- How to apply the exemption in the best interests of the spouses' children;
- Reasonableness of the spouses' respective claims;
- Judgment creditor's preference;
- Preference of the nondebtor spouse; and
- Source of the income used to acquire the two properties where exemption is claimed.

If a statute requires that the exemption be applied first to property not before the court and then to property before the court, the application of the exemption to property not before the court must be made to the community property and to the separate property of both spouses, regardless of whether this property is subject to enforcement of a money judgment. CCP §703.110(b).

### **11. [§4.133] Use of Exempt Property to Satisfy Support Judgment**

Except as to property that is exempt without making a claim, if property sought to be applied to the satisfaction of a judgment for child, family, or spousal support is shown to be exempt, the court must, on noticed motion of the judgment creditor, determine the extent to which the exempt property nevertheless may be applied to the satisfaction of the judgment. In making this determination, the court takes into account the needs of the judgment creditor, the needs of the judgment debtor and all the persons the judgment debtor is required to support, and all other relevant circumstances. The court must effectuate its determination by an order specifying the extent to which the otherwise exempt property is to be applied to satisfy the judgment. CCP §703.070(c).

### **12. [§4.134] Need-Based Exemptions**

In ruling on an exemption based on the needs of the judgment debtor and of the debtor's spouse, dependents, or family, the court must take into account all the judgment debtor's property and, if the debtor has a spouse, dependents, or family, all property of these persons, including community property and the spouse's separate property, whether or not this property is subject to enforcement of the money judgment. CCP §703.115.

This provision creates an exception to the general rule that property that is not liable for satisfying a judgment does not enter into an exemption determination. It provides an exception for exemptions based on the needs of the judgment debtor and of the debtor's spouse and dependents. In such cases, the court must consider both liable and nonliable property in determining need. See Comment to CCP §703.110.

The portion of a judgment debtor's earnings that the judgment debtor proves is necessary for self-support or the support of the judgment debtor's family (including a former spouse) in whole or in part is exempt from levy by wage garnishment, unless one of the following exceptions, among others, applies (CCP §706.051(a)–(b)):

- The order is a withholding order for support under CCP §706.030 (CCP §706.051(c)(3)); or
- The debt was incurred under an order or award for the payment of attorney's fees under Fam C §2030, §3121, or §3557 (CCP §706.051(c)(1)).

### **13. [§4.135] Tracing Exempt Funds**

A fund that is exempt remains exempt to the extent it can be traced to a deposit account or cash or its equivalent (cashier's or certified checks, or money orders). CCP §703.080(a) and Comment. The ability to trace an exempt fund is subject to any limitations provided in the particular exemption. CCP §703.080(a).

Certain proceeds may be traced as exempt only for a limited period. Comment to CCP §703.080. For example:

- Ninety days for proceeds of sale of a motor vehicle (CCP §704.010(b)), household furnishings and other personal effects (CCP §704.020(c)), or personal property used in a trade, business, or profession (CCP §704.060(b)).
- Six months for proceeds of sale of a claimed homestead (CCP §704.720(b)) or a declared homestead (CCP §704.960(b)).

The burden of tracing an exempt fund is on the exemption claimant. CCP §703.080(b). This is consistent with the general burden placed on the claimant in exemption proceedings under CCP §703.580(b). Comment to CCP §703.080.

The tracing of exempt funds in a deposit account must be by applying the lowest intermediate balance principle, unless the claimant or judgment creditor shows that some other tracing method would be more just under the circumstances. CCP §703.080(c). Under this principle, the exempt fund may not exceed the lowest balance occurring at any time between the deposit of the exempt amount of money and the time of levy. New deposits do not replenish the original exempt fund, but new deposits may themselves be exempt. See Comment to CCP §703.080 (example of applying lowest intermediate balance principle).

### **14. [§4.136] Order on Claim of Exemption and Appeal**

The court must issue an order as to whether the property is exempt in whole or in part. Findings are not required. The order determines the creditor's right to apply the property to satisfy the judgment, subject to the right to appeal from the order under CCP §703.600. CCP §703.580(d). The clerk must promptly transmit a certified copy of the order to the levying officer, who must then release the property or apply it to satisfy the judgment. CCP §703.580(e).

A court's order granting or denying a claim of exemption is appealable. CCP §703.600; *Schwartzman v Wilshinsky* (1996) 50 CA4th 619, 626, 57 CR2d 790. Notice of any appeal must be given to the levying officer, who must hold, release, or dispose of the property in accordance with the provisions governing enforcement and stay of enforcement of money judgments pending appeal. CCP §703.610(c). Unless the court orders otherwise, if an exemption is not

determined within the time provided by CCP §703.570, the property claimed to be exempt must be released. CCP §703.580(f).

### 15. [§4.137] Recovery of Costs of Levy

If the judgment creditor fails to timely oppose the debtor's claim of exemption, or a court determines the property is exempt, and the creditor thereafter levies on or seeks to apply the property to satisfy the judgment, the creditor is not entitled to recover subsequent costs of collection unless the property is applied to satisfy the judgment. CCP §703.090. This provision is intended to deter a judgment creditor from making repeated levies on the same property. It does not affect any right the debtor may have to recover damages for abuse of process. Comment to CCP §703.090.

### C. [§4.138] No Limitations Period on Support Enforcement

Judgments for child, family, or spousal support, including judgments for arrearages or reimbursement (Fam C §17402 public assistance reimbursement or otherwise) and all lawful interest and penalties, are exempt from any requirement that judgments be renewed. Such judgments are enforceable until paid in full and, as to child support, notwithstanding that the child has reached age 18. There is thus no limitations period on enforcement. Fam C §§291(a)–(b), 4502, 4503, 17400(e); see *Marriage of Hamer* (2000) 81 CA4th 712, 722, 97 CR2d 195, superseded by statute as stated in 39 C4th 179, 185 n6; *Marriage of Cutler* (2000) 79 CA4th 460, 473–474, 94 CR2d 156 (unenforced child support judgment that became “dormant” under prior law remains enforceable under current law).

Choice-of-law rules under the Uniform Interstate Family Support Act (UIFSA) (Fam C §§5700.101 et seq) and the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 USC §1738B), ensure that sister-state support orders will be enforceable in California under the same open-ended period until paid in full, even though a shorter statute of limitations might apply under the laws of the state where the order was made. 28 USC §1738B(h)(3); Fam C §4820; *Marriage of Ryan* (1994) 22 CA4th 841, 848–850, 27 CR2d 580.

California's longer statute of limitations, however, cannot revive a “dead judgment.” Thus, a California court cannot enforce an out-of-state support order that has been declared void by the issuing state because of the passage of time. *Scheuerman v Hawk* (2004) 116 CA4th 1140, 1141–1142, 11 CR3d 125.

Although it is not required, judgments for child, family, or spousal support, including judgments for arrearages or for reimbursement, may be renewed under the general procedures for renewal of money judgments (CCP §§683.110 et seq) if the judgment was never renewed as to any past-due amounts. If it has been previously renewed, the judgment may be renewed as to the previously renewed amount and any amounts that came due after the earlier renewal, but only after at least 5 years have elapsed from the last renewal. Fam C §291(c).

*Note:* A trust deed that secures a promissory note issued in connection with a family law judgment expires 10 years after the maturity date, as provided by the Marketable Record Title Act (MRTA), because Fam C §291 does not bar the expiration. However, the underlying family law judgment is not rendered unenforceable by the MRTA. *Schelb v Stein* (2010) 190 CA4th 1440, 1448–1449, 119 CR3d 267.

Where support orders have been issued, and have not yet been terminated, there is a prohibition of dismissals for delay in prosecution under CCP §583.161; for a discussion on duration of child support orders, see §4.183.

## **D. Collateral Attack (Void Judgments and Orders)**

### **1. [§4.139] Nature of Collateral Attack**

Jurisdictionally defective judgments are open to challenge at any time by “collateral attack.” Basically, a collateral attack may be raised in an independent proceeding to set aside the judgment or as a defense to enforcement of the judgment on the theory the court had no power to enter the judgment. *Armstrong v Armstrong* (1976) 15 C3d 942, 950, 126 CR 805; see *McCallum v McCallum* (1987) 190 CA3d 308, 314, 235 CR 396. A final judgment shown to be jurisdictionally defective is void and thus not entitled to full faith and credit.

A direct attack challenges the judgment in the same proceeding out of which it arose (*e.g.*, by motion to vacate, for new trial, or appeal), whereas collateral attack is available only on jurisdictional grounds and is made in an independent proceeding.

For further discussion of direct versus collateral attacks, see 8 Witkin, *California Procedure, Attack on Judgment in Trial Court* (5th ed 2008).

### **2. [§4.140] Domestic vs. Foreign Judgments**

Both in-state and out-of-state judgments may be subject to collateral attack on like grounds, with one significant distinction: a California judgment is conclusively presumed valid unless jurisdictional defects appear on the face of the record. Collateral attack on another state’s judgments, on the other hand, can be supported by extrinsic evidence, even if the judgment contains recitals of jurisdiction. *Marriage of Leff* (1972) 25 CA3d 630, 636, 102 CR 195; see *Marriage of Nosbisch* (1992) 5 CA4th 629, 635, 6 CR2d 817 (“court’s recital in its order that it had jurisdiction . . . does not make that recited statement law”).

### **3. Grounds for Collateral Attack**

#### **a. [§4.141] Lack of Subject Matter Jurisdiction**

A marriage dissolution judgment is subject to collateral attack, for example, if based on defective “domicile” jurisdiction. A paternity order is subject to collateral attack if the rendering court lacked UPA jurisdiction.

When courts of two states have concurrent jurisdiction over the same parties and subject matter (concurrent “domicile jurisdiction” to adjudicate termination of marital status based on each party’s separate domicile), the second court to acquire jurisdiction by service of process will generally, on motion, stay its proceedings as a matter of comity in deference to the first forum’s jurisdiction. *Leadford v Leadford* (1992) 6 CA4th 571, 574, 8 CR2d 9. But neither forum’s subject matter jurisdiction to hear the case is impeded unless and until the action in the other forum proceeds to final judgment. *Leadford v Leadford, supra*, 6 CA4th at 574; compare *Marriage of Zierenberg* (1994) 11 CA4th 1436, 1444–1445, 16 CR2d 238.

### **b. [§4.142] Constitutionally Defective Notice**

A judgment entered on defective notice of the underlying proceeding is void and subject to collateral attack. See *Marriage of Van Sickle* (1977) 68 CA3d 728, 740, 137 CR 568 (substantial deviations between original complaint and copy served on respondent); *Marriage of Kreiss* (1990) 224 CA3d 1033, 1039–1040, 274 CR 226 (noncompliance with Fam C §215 (former CC §4809) requiring mandatory service of modification or other postdissolution motions on opposing party is the equivalent of failure to serve summons and complaint).

### **c. [§4.143] Defective Personal Jurisdiction**

A judgment imposing personal obligations (support) is void and subject to collateral attack if the forum court lacked personal jurisdiction over the obligor. See *Kulko v Superior Court* (1978) 436 US 84, 98 S Ct 1690, 56 L Ed 2d 132; *Marriage of Stich* (1985) 169 CA3d 64, 214 CR 919; *Marriage of Nosbisch* (1992) 5 CA4th 629, 6 CR2d 817; *David L. v Superior Court* (2018) 29 CA5th 359, 240 CR3d 462.

### **d. [§4.144] Nonjurisdictional Errors**

Alleged “defects” in the underlying judgment that do not implicate the court’s fundamental power to act cannot be raised by collateral attack. *Armstrong v Armstrong* (1976) 15 C3d 942, 950–951, 126 CR 805; *McCallum v McCallum* (1987) 190 CA3d 308, 314, 235 CR 396. Thus once the judgment becomes final, it is no defense to enforcement that, for example, the underlying complaint failed to state a cause of action, that the judgment was based on insufficient evidence, that the court abused its discretion, or that the court misapplied applicable law or erroneously decided the facts. These are all nonjurisdictional errors that may be raised, if at all, only by direct attack on the judgment. *Armstrong v Armstrong, supra*, 15 C3d at 950; *Bank of America Nat’l Trust & Sav. Ass’n v Jennett* (1999) 77 CA4th 104, 118, 119, 91 CR2d 359; see also *Marriage of Maxfield* (1983) 142 CA3d 755, 759, 191 CR 267 (a support modification without a finding of changed circumstances, though arguably exceeding the court’s authority, is a nonjurisdictional mistake of law).

## **4. [§4.145] Res Judicata Limitation on Standing**

If the disputed issue has already been litigated by the parties or could have been litigated in the underlying proceeding, the determination is res judicata and cannot be challenged by collateral attack in a later proceeding. *Moffat v Moffat* (1980) 27 C3d 645, 654, 165 CR 877; *County of San Diego v Hotz* (1985) 168 CA3d 605, 214 CR 658; *Smith v Smith* (1981) 127 CA3d 203, 179 CR 492 (prior judgment binding even if incorrectly decided).

Collateral attack will be barred by res judicata if (see *Sherrer v Sherrer* (1948) 334 US 343, 351–352, 68 S Ct 1087, 92 L Ed 2d 1429; *Heuer v Heuer* (1949) 33 C2d 268, 201 P2d 385; *Souza v Superior Court* (Bristow) (1987) 193 CA3d 1304, 1311, 238 CR 892):

- The challenging party participated in the underlying proceeding;
- The challenging party had a full opportunity to contest the rendering court’s jurisdiction, even if the jurisdictional issue was not actually raised; and
- The judgment could not be collaterally attacked in the rendering state.

The type of participation that bars relitigation, however, is a general appearance. A spouse who makes only a motion to quash service of summons has not participated for res judicata purposes; nor is there effective participation by a spouse whose only appearance is an unsuccessful motion to set aside a default judgment. *Johnson v Johnson* (1968) 259 CA2d 139, 143–146, 66 CR 172.

The challenging party must have had a fair opportunity to participate in the proceeding on its merits. Thus, if a fair chance to litigate has been denied by extrinsic fraud or mistake, the jurisdictional issue can be raised by collateral attack. *Aldabe v Aldabe* (1962) 209 CA2d 453, 471–476, 26 CR 208. For example, the following acts constitute extrinsic fraud (*Marriage of Stevenot* (1984) 154 CA3d 1051, 1069, 202 CR 116):

- The failure to disclose to the court the inability of the other party to participate;
- Failure to give notice of an action, or obtaining a judgment without the other party knowing, while reconciled with the other party;
- Convincing the other party not to obtain counsel because the matter is not going to proceed; or
- Completing a dissolution after representing that it would not proceed without further notice.

☛ **JUDICIAL TIP:** Traditional equitable relief is preempted in part by statute. See Fam C §§2120 et seq (relief from post-1992 property division or support judgments in dissolution, legal separation, or nullity proceedings), §§3691 et seq (relief from support orders in other civil actions). For further discussions, see [§4.162](#).

A judgment is subject to collateral attack in the rendering state, and thus not res judicata in the enforcing state, if it lacks recital of facts establishing jurisdiction, or if it appears on the face of the record that the court exceeded its jurisdiction. *Craig v Superior Court* (Fountaine) (1975) 45 CA3d 675, 680, 119 CR 692.

## **E. [§4.146] Contempt Bar to Enforcement**

While a party to a divorce or separate-maintenance action held in contempt of court generally may not enforce a judgment against the opposing party, this restriction does not affect the enforcement of child or spousal support orders. CCP §1218(b). Neither an obligor parent's duty to support a minor, nor a court's attempt to enforce that duty, is affected by the other parent's failure or refusal to implement the obligor's right to custody or visitation. Fam C §3556.

## **F. Equitable Offset**

### **1. [§4.147] Offsetting Judgments**

A judgment debtor who has obtained a judgment against the judgment creditor may file a motion, in the court where the judgment against the debtor was rendered, for an order offsetting the debtor's judgment against the creditor's judgment. The offset of judgments is a matter of right in the absence of facts establishing competing equities or an equitable defense precluding the offset. *Brienza v Tepper* (1995) 35 CA4th 1839, 1847–1848, 42 CR2d 690. The right to an equitable offset exists independently of statute and rests on a court's inherent power to afford

justice to the parties who are before the court. *Aplanalp v Forte* (1990) 225 CA3d 609, 615, 275 CR 144.

## 2. [§4.148] Equitable Offset Against Child Support

A trial court maintains continuing equitable jurisdiction to determine the manner in which a child support order or judgment will be paid and to consider the extent to which a defaulting parent has satisfied or otherwise discharged a support obligation. The court has the equitable power to modify the manner in which support payments are made or deemed satisfied. *Marriage of Trainotti* (1989) 212 CA3d 1072, 1075, 261 CR 36; *Jackson v Jackson* (1975) 51 CA3d 363, 124 CR 101.

Accordingly, the trial court may give credit for past overpayment (*Marriage of Peet* (1978) 84 CA3d 974, 980–981, 149 CR 108) or “permit only partial enforcement or ... quash, in toto, a writ of execution directed against a parent in arrearage who, during the period in question, has had the sole physical custody of the child.” *Marriage of Trainotti, supra*, 212 CA3d at 1075; see also *Marriage of Dandona & Araluce* (2001) 91 CA4th 1120, 1126–1127, 111 CR2d 390 and *Helgestad v Vargas* (2014) 231 CA4th 719, 180 CR3d 318 (credit for in-home support during subsequent reconciliation).

## G. [§4.149] Laches as Defense to Amount Owed to State

Family Code §291(d) provides that in proceedings to enforce judgments for child, family, and spousal support, obligors may raise the defense of laches, and courts may consider that defense, only as to any amount that the obligor owes to the state. This statute has retroactive effect and bars the defense of laches for support obligations other than to the state for support accrued before its effective date of January 1, 2003. *Marriage of Fellows* (2006) 39 C4th 179, 186, 46 CR3d 49 (construing former Fam C §4502(c)).

## H. [§4.150] Waiver and Estoppel

Waiver and estoppel as defenses to actions for arrearages are discussed in [§§4.186–4.189](#).

# V. SETTING ASIDE JUDGMENTS AND ORDERS

## A. [§4.151] Scope

This part reviews the different methods and theories available to set aside an order or judgment for child support, including those under general civil procedure provisions and provisions specific to the Family Code, and in particular with regard to parentage determinations.

*Note: Depending on the remedy invoked and the specific facts involved, an underlying judgment or order may be voidable or void.*

For a convenient chart summarizing methods for setting aside judgments or orders relating to child support and parentage, see [Appendix J](#).

## **B. [§4.152] General Civil Remedies**

For more detailed coverage of these remedies, see California Judges Benchbook: Civil Proceedings—After Trial (Cal CJER) chap 1, *Relief From Default and Default Judgments*.

*Reconsideration:* Prior to, separate from, and even after seeking a set aside, an Application for Reconsideration may be filed: any party affected by an order made on application and refused in whole or in part, or granted, or granted conditionally, or on terms, may, within 10 days after service on the party of written notice of entry of the order and based on new or different facts, circumstances, or law, apply to the same judge who made the order to reconsider the matter and modify, amend, or revoke the prior order. CCP §1008(a). The new or different facts must not have been known or could not have been reasonably ascertained at the time of the original hearing. Motions for reconsideration apply to renewed applications for relief from default, including one made under CCP §473(b) and must follow the strict requirements found in CCP §1008. *Even Zohar Construction Remodeling Inc v Bellaire Townhouses LLC* (2015) 61 C4th 830, 189 CR3d 824. See also §2.11.

### **1. [§4.153] Mistake, Inadvertence, Surprise, and Excusable Neglect**

Judgments or orders that have been entered by the mistake, inadvertence, surprise, or excusable neglect of a party may be set aside. CCP §473(b). Code of Civil Procedure §473 is frequently used when a default has been entered. The cases interpreting this section state that the preference is that matters be decided on the merits and not by default. See *Rodrigues v Superior Court* (2005) 127 CA4th 1027, 26 CR3d 194. The motion must be made within a reasonable time, in no event longer than 6 months after the judgment, dismissal, order, or proceeding was taken. It must be accompanied by the proposed responsive pleading. CCP §473(b).

### **2. [§4.154] Attorney Mistake**

If the attorney for the defaulted party provides a declaration admitting his or her own mistake, the set aside is mandatory if it is timely requested. When relief is granted, the court must order the attorney to pay attorney's fees and costs to the opposing counsel or parties. CCP §473(b).

"Ineffective assistance of counsel" is not a basis to set aside a judgment in a dissolution matter because there is no right to counsel in dissolution proceedings. *Marriage of Campi* (2013) 212 CA4th 1565, 1575, 152 CR3d 179. This principle will likely also apply in other matters where DCSS is involved, except parentage, contempt, and other criminal enforcement actions, as individuals do have the right to counsel in those matters.

### **3. [§4.155] Service of Process Issues**

There are several issues that can arise surrounding service: the service itself can be defective, or the service method utilized did not give actual notice.

#### **a. [§4.156] Defective Service**

When service of process is defective (such as a summons and complaint served at an incorrect address), the court never properly acquires jurisdiction, and any orders or judgments

taken in that proceeding by default are void and may be set aside at any time. Also, if the court never acquires personal jurisdiction (*e.g.*, no long-arm jurisdiction), the judgment is void and can be set aside. See CCP §473(d). The mere fact that a person has or had actual knowledge of the action does not “cure” a *void* judgment.

*Note:* There is an excellent discussion of the various methods of service of process and the rules governing service in *American Express Centurion Bank v Zara* (2011) 199 CA4th 383, 131 CR3d 99 (process server’s claimed personal service found defective).

If the summons and complaint are not properly or timely served, the court may find that the judgment entered in the action was entered in excess of the court’s jurisdiction. For example, a summons and complaint must be served within 3 years of the start of an action. An action begins at the time the complaint is filed. CCP §583.210(a). If the action did not begin within this time frame, the court must dismiss the action or may find the judgment to be invalid.

Once a trial court finds that a default judgment is void, as a consequence of the filing of a false proof of service, the trial court is required to dismiss the action. *County of San Diego v Gorham* (2010) 186 CA4th 1218, 1229, 1234, 113 CR3d 147. See also *Yolo County DCSS v Myers* (2016) 248 CA4th 42, 49, 205 CR3d 96, which held that *Gorham* is limited to its facts and when there is a presumption of valid service the party challenging the service must adequately rebut that presumption with evidence other than mere self-serving testimony.

#### **b. [§4.157] Lack of Actual Notice**

If the service of the summons did not give actual notice of the proceedings, relief may be granted if requested within 2 years after entry of judgment or 180 days after service of the notice of entry of judgment, whichever is earlier. CCP §473.5(a). Relief under this section is available if lack of notice was not the result of respondent’s avoidance of service or inexcusable neglect. CCP §473.5(c).

#### **4. [§4.158] Extrinsic Fraud or Mistake**

Extrinsic fraud or mistake is also a ground for relief from a default judgment. This is based on the court’s inherent equitable power when the respondent shows (1) a meritorious defense, (2) a satisfactory excuse for not presenting the defense earlier, and (3) diligence in seeking relief after discovering the default. *Gibble v Car-Lene Research, Inc.* (1998) 67 CA4th 295, 315, 78 CR2d 892. Because public policy favors the finality of judgments, the fraud must be extrinsic, not intrinsic. See *Parage v Couedel* (1997) 60 CA4th 1037, 1042, 1044, 70 CR2d 671; see also [§4.172](#) (definition of extrinsic fraud).

### **C. Family Code Remedies**

#### **1. [§4.159] Setting Aside Presumed Income Judgment**

When the court determines that the presumed income used to set support in a default judgment differs substantially from respondent’s actual income, the court may set aside the support order and enter a new order based on the actual income. Fam C §17432(a)–(c). “Substantial” is defined as enough of a difference to cause a reduction of support of at least 10

percent. Fam C §17432(c). For a form of declaration regarding a set-aside request, see form FL-643.

This motion may be made any time within 1 year of the first collection of child support by the LCSA or the obligee. Fam C §17432(f). For a form of notice and motion to set aside an order based on presumed income, see form FL-640. Before ruling on the motion, the court must consider (Fam C §17432(h)):

- The amount of time that has passed since the order's entry;
- The circumstances surrounding the respondent's default;
- The relative hardship on the children to whom the duty of support is owed, the caretaker parent, and the respondent; and
- Other equitable factors that the court deems appropriate.

The new order begins on the same date as the order set aside. Fam C §17432(i).

➤ **JUDICIAL TIP:** This remedy is only available in cases that started out as government cases under Title IV-D and where a presumed income default judgment was entered. While the vast majority of presumed income set aside issues will arise in the Title IV-D court, it is possible the issue may come up in regular family law courts (*e.g.*, where DCSS closed its case and is no longer “involved” prior to the expiration of the 1 year timeframe after first collection).

Many pro per parents do not know what a “presumed income default judgment” is or what it means, it is also possible that many years may go by before there is any collection on such a default judgment. When a parent comes to court for the first time complaining about a large amount of arrears, a referral to the Family Law Facilitator on this issue may very well be appropriate.

## 2. [§4.160] Mistaken Identity

The respondent may also obtain relief from a judgment if the respondent can establish that he or she was mistakenly identified in the order or in any subsequent documents or proceedings as the person having an obligation to provide support. The motion can be brought at any time. Once mistaken identity is established, the child support collection stops, and in Title IV-D cases, DCSS is obligated to return all funds collected from the respondent to the extent that they have not been paid out to the other parent. Fam C §§17433, 17530.

## 3. Grounds Beyond CCP §473

### a. [§4.161] Support Orders

The court is authorized to set aside a child support order in whole or in part beyond the limits of CCP §473 on the following bases:

- *Lack of notice.* There is a 6-month limitation on the motion from the date the respondent received notice or should reasonably have had notice. Fam C §3691(c).
- *Actual fraud (extrinsic fraud).* This ground is available when the defrauded party was kept in ignorance or in some other manner, other than his or her own lack of care or attention, was fraudulently prevented from fully participating in the proceeding. There is

a 6-month limitation on the motion, from the date the fraud was discovered or should have been discovered. Fam C §3691(a); *Marriage of Zimmerman* (2010) 183 CA4th 900, 910, 109 CR3d 96.

- *Perjury*. There is a 6-month limitation on the motion, from the date the perjury was discovered or should have been discovered. Fam C §3691(b).
- *Equitable tolling*. Equitable tolling has been applied in carefully considered situations to prevent the unjust technical forfeiture of causes of action, when the respondent would suffer no prejudice. However, equitable tolling should not apply if it is inconsistent with the text of the relevant statute or contravenes clear legislative policy. As with other general equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the petitioner occasioned by the bar of his or her claim against the effect on the important public interest or policy expressed by the limitations statute. The petitioner bears the burden of proving the applicability of equitable tolling. *Marriage of Zimmerman* (2010) 183 CA4th 900, 911, 109 CR3d 96.
- *Void judgment or order*. A judgment or order void on its face, or otherwise void under the law, may be set aside at any time. CCP §473(d); *Renoir v Redstar Corp.* (2004) 123 CA4th 1145, 1154, 20 CR3d 603.

Family Code §3691 does not preempt a trial court's traditional or inherent equitable power to set aside a child support order or judgment. *County of San Diego v Gorham* (2010) 186 CA4th 1218, 1232, 113 CR3d 147.

Aside from the 6-month period specified in CCP §473(b) for moving to set aside an order, Fam C §3691 is the exclusive statutory set-aside remedy. After the CCP §473(b) 6-month time limit has run, the trial court may relieve a party from a support order based only on the grounds and within the time limits set forth in Fam C §§3691 et seq. *Marriage of Zimmerman* (2010) 183 CA4th 900, 910, 109 CR3d 96.

#### **b. [§4.162] Dissolution, Nullity, or Legal Separation Cases**

In dissolution, nullity, or legal separation cases, once the 6-month limitation for relief under CCP §473(b) has passed, Fam C §§2120 et seq provide the exclusive statutory grounds for relief from property division and support judgments entered on or after January 1, 1993. Fam C §§2121, 2129. The court may relieve a party from a judgment in such cases on the following grounds:

- *Mistake of law or fact (whether mutual or unilateral)*. There is a 1-year limitation from the entry of judgment. Fam C §2122(e).
- *Actual fraud (extrinsic fraud)*. This ground is available when the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. There is a 1-year limitation from when the respondent discovered or should have discovered the fraud. Fam C §2122(a).
- *Perjury*. This ground is available where there is perjury in the preliminary or final declaration of disclosure, the waiver of the final disclosure declaration, or the current

income and expense statement. There is a 1-year limitation from when the respondent discovered or should have discovered the perjury. Fam C §2122(b).

- *Failure to comply with disclosure requirements.* There is a 1-year limitation from the date noncompliance was discovered or should have been discovered. Fam C §2122(f).
- *Duress.* There is a 2-year limitation from the entry of judgment. Fam C §2122(c).
- *Mental incapacity.* There is a 2-year limitation from the entry of judgment. Fam C §2122(d).

A court does not have the authority to set aside a judgment “simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances cause the division of assets or liabilities to become inequitable, or the support to become inadequate.” Fam C §2123.

- **JUDICIAL TIP:** Family Code §§2120 et seq govern relief from support judgments or any parts of them in dissolution, legal separation, or nullity actions, while Fam C §§3691 et seq govern relief from support orders. Although similar, these statutory schemes are not identical; care should be taken to proceed under the correct scheme.

#### **4. Parentage**

##### **a. [§4.163] Introduction**

Attacking a judgment of parentage or challenging a parentage determination can effectively cause child support judgments or orders to be set aside. Procedures to establish parentage are discussed in Section III of Chapter 1 of this Handbook. That part includes a discussion of rescission of voluntary declarations of parentage within 60 days of execution and rebutting the conclusive and rebuttable presumptions of parentage. Other methods of attacking parentage determinations are discussed below.

##### **b. [§4.164] Motion to Set Aside Voluntary Declaration Within 2 Years of Birth**

Paternity can be established by the father and mother signing a voluntary declaration of paternity on a form provided by the hospital (if at birth) or by the court or the LCSA (Paternity Opportunity Program or “POP” form). Fam C §§7570 et seq; see Section III of Chapter 1 of this Handbook.

To set aside a voluntary declaration, a notice of motion for genetic tests may be filed not later than 2 years from the date of the child’s birth by (Fam C §7575(b)(3)):

- A local child support agency,
- The mother, or
- The man who signed the voluntary declaration as the child’s father.

The motion may be filed in (Fam C §7575(b)(3)):

- An action to determine the existence or nonexistence of a parent and child relationship under Fam C §7630, or
- Any action to establish an order for child custody, visitation, or child support based on the voluntary declaration of paternity.

Specific Judicial Council forms must be used to make and rule on the motion. See forms FL-280 (request for hearing), FL-285 (responsive declaration), FL-290 (order after hearing); see also form FL-281 (optional information sheet).

*Note: Effective January 1, 2020: To set aside a voluntary declaration of parentage, a signatory may, within 2 years after the effective date provided in Fam C §7573(c), commence a proceeding to challenge the declaration on the basis of fraud, duress, or material mistake of fact. Fam C §7576(a). A person who is not a signatory to the declaration may challenge the declaration within 2 years after the effective date by filing a petition. Fam C §7577(d).*

Under Fam C §7575(b), if the motion is not filed within 2 years, the court has no power to order genetic testing absent extrinsic fraud. See *County of Orange v Superior Court* (Rothert) (2007) 155 CA4th 1253, 1260–1261, 66 CR3d 689.

- **JUDICIAL TIP:** It is important to note that this provision is separate and distinct from Fam C §7575(c), which may provide an alternative basis for ordering a genetic test outside of the 2-year time limit of Fam C §7575(b) and *Rothert*. See §4.165. After January 1, 2020, either procedure may be available only for non-signatories of the declaration.

*Determining factors.* If the court finds that the conclusions of all the experts based on the results of the genetic tests performed under Fam C §7550 are that the man who signed the voluntary declaration is not the father of the child, the court may set aside the voluntary declaration of paternity unless the court determines that denial of the action is in the child's best interest. The court must consider all the following factors (Fam C §7575(b)(1)):

- The child's age.
- The length of time since the execution of the voluntary declaration by the man who signed the declaration.
- The nature, duration, and quality of any relationship between the man who signed the voluntary declaration and the child, including the duration and frequency of any time periods during which the child and the man resided in the same household or enjoyed a parent-child relationship.
- The request of the man who signed the voluntary declaration that the parent-child relationship continue.
- Notice by the biological father of the child that he does not oppose preservation of the relationship between the man who signed the voluntary declaration and the child.
- The benefit or detriment to the child in establishing the biological parentage of the child.
- Whether the conduct of the man who signed the voluntary declaration has impaired the ability to ascertain the identity of, or get support from, the biological father.
- Additional factors deemed by the court to be relevant in determining the child's best interest.

If the court denies the action, the court must state on the record the basis for the denial and any supporting facts. Fam C §7575(b)(2). For compensation of experts, see Fam C §7553.

*Note: Effective January 1, 2020, these factors may only be available to challengers who are non-signatories to the declaration. If the challenger is a signatory, then new Fam C §7576 would limit a challenger to factors involving fraud, duress, or material mistake of fact.*

### c. [§4.165] Motion to Set Aside Voluntary Declaration Under CCP §473

Either parent may file a motion or action to set aside a voluntary declaration of paternity based on the grounds and within the time limits of CCP §473, which provides for relief from mistake, inadvertence, surprise, or excusable neglect. The applicable time limits under section 473 begin on the date the court makes an *initial* order for custody, visitation, or child support based on the voluntary declaration of paternity. Fam C §7575(c)(1).

- **JUDICIAL TIP:** This provision is separate and distinct from Fam C §7575(b) (set aside POP declaration within 2 years of birth) discussed above.

Nothing in Fam C §7575(c) is intended to restrict a court from acting as a court of equity. Fam C §7575(c)(4). Some interpret this provision to allow expansion of the more specific time constraints in that section.

If the voluntary declaration is set aside, the court must order that the mother, child, and alleged father submit to genetic tests. Fam C §7575(c)(5).

Specific Judicial Council forms must be used to make and rule on this motion. See forms FL-280, FL-285, FL-290; see also form FL-281 (optional information sheet). For more details about CCP §473 procedures, see California Judges Benchbook: Civil Proceedings—After Trial (Cal CJER) chap 1, *Relief From Default and Default Judgments*, and chap 3, *Other Postjudgment Proceedings*.

*Note: Effective January 1, 2020: To set aside a voluntary declaration of parentage, a signatory may, within 2 years after the effective date provided in Fam C §7573(c), commence a proceeding to challenge the declaration on the basis of fraud, duress, or material mistake of fact. Fam C §7576(a).*

### d. [§4.166] Motion to Set Aside Voluntary Declaration by Presumed Parent Under Fam C §7612(d)

A person who is presumed to be a parent under Fam C §7611 may file a petition under Fam C §7630 to set aside a voluntary declaration of parentage within 2 years of its execution. Fam C §7612(e).

The court ruling on the petition must take into account the declaration's validity and the child's best interest, based on factors in Fam C §7575(b) and on the nature, duration, and quality of the petitioner's relationship with the child and the benefit or detriment of continuing that relationship. If there is any conflict between the presumption under Fam C §7611 and the voluntary declaration, the weightier considerations of policy and logic control. Fam C §7612(e). In an appropriate action, the court may find that more than two persons with a claim to parentage under Division 12 of the Family Code (Fam C §§7500 et seq) are parents if the court finds that recognizing only two parents would be detrimental to the child. Fam C §7612(c); see [§1.25](#).

Unless the court orders otherwise under Fam C §7612(c), a presumption under Fam C §7611 is rebutted by a judgment establishing parentage by another person. Fam C §7612(d).

The voluntary declaration is invalid if, at the time when the declaration was signed, any of the following conditions exist (Fam C §7612(f)):

- The child already had a presumed parent under Fam C §7540 (child of marriage);
- The child already had a presumed parent under Fam C §7611(a), (b), or (c) (man and natural mother married, or attempted marriage before or after birth); or
- The man signing the declaration is a sperm donor, consistent with Fam C §7613(b).

*Note: Fam C §7573.5 provides that a voluntary declaration of parentage is void if, at the time of the signing, any of the following provisions exist:*

- 1. A person other than the woman who gave birth to the child or a person seeking to establish parentage through a voluntary declaration of parentage is a presumed parent under Fam C §7540 or Fam C §7611(a), (b), or (c).*
- 2. A court has entered a judgment of parentage of the child.*
- 3. Another person has signed a valid voluntary declaration of parentage.*
- 4. The child has a parent under Fam C §7613 or Fam C §7962 other than the signatories.*
- 5. The person seeking to establish parentage is a sperm or ova donor under Fam C §7613(b) or (c).*
- 6. The person seeking to establish parentage asserts that he or she is a parent under Fam C §7613 and the child was not conceived through assisted reproduction.*

### **e. Motion to Set Aside Parentage Judgment (Paternity Disestablishment)**

#### **(1) [§4.167] Availability**

Family Code §§7645 et seq provide a motion procedure for setting aside judgments when parentage has been established in specified cases in the family law court, in the juvenile court (whether under dependency or delinquency statutes), or by a voluntary declaration. Fam C §7645(b). The following types of cases or judgments are excluded from this process:

- Dissolutions, nullities, or legal separation proceedings. Fam C §7645(b).
- Judgments from another state. Fam C §7648.3(a).
- A judgment based on genetic tests conducted before the entry of judgment that did not exclude the previously established father as the biological father of the child. Fam C §7648.3(b).
- Adoptions. Fam C §7648.8. (“This article does not establish a basis for termination of any adoption, and does not affect any obligation of an adoptive parent to an adoptive child.”)

➤ **JUDICIAL TIP:** This provision does not necessarily preclude the court from ordering genetic testing in a case otherwise eligible under the statute just because the child has been adopted.

- Surrogacy or assisted reproduction cases. Fam C §7648.9.
- When conclusive marital presumptions apply. Fam C §§7646(b), 7647(a)(2)(D).

Given these exclusions, UPA or child support proceedings will be the primary forum for this motion. This procedure is sometimes known as “paternity disestablishment.”

## (2) [§4.168] Motion Procedures

The motion may be brought by the previously established parent, the child, or the legal representative of any of these persons. Fam C §7646(a). Specific Judicial Council forms must be used to make and rule on the motion. See forms FL-272 (notice of motion), FL-273 (supporting declaration), FL-276 (response), FL-278 (order after hearing); see also form FL-274 (optional information sheet).

Venue is not defined in the statute. In Title IV-D cases, DCSS has a policy that venue is proper where the support order is currently registered. See CSS Letter 06-16. Other procedural requirements for the motion are set forth in Fam C §7647.

➤ **JUDICIAL TIP:** If the motion is brought and determined in a court *other than* where the original judgment was entered (*e.g.*, due to registration and Fam C §5601(e)), then it is imperative that the court where the original judgment was entered be formally notified so that its records pertaining to that judgment are accurate and complete. Under such circumstances, it is suggested that a formal provision be included in any ruling that the original-judgment court be formally served with a copy of any ruling.

*Genetic testing.* The motion must be supported by genetic evidence excluding the adjudicated parent as the biological parent. Fam C §7646(a). Genetic testing must be performed by an accredited laboratory (Fam C §7552) and must be ordered if requested by any party authorized to bring the motion, or on the court’s own motion. Fam C §7647.7. A court cannot vacate a paternity judgment without conducting genetic testing. Failure of a nonmoving party and/or child to submit to genetic testing cannot be the basis for the setting aside of a judgment. *San Mateo County DCSS v Clark* (2008) 168 CA4th 834, 841–843, 85 CR3d 763.

*Statute of limitations.* The motion to set aside must be filed within 2 years commencing with the date on which the previously established father knew or should have known of a judgment that established him as a father of the child, or commencing with the date the previously established father knew or should have known of the existence of an action to adjudicate the issue of parentage, whichever occurs first. Fam C §7646(a)(1).

A third deadline for a motion to set aside a default parentage judgment more than 2 years old expires by its own terms in 2006 (2 years after enactment of the legislation). Fam C §7646(a)(3). Reconsideration of this motion may be granted if (1) the motion was filed between September 24, 2006, and December 31, 2006; (2) the motion was denied solely on the basis that it was untimely; and (3) the motion for reconsideration is filed on or before December 31, 2009. Fam C §7646(c).

### (3) [§4.169] Determining Motion

If the court grants the motion, it must vacate any ongoing order for child support and arrearages accrued based on the previous judgment of paternity. There is no right to recover any previously paid child support or arrears. Fam C §7648.4; *County of Los Angeles v James* (2007) 152 CA4th 253, 256–257, 60 CR3d 880.

If the results of the genetic tests indicate that the previously established parent is not the biological parent, the court may nevertheless deny the motion to set aside the judgment if it determines that denying the motion would be in the child's best interest, such as when the child and adjudicated parent have developed a strong bond and the child looks to that person as a parent. The court must consider the following factors before making its determination (Fam C §7648(a)–(h)):

- The child's age;
- The length of time since entry of the parentage judgment;
- The nature, duration, and quality of any relationship between the previously established father and the child, including duration and frequency of any time they resided together or enjoyed a parent-child relationship;
- The request of the previously established father that the parent-child relationship continue;
- Notice by the biological father that he does not oppose preservation of the relationship between the previously established father and the child;
- The benefit or detriment to the child in establishing the genetic father as the parent of the child;
- Whether the conduct of the previously established father has impaired the ability to ascertain the identity of, or get support from, the biological father; and
- Any additional factors the court deems relevant to its determination.

If the court denies the motion when genetic testing excludes the adjudicated parent, it must state, on the record, the basis for the denial and any supporting facts. Fam C §§7648, 7648.1.

### f. [§4.170] Other Attacks on Parentage Judgment

Aside from the challenges discussed above that pertain to set asides of voluntary paternity declaration and paternity judgments (disestablishment), there are still other ways in which a paternity judgment may be attacked.

### (1) [§4.171] Motion to Set Aside Paternity Stipulation

Family Code §17416 provides a procedure by which a noncustodial parent and the LCSA may stipulate to a judgment of paternity. The noncustodial parent must specifically waive due process rights before judgment is entered. Fam C §17416(b). Such a stipulation is voidable if the parent was unrepresented by counsel and can establish that he was not advised of his right to trial, he was unaware of that right, and if he had been aware of that right he would not have executed the agreement. See *County of Los Angeles v Soto* (1984) 35 C3d 483, 486, 198 CR 779.

Stipulations regarding parentage and stipulated judgments can also occur in other types of actions, and it is equally important to get a proper waiver of due process rights. See §1.11. Failure to adhere to the proper advisements and waiver can render a judgment voidable (not void) and subject to attack.

### (2) [§4.172] Direct and Indirect Attacks on Parentage Judgment

A judgment determining parentage may also be attacked by (*Adamson v Adamson* (1962) 209 CA2d 492, 500, 26 CR 236; *Marriage of Guardino* (1979) 95 CA3d 77, 86, 156 CR 883):

- A timely motion for a new trial,
- A timely appeal,
- A timely motion for relief under CCP §473, or
- An independent suit in equity.

If a suit in equity is brought, the general rule is that only *extrinsic* fraud provides a basis for equitable relief. See 95 CA3d at 88. Extrinsic fraud occurs when a party is deprived of the opportunity to present its claim or defense to the court and when the party was kept ignorant or, other than from the party's own negligence, fraudulently prevented from fully participating in the proceedings. *City & County of San Francisco v Cartagena* (1995) 35 CA4th 1061, 1065, 1067, 41 CR2d 797; *County of San Diego v Gorham* (2010) 186 CA4th 1218, 1228–1229, 113 CR3d 147. By contrast, fraud is *intrinsic* and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present its case and to protect itself from any mistake or fraud of its adversary but has unreasonably neglected to do so. *City & County of San Francisco v Cartagena, supra*, 35 CA4th at 1067–1068; see *Margarita D.* (1999) 72 CA4th 1288, 1295, 85 CR2d 713. A false return of summons may constitute both extrinsic fraud and mistake. *County of San Diego v Gorham, supra*, 186 CA4th at 1229.

### (3) [§4.173] Equitable Grounds for Relief From Judgment

If statutory remedies are unavailable, courts nevertheless have equitable powers to set aside judgments, although such powers may be limited. For example, even though it was intrinsic fraud, the court in *County of Los Angeles v Navarro* (2004) 120 CA4th 246, 14 CR3d 905, held that equity could be invoked to set aside a 5-year-old default paternity judgment when the county conceded that the respondent had been mistakenly charged with being the child's father. When a mistake occurs in a child support action, the county must correct it, not exploit it. The county should not enforce child support judgments it knows to be unfounded.

Compare the case of *County of Fresno v Sanchez* (2005) 135 CA4th 15, 37 CR3d 192, in which the court declined to follow *Navarro*. The respondent in *Sanchez* had filed a motion in 2003 to set aside a 1996 default paternity judgment on the ground that the alleged DNA testing excluded the respondent as the biological father. The appellate court affirmed the denial of the motion to vacate the default paternity judgment, holding that the trial court was following the law in effect at that time. In dicta, the court opined that the recently enacted statutory scheme under Fam C §§7645 et seq (see §4.167), which provides a remedy for parents in similar situations, vitiated *Navarro*.

- JUDICIAL TIP: It appears that *Navarro* and *Sanchez* may both still be good law, although possibly presenting conflicting views. A portion of Fam C §§7645 et seq,

specifically Fam C §7646(a)(3), expired in 2006 (2 years from enactment). Arguably this may be a factor to consider in determining if *Navarro* remains viable.

#### **D. [§4.174] Violation of Servicemembers Civil Relief Act**

When a default judgment is entered against a military respondent, the respondent may apply, within 90 days after termination of military service, to open and vacate the judgment under the Servicemembers Civil Relief Act (SCRA). 50 USC §§3901 et seq. The respondent must establish that (50 USC §3931(g)):

- The respondent was materially affected by reason of military service in defending the action or proceeding; and
- The servicemember has a meritorious legal defense to all or part of the action.

For further discussion of the SCRA, see [§§2.62–2.70](#).

### **VI. DETERMINING ARREARS**

#### **A. [§4.175] Introduction**

In general, support arrearages may be determined by judgment, noticed motion, renewal of judgment, or registration of the support order. In Title IV-D proceedings, every applicant for support enforcement services must provide a statement of arrearages under penalty of perjury, and any party may request a judicial determination of arrearages. Fam C §§17524, 17526. This part generally covers the various situations in which a request for determination of arrearages arises, along with the various theories that a court may encounter or consider on such requests, aside from a straightforward accounting (*e.g.*, whether completed payments were properly accounted for and applied).

This part does not cover the separate and distinct administrative review by the LCSA of arrearages under Fam C §17526, or the limited authority under DCSS's administrative State Fair Hearing complaint process, to address the issue of arrearages, both of which may occur before any judicial determination of arrearages. See Fam C §§17800, 17801. See [§§5.47–5.54](#) for more information on arrearages determinations by the LCSA.

#### **B. [§4.176] Public Policy and General Principles**

In determining arrearages, the court should consider the following policies and principles.

##### **1. [§4.177] Right to Support Cannot Be Waived by Agreement**

Under state public policy, a parent may not enter an agreement to waive or limit a child's right to support. Child support differs from spousal support in that it is a legal (law-imposed), not an equitable, right. Fam C §3585. Parents cannot agree to limit the power of the family law court with respect to the welfare of children. Thus, parents cannot abridge the court's ability to act on behalf of the children, either by direct attempts to terminate the court's power or by interference with the establishment or modification of child support orders. Stipulations between parents involving the minor children that attempt to divest the court of jurisdiction are void, and the doctrine of estoppel does not apply. *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1026, 230

CR 203; *Marriage of Lambe & Meehan* (1995) 37 CA4th 388, 393, 44 CR2d 641; *Marriage of LaBass & Munsee* (1997) 56 CA4th 1331, 1341, 66 CR2d 393; *Marriage of Alter* (2009) 171 CA4th 718, 89 CR3d 849.

## 2. [§4.178] Parents Have Equal Duty to Support Their Children

The responsibility to support one's children is placed on both parents equally. Fam C §3900. This mutual duty is a parent's first and principal obligation, and it requires that each parent pay for the support of the children according to that parent's ability. Fam C §4053(a), (d).

## 3. [§4.179] Priorities and Provisions Regarding Payment of Support

The Statewide Uniform Guideline seeks to place the interests of children as the state's top priority. Fam C §4053(e). Likewise, child support payments of the obligor come before debt payments to creditors. Thus, payment of child support ordered by the court must be made by the person owing the support payment before payment of any debts owed to creditors. Fam C §4011. Provisions for child support are deemed separate and severable from all other provisions of any agreement relating to property and spousal support. Fam C §3585.

## 4. Limitations on Court's Authority

### a. [§4.180] No Retroactive Modifications of Support Order or Accrued Arrearages, Including Add-Ons

A court lacks equitable power to forgive accrued child support arrearages in response to a motion to modify support or to determine arrears. Except for supplemental complaints or servicemembers deployed out-of-state on active duty, the court cannot modify a support order that is effective before the date of the filing of the motion or order to show cause to modify or terminate support. Fam C §3651(c); see also *County of Santa Clara v Wilson* (2003) 111 CA4th 1324, 1326–1327, 4 CR3d 653; *Marriage of Tavares* (2007) 151 CA4th 620, 625–627, 60 CR3d 39 (child-care add-on). See [§§1.105–1.106](#) on retroactivity in setting support orders.

- **JUDICIAL TIP:** On occasion, there may be specific language in an order where there has been a *specific reservation of jurisdiction* on a support issue (either back to a specific date or for a specified time frame), in which case the court has the specific authority to go back and re-determine amounts owed. This is not considered a retroactive modification. However, care must be taken in examining the language in such orders to ensure that the court does indeed still validly have such jurisdiction.

### b. [§4.181] Limited Authority to Set Arrears Retroactively or Stay Enforcement Activity

In the initial setting of the amount of a retroactive support award for arrearages, the court has the discretion to lower the amount set by the guidelines based on a showing that the application of the formula would be unjust or inappropriate due to special circumstances in the particular case. Fam C §4057(b)(5); *City & County of San Francisco v Funches* (1999) 75 CA4th 243, 246–247, 89 CR2d 49 (accrued support reduced when child was 16, and reduced amount made support plus arrearages one-third of parent's net monthly income).

Separately, with respect to enforcement of a child support judgment, a trial court has some equitable powers and discretion to determine and make orders regarding whether and to what extent the original support provision should be enforced by execution or otherwise (e.g., power to stay enforcement activity). See *Parker v Parker* (1928) 203 C 787, 796, 266 P 283, superseded on other grounds in 51 C3d 1160; *Marriage of Sandy* (1980) 113 CA3d 724, 728, 169 CR 747. Child support proceedings are equitable in nature. To the extent permitted by the child support statutes, the trial court is permitted the broadest discretion in order to achieve fairness and equity. *Marriage of Lusby* (1998) 64 CA4th 459, 470–471, 75 CR2d 263. Moreover, a basic equitable principle prevents a person from taking advantage of his or her own “wrong.” *Marriage of Klug* (2005) 130 CA4th 1389, 1403, 31 CR3d 327. See also *Marriage of Boswell* (2014) 225 CA4th 1172, 1175, 171 CR3d 100 (family law court, in the exercise of its broad equitable discretion, and upon a finding of “unclean hands” may decline to enforce a child support arrearage judgment).

### 5. [§4.182] Arrears and Interest Are Owed Until Paid

Arrears are owed until paid, plus accruing interest. Interest in California on California judgments accrues at the legal rate, which is currently 10 percent per year. CCP §685.010(a). (Note: The interest rate before January 1, 1984, was 7 percent.) No interest accrues on an obligation for current support due in a given month until the first day of the following month. Fam C §17433.5; see CCP §685.020(b) (interest accrues on each installment as it becomes due). It is simple interest and is not compounded. Any forgiveness of accrued interest would be an impermissible retroactive modification. *Marriage of Perez* (1995) 35 CA4th 77, 81, 41 CR2d 377; *Marriage of Cordero* (2002) 95 CA4th 653, 667–668, 115 CR2d 787; *Marriage of Hubner* (2004) 124 CA4th 1082, 1089, 22 CR3d 549. However, due process considerations apply. *County of Alameda v Weatherford* (1995) 36 CA4th 666, 670–671, 42 CR2d 386 (county estopped when no notice to obligor). There is also a separate limitation on the interest rate applicable to arrears for individuals active in military service. See §2.70.

- **JUDICIAL TIP:** If the original judgment was made in another state, it is possible that a different rate of interest applies, or even no interest at all. The other parent or an LCSA may be charging an inappropriate rate, for example, by erroneously assuming California’s interest rate applies, or by loading a judgment into DCSS’ statewide system as a California order when the judgment originated from a state that does not charge interest (such as Connecticut) and was subsequently registered for enforcement. This would be grounds for an obligor to challenge the amount owed and seek a judicial determination of arrears. See [Appendix I](#) for a chart of each state’s interest rates. The Office of Child Support Enforcement (OCSE) maintains a website with information on each state. See <https://www.acf.hhs.gov/programs/css/irg-state-map>, select a particular state, then select “Support Details.” For links to child support agencies in each state, see <https://www.acf.hhs.gov/programs/css/resource/state-and-tribal-child-support-agency-contacts>.

## 6. [§4.183] Duration of California Support Orders

An order for child support continues in effect until the order is terminated by the court or terminates by operation of law. Fam C §3601. See §§1.99–1.101. If the parents agree (*e.g.*, in dissolution judgments, marital settlement agreements, or otherwise agree in writing) to extend the obligation to support their children to a later date, such agreements are enforceable.

### C. Motion to Determine Arrears

#### 1. [§4.184] Standing

Generally, the obligor files a motion challenging the accuracy of the outstanding arrears or asking the court to apply its equitable authority to reduce or terminate unpaid child support amounts, but the parent owed support may also make a request asking the court to set or determine the arrears amount owed. In a Title IV-D proceeding, any party can seek a determination of arrears under Fam C §17526(c).

- **JUDICIAL TIP:** If there is a prior judgment or order after a hearing that has already addressed the specific issue of arrears for the time frame in question on the merits, then that issue would be precluded by *res judicata* principles. For further discussion of *res judicata* and collateral attacks, see §4.145.

#### 2. [§4.185] Forms and Showing

In Title IV-D cases, the Judicial Council has adopted a mandatory form Request for Judicial Determination of Support Arrearages (Governmental) (form FL-676). And where enforcement services are provided by the LCSA, any motion to determine arrearages filed with the court must include a monthly breakdown showing amounts ordered and amounts paid, in addition to any other relevant information. Fam C §17526(c). This includes setting forth facts sufficient to establish any claims or affirmative defenses raised in support of the request.

Both regular family law courts and Title IV-D courts, however, may very well see the issue raised in another pleading if it is being brought in conjunction with a related or concurrent motion filed with the court, such as an “other” issue in a notice of motion, request for order, or order to show cause filed to modify current support. The burden of proof is on the party seeking the relief. Evid C §500.

Many self-represented litigants do not necessarily use the same language in their request to the court or in the supporting papers. Thus, the obligor may ask the court to “adjust,” “reduce,” or “waive” unpaid child support for a variety of different reasons and under various factual scenarios that are discussed in following sections. Some examples include claims of the following:

- An express or implied agreement between the parents (waiver);
- Direct care and custody credits (also known as “Jackson credits”);
- Child concealment;
- Private agreement or arrangement regarding the monthly obligation;
- Past periods of unemployment or disability;
- Past periods of incarceration;
- Multiple or inconsistent orders; or

- Other equitable issues.

In these instances, the obligor is often asking the court to redetermine or reduce to zero unpaid child support and accrued interest for the time frame in question.

## D. Common Issues

### 1. Waiver or Compromise of Arrears

#### a. [§4.186] By Parties

A parent-obligee may affirmatively waive or compromise all or any portion of the accrued arrears so long as the waiver is done expressly, voluntarily, knowingly, and intelligently, and is not conditional on any waiver of current or future support. An effective waiver requires the obligee to be fully informed about the rights he or she is giving up and of the consequences of waiving the arrearages. Waiver is the intentional relinquishment of a known right. *Washington ex rel Burton v Leyser* (1987) 196 CA3d 451, 460, 241 CR 812; *Marriage of Damico* (1994) 7 C4th 673, 681, 29 CR2d 787; 13 Witkin, Summary of California Law, *Equity* §193 (10th ed 2005). The elements of waiver are set forth more specifically in *Outboard Marine Corp. v Superior Court* (1975) 52 CA3d 30, 41, 124 CR 852: “To constitute waiver, it is essential that there be an existing right, benefit, or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished.”

- **JUDICIAL TIP:** If a waiver is going to be accepted orally in open court, the court should thoroughly voir dire the obligee who desires to waive any arrearages to ensure that the waiver or compromise is free of any undue influence, made with full knowledge of the obligee’s rights and a full understanding of the consequences of such a waiver. The court should also ensure that the parties understand that it is without prejudice to any rights assigned to DCSS, and the collection by DCSS of any such assigned arrears (also known as aided, or welfare reimbursement, arrears). In Title IV-D cases, if the parties agree to a waiver of unassigned (nonaid) arrears, it is recommended that they use Judicial Council form FL-626, an optional governmental form regarding a stipulation and order waiving unassigned arrears.

Courts should also be aware that there is nothing to prevent a custodial parent in a nonaid case from entering into a *conditional* waiver (*e.g.*, agreeing to waive interest for a specified period on the condition of timely payment of current support for a specified period, or agreeing to waive a *portion* of the arrears owed, for a specified lesser lump-sum amount), so long as it does not involve the waiver of current or future support as noted. While this may create some potential special account monitoring needs, such voluntary agreements between the parents can often help resolve some certain difficult arrearage disputes.

A waiver cannot be implied from the obligee’s mere acceptance of a lesser amount than is owed under the judgment or delay in pursuing full collection efforts. *Marriage of Hamer* (2000) 81 CA4th 712, 721–722, 97 CR2d 195; see also *Marriage of Brinkman* (2003) 111 CA4th 1281,

1290–1291, 4 CR3d 722 (estoppel defense predicated on obligee’s acceptance of lesser sum rejected on the facts).

Purported agreements to settle or forgive arrears, when there is no consideration or it is entered into under duress or there is no bona fide dispute as to the amount of arrears, are unenforceable. *Marriage of Sabine & Toshio M.* (2007) 153 CA4th 1203, 63 CR3d 757 (mother “was desperate and under duress” when she received settlement offer, and court found that there was no bona fide dispute as to the amount of arrears owed and thus could not find a proper accord and satisfaction; the court also viewed it as an improper attempt to retroactively modify support). *Note*: The decision in this case may be limited to its specific facts.

### **b. [§4.187] By DCSS**

There is a statutory Compromise of Arrears Program (COAP) under which DCSS can accept offers in compromise of arrears owed the state for reimbursement. Fam C §17560.

## **2. Estoppel**

### **a. [§4.188] General Principles**

Estoppel by conduct is found when one person intentionally and deliberately leads another to believe that a particular thing is true and to act on such belief. *Washington ex rel Burton v Leyser* (1987) 196 CA3d 451, 460, 241 CR 812; *Marriage of Damico* (1994) 7 C4th 673, 681, 29 CR2d 787; 13 Witkin, Summary of California Law, *Equity* §191 (10th ed 2005). The general principle is stated in Evid C §623: “Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act on such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.”

Estoppel requires that (*Marriage of Thompson* (1996) 41 CA4th 1049, 1061, 48 CR2d 882):

- (1) The party to be estopped knew the facts;
- (2) The other party was ignorant of the true facts;
- (3) The party intended its conduct would be acted on, or acted in a manner that the party asserting the estoppel had a right to believe it so intended; and
- (4) The other party relied on the conduct to its injury.

The doctrine acts defensively only and operates to prevent one from taking unfair advantage of another but not to give an unfair advantage to one seeking to invoke the doctrine. See *Marriage of Umphrey* (1990) 218 CA3d 647, 658, 267 CR 218.

### **b. [§4.189] Defense of Estoppel in Support Actions**

Estoppel can be raised in support proceedings, although the court may or may not find the defense applicable. See *Marriage of Thompson* (1996) 41 CA4th 1049, 1060–1062, 48 CR2d 882 (county not estopped from collecting accrued interest on public assistance reimbursement debt even though it mistakenly omitted accrued interest from amount quoted to obligor as balance due, and obligor paid same in mistaken belief it was total amount owed); cf. *County of Alameda v Weatherford* (1995) 36 CA4th 666, 670–671, 42 CR2d 386; *County of Orange v Carl D.* (1999) 76 CA4th 429, 439–441, 90 CR2d 440 (county estopped from recouping public assistance payments made for children based on its misrepresentations concerning “absent” father’s known whereabouts); see also [§2.47](#).

The estoppel defense is often raised when the obligor presents conflicting letters and accountings from one or more LCSA's regarding arrears. The letters and conflicting information sent to the payor, while certainly sufficient to justify some confusion, are usually insufficient to justify much else. See *Marriage of Comer* (1996) 14 C4th 504, 523, 59 CR2d 155 (“unless a county has done an affirmative act or made an affirmative representation that induces reliance, no estoppel will be found.”) Thus, if an LCSA makes an accounting error in favor of the obligor, that alone does not support an estoppel defense.

### 3. [§4.190] Laches

In proceedings to enforce judgments for child, family, and spousal support, obligors may raise the defense of laches, and courts may consider that defense, only as to any amount that the obligor owes to the state. Fam C §291(d). Thus, laches is not applicable to actions to enforce child support judgments by parents. Family Code §291(d) has retroactive effect and bars the defense of laches for support obligations other than to the state for support accrued before its effective date of January 1, 2003. *Marriage of Fellows* (2006) 39 C4th 179, 186, 46 CR3d 49 (construing former Fam C §4502(c)).

Laches is defined as an unreasonable delay in asserting an equitable right, causing prejudice to an adverse party that renders the granting of relief to the other party inequitable. *Marriage of Copeman* (2001) 90 CA4th 324, 333, 108 CR2d 801; *County of Orange v Smith* (2002) 96 CA4th 955, 963, 117 CR2d 336.

### 4. [§4.191] No Offset by Payment of Other Business Debt

Because a child support obligation runs to the child and not the parent, a debt owed by the custodial parent to the supporting parent generally cannot be offset against child support arrearages. Thus, a parent who is ordered to pay child support cannot offset a business debt against that obligation. *Williams v Williams* (1970) 8 CA3d 636, 639, 87 CR 754; *Marriage of Armato* (2001) 88 CA4th 1030, 1038–1039, 106 CR2d 395.

However, a parent may seek an offset to arrears based on payment of certain expenses or the payment of debt. See, e.g., discussion of *Jackson* credits in §4.193. And when there has been an overpayment on arrears (e.g., when a court order grants a downward modification effective back to the date of filing, effectively creating an “overpayment” and right to reimbursement when those prior months were paid), the court does have authority to offset any reimbursement against previously accrued arrears, or against an existing child support obligation under terms the court deems just and reasonable. Fam C §3653(d); *Marriage of Dandona & Araluce* (2001) 91 CA4th 1120, 1126–1127, 111 CR2d 390.

For a more detailed discussion of equitable offsets against child support payments, see §4.147.

### 5. [§4.192] Incarceration

Periods of incarceration are relevant and must be considered when first establishing a support order, or when a judgment or order has been set aside on procedural or due process grounds (e.g., original judgment void on service grounds) and the support obligation must be recalculated for the time periods within the court's jurisdiction. In these situations, absent any

other evidence of assets or financial ability, during periods of incarceration there is no ability to pay and no authority to impute income. *Marriage of Smith* (2001) 90 CA4th 74, 82–85, 108 CR2d 537; *Oregon v Vargas* (1999) 70 CA4th 1123, 1126, 83 CR2d 229.

Under Fam C §4007.5, every money judgment or order for child support shall be suspended, by operation of law, where the person ordered to pay support is either incarcerated or involuntarily institutionalized, unless certain specified conditions exist. The suspension is triggered only if an individual is incarcerated or institutionalized for more than 90 consecutive days, and it does not apply if either: (1) the person owing support otherwise has the means to pay while incarcerated or institutionalized, or (2) the person owing support was incarcerated or institutionalized for an offense constituting domestic violence against the supported party or child, or as the result of a failure to comply with a court order to pay child support. Fam C §4007.5(a)(1)(2) and (f).

“Incarcerated or involuntary institutionalized” includes, but is not limited to, confinement in state prison, county jail, certain juvenile facilities or a mental health facility. Fam C §4007.5(e)(1). “Suspend” means that the payment due on the current support order, an arrears payment on a preexisting arrears balance, or interest on arrears created during a qualifying period of incarceration is by operation of law set to zero dollars (\$0) for the period in which the obligor is incarcerated or institutionalized. Fam C §4007.5(e)(2).

As noted, every money judgment or child support order issued or modified on or after October 8, 2015, is subject to this suspension statute. The statute also gives LCSAs the authority to administratively adjust account balances. Fam C §4007.5(c). See §5.51 for further discussion on this administrative process.

The statute is not exclusive. Obligors can still file for modification based upon changed circumstances (including incarceration or any other appropriate reason), and anyone can petition the court for a determination of child support or arrears amounts. Fam C §4007.5(b), (d).

## 6. [§4.193] Direct Care and Support

In certain situations, a parent may be deemed to have satisfied a child support obligation when there was a change in physical custody or primary residence of the minor children, yet the support order remained unchanged. *Jackson v Jackson* (1975) 51 CA3d 363, 368, 124 CR 101 (court has discretion not to enforce arrears that accrued when the obligor had primary physical custody); see also *Marriage of Trainotti* (1989) 212 CA3d 1072, 261 CR 36. Credit may also be available to an obligor parent for in-the-home child support that the parent afforded the children during a subsequent period of reconciliation when the parents and children resumed living together. *Helgestad v Vargas* (2014) 231 CA4th 719, 180 CR3d 318. These situations do not involve any retroactive modification of a support order, which is not permitted under Fam C §3653, nor an impermissible equitable forgiveness of arrears. Instead, the *Jackson* court made a finding that the obligor had met his court-ordered obligation due to having custody. *Jackson v Jackson, supra*, 51 CA3d at 368. This is often referred to as an equitable offset or “*Jackson* credits.”

- **JUDICIAL TIP:** The facts in both the *Jackson* and *Trainotti* cases showed a change in the physical custody of the child. An obligor parent’s claim based only on a change in the timeshare, even up to a substantially equal or more time arrangement, would probably not meet that standard.

### 7. [§4.194] Minor Child Moves Out of Custodial Party's Home

If an older but unemancipated child leaves the home of the custodial party, an issue is sometimes raised regarding to whom is the child support obligation owed, and whether the obligor is entitled to relief when determining arrears. There is no clear authority.

The trial court does have equitable powers and discretion to determine whether and to what extent the original support provision should be enforced. *Marriage of Sandy* (1980) 113 CA3d 724, 728, 169 CR 747; *Marriage of Lusby* (1998) 64 CA4th 459, 470–471, 75 CR2d 263. Time-sharing may also be imputed when the child is not in either parent's actual physical custody. See, e.g., *Marriage of Katzberg* (2001) 88 CA4th 974, 982–983, 106 CR2d 157 (child's time living at boarding school imputed to father who had primary custody, paid for transportation and incidental expenses, and was sole signatory on school contract).

- **JUDICIAL TIP:** Resolution of such an issue will often depend on the unique or specific facts of each case, and may hinge on a determination as to who or whether the legal custodial parent was actually providing support to the child that was living elsewhere.

### 8. [§4.195] Child Concealment as Defense

There is a narrowly drawn estoppel defense to the enforcement of child support arrearages for child concealment. This defense applies if:

- The arrearages accrued during a period in which the custodial (obligee) parent actively concealed himself or herself and the child,
- The noncustodial parent made reasonably diligent efforts to locate them, and
- Support was not sought until the child reached majority.

In this situation, the custodial parent is estopped from later collecting child support arrearages for the period of concealment. *Marriage of Damico* (1994) 7 C4th 673, 685, 29 CR2d 787. *Marriage of Boswell* (2014) 225 CA4th 1172, 1175, 171 CR3d 100 (trial court properly exercised “its broad equitable discretion” in declining to enforce child support arrearages, based on mother's concealment of children for 15 years). The custodial parent is estopped if the concealment continues until the child reaches 18 even though the concealment ended before the child's emancipation because the child was not 19 and still in high school. *Stanislaus County DCSS v Jensen* (2003) 112 CA4th 453, 5 CR3d 178.

The defense does not apply when (1) the concealment ends during the children's minority or (2) the support was ordered to be paid to a county agency (e.g., aid reimbursement) or other court trustee. *Willmer v Willmer* (2006) 144 CA4th 951, 962–963, 51 CR3d 10; *Marriage of Comer* (1996) 14 C4th 504, 510, 59 CR2d 155; *Marriage of Vroenen* (2001) 94 CA4th 1176, 1182, 114 CR2d 860 (no estoppel defense when concealment ended while children were minors, even though motion to collect arrearages was not filed until age of majority). Compare: *Marriage of Boswell, supra* (equitable estoppel to enforce arrearages due to unclean hands proper where mother concealed both children for over 15 years and waited 10 more years to enforce, and even though one child had been returned to other parent while still a minor).

In *Marriage of Walters* (1997) 59 CA4th 998, 1006, 70 CR2d 354, the court held that concealment of the child from father for 10 years did not estop the county from collecting child

support arrearages for reimbursement for welfare payments made to the mother. Estopping the county from collecting reimbursement would undermine strong public policy of protecting public funds by collecting AFDC reimbursement. Nor was there estoppel for accrued support when the mother was not collecting welfare and was entitled to the support. The payments were to be made to the county, and the mother's concealment did not prevent them from being paid.

Moreover, the estoppel defense does not apply if there is a mere failure or refusal by the custodial parent to implement any rights as to custody or visitation granted by a court. Fam C §3556; *Cooper v O'Rourke* (1995) 32 CA4th 243, 247, 38 CR2d 444 (custodial parent's failure to give notice of move from California to Florida and to provide any information about child's whereabouts for 3 months after move constituted only interference, not concealment).

### **9. [§4.196] Hold Harmless Agreement**

Although there is no direct case on point, dictum suggests that a "hold harmless agreement" between parents, coupled with the custodial parent's failure to seek child support arrearages for several years, might support an estoppel or waiver defense to the enforcement of past-due child support. *Marriage of Ayo* (1987) 190 CA3d 442, 452, 235 CR 458.



# Chapter 5

## AB 1058 PROCEEDINGS

### I. OVERVIEW

#### A. Roles and Duties

1. [§5.1] Department of Child Support Services (DCSS)
2. [§5.2] Local Child Support Agency (LCSA)
  - a. [§5.3] LCSA Involved as a Party and Notice
  - b. [§5.4] LCSA as Managing County
3. [§5.5] Family Law Facilitator
4. Child Support Commissioner
  - a. [§5.6] In General
  - b. [§5.7] Duties and Responsibilities
  - c. [§5.8] Related Duties
  - d. [§5.9] Status as Temporary Judge
  - e. [§5.10] Special Considerations
5. [§5.11] Objections and Reviewing Judge
6. [§5.12] Custody and Visitation in Title IV-D Cases
7. [§5.13] Spousal Support in Title IV-D Cases

#### B. Procedures in LCSA Proceedings

1. Pleadings
  - a. [§5.14] Complaint
  - b. [§5.15] Supplemental Complaint
  - c. [§5.16] Answer
  - d. [§5.17] Declaration for Amended Proposed Judgment
  - e. [§5.18] Stipulated Judgment
2. [§5.19] Default
3. [§5.20] Motion for Judgment
4. [§5.21] Child Support Arrears
5. [§5.22] Party Status of Custodial Parent
6. [§5.23] Death of Custodial Parent
7. [§5.24] Application or Allocation of Payments
8. [§5.25] Emancipated Children
9. [§5.26] Venue

#### C. Title IV-D Hearings

1. [§5.27] Discovery
  - a. [§5.28] LCSA Discovery Tools
2. [§5.29] Confidentiality
3. [§5.30] Telephone Appearances in IV-D Proceedings
  - a. [§5.31] Who Can Make Request
  - b. [§5.32] Required Procedure
  - c. [§5.33] Additional Court Authority
4. Motions Generally
  - a. [§5.34] Modification—Who Can File and Notice

- b. [\[§5.35\]](#) Enforcement Motions—LCSA Consent or Objection
- 5. [\[§5.36\]](#) Private Agreements
- D. Transfer of Title IV-D Case to Tribal Court
  - 1. [\[§5.37\]](#) Jurisdiction in General
  - 2. [\[§5.38\]](#) Procedures to Transfer
  - 3. [\[§5.39\]](#) Procedures After Order Granting Transfer
  - 4. [\[§5.40\]](#) Transfer of Proceedings From Tribal Court
- E. Other Procedures Applicable to IV-D Proceedings
  - 1. Regulations and Policies
    - a. [\[§5.41\]](#) In General
    - b. [\[§5.42\]](#) Applicable Rules and Regulations
    - c. [\[§5.43\]](#) Other Policies and Information
  - 2. [\[§5.44\]](#) Records of the Department of Child Support Services Agency
  - 3. [\[§5.45\]](#) Cooperation From Other State Agencies
  - 4. [\[§5.46\]](#) Complaints Against LCSA
- F. [\[§5.47\]](#) Arrears
  - 1. [\[§5.48\]](#) In General
  - 2. [\[§5.49\]](#) Statement of Arrearages
  - 3. [\[§5.50\]](#) Review and Judicial Determination of Arrearages
  - 4. [\[§5.51\]](#) Administrative Adjustment Due to Incarceration
  - 5. [\[§5.52\]](#) Compromise of Arrears
    - a. [\[§5.53\]](#) Compromise of Arrears Program (COAP)
    - b. [\[§5.54\]](#) Family Reunification Compromise of Arrears Program (FR-COAP)
- G. Enforcement Tools Unique to DCSS
  - 1. [\[§5.55\]](#) Civil Enforcement in General
  - 2. Levy
    - a. [\[§5.56\]](#) Lien Enforcement by Levy
    - b. [\[§5.57\]](#) Exemption Processes
    - c. [\[§5.58\]](#) Bank Levies
    - d. [\[§5.59\]](#) Personal Property Liens
    - e. [\[§5.60\]](#) Liquidation of Financial Assets
  - 3. [\[§5.61\]](#) Tax Refund Intercept
  - 4. Licenses
    - a. [\[§5.62\]](#) Suspension
    - b. [\[§5.63\]](#) Judicial Review
  - 5. [\[§5.64\]](#) Passports
  - 6. [\[§5.65\]](#) State Disability, Unemployment, and Workers' Compensation Benefits
  - 7. [\[§5.66\]](#) Social Security
  - 8. [\[§5.67\]](#) Enforcement Action Taken in Error

## I. OVERVIEW

### A. Roles and Duties

#### 1. [§5.1] Department of Child Support Services (DCSS)

The state Department of Child Support Services (DCSS) administers all services and performs all functions necessary to establish, collect, and distribute child support. Fam C §17200. Before January 2000, the state Department of Social Services was the designated agency under federal and state law, and it contracted with the district attorney in each county to perform the required establishment and enforcement activities.

#### 2. [§5.2] Local Child Support Agency (LCSA)

The child support enforcement program is sometimes referred to as the “IV-D Program.” Title IV-D of the Social Security Act (42 USC §§651 et seq) requires that each state establish and enforce support orders when public assistance has been expended and on request of any parent who is not receiving public assistance. Title IV-D requires each state to designate an agency that is responsible for establishing parentage and obtaining and enforcing child support orders. 42 USC §654. California has designated the state DCSS as that agency. The DCSS website is <https://childsupport.ca.gov>. The local child support agency (LCSA) is the office established in each county by the DCSS.

The LCSA does not represent either parent or the child in the proceeding, but rather acts in the public interest. There is no attorney-client relationship between the LCSA attorney and either parent or the child, despite the incidental benefit to the custodial parent. Fam C §17406(a); *Marriage of Ward* (1994) 29 CA4th 1452, 1457–1458, 35 CR2d 32.

The LCSA is required by law to be involved in any paternity or support proceeding involving public assistance payments, including TANF (Temporary Assistance for Needy Families) or CalWORKS and Medi-Cal. In addition, any party can request the assistance of the LCSA in setting and enforcing child support, as well as enforcing spousal support in certain cases. Not all local child support cases are TANF cases. The LCSA may intervene in an ongoing family law support proceeding in the public interest or initiate a complaint to establish parental relations or enforce a support obligation when its services are requested or required by law. When the LCSA becomes involved, all proceedings relating to the services they are providing must be referred to a Title IV-D child support commissioner. See §§5.6–5.11. In addition, the LCSA must be served notice by the moving party of any proceeding in which support is at issue. Any order for support that is entered without the local child support agency having received proper notice is voidable upon the motion of the LCSA. Fam C §4251(f).

#### a. [§5.3] LCSA Involved as a Party and Notice

Generally, there are two ways an LCSA providing services as required by Fam C §17400 officially becomes “involved” in a court case. First, an LCSA is clearly “involved” when it actually initiates a new court case by, for example, filing a summons and complaint, registering an order for the first time (opening a new court case), or filing a UIFSA petition. In these situations, all support matters must be heard in the Title IV-D court.

An LCSA providing required services can also appear in any action or proceeding it did not initiate by giving written notice to all parties, on Judicial Council form FL-632 (Notice

Regarding Payment of Support, also known as a NRPS notice), that it is providing Title IV-D services in that action or proceeding. This notice must be served on both the support obligor (individual who owes support) and obligee (individual to whom support is owed) in compliance with CCP §1013, and it must be filed in the action in which the support order was issued. Fam C §4204; Cal Rules of Ct 5.360. The filing of the NRPS notice in a court action alerts the court that the LCSA is now “involved” in the case, whereupon support matters must be heard in the Title IV-D court. Upon the service and filing of the notice, the court cannot require the LCSA to file any other notice or pleading before the agency appears in the action or proceeding. Cal Rules of Ct 5.360.

When the LCSA ceases its involvement in any court case, regardless of whether the case was initiated by the LCSA or was one in which the LCSA had appeared (“stepped into”) upon the filing of a NRPS notice, the LCSA can use the same NRPS notice (Judicial Council form FL-632), to substitute out as payee. The notice must again be served on the obligor and obligee, and filed in the court action. When this occurs, Title IV-D services are no longer being provided, and support matters are no longer required to be heard by a Title IV-D commissioner. When the LCSA stops providing services, it will also send a “closure letter” directly to the parties.

- **JUDICIAL TIP:** Because the same form FL-632 is used anytime the LCSA intervenes and becomes involved in an existing case, or ceases to be involved in any case (even one it initiated), it is important to take care to determine whether the LCSA is stepping “in” or stepping “out” of a case, so courts can determine whether IV-D services are being provided, and whether a support matter must be heard in a IV-D court or not. Not all LCSAs use the form uniformly, which can sometimes cause delays if the support matter is set in the wrong court. Some counties have devised ways to have a case “marked” in their case management system to display when the local agency of DCSS is “IN” versus “OUT” based upon when the LCSA initiates cases and/or files NRPS notices to step in and out of cases.

Courts should also be aware that litigants often get confused when the LCSA closes down its internal case and sends a closure letter to the parties. A closure letter does not “close” down the court order. Rather, the order continues to run unless and until the order itself is either modified in court, or it terminates as a matter of law (*e.g.*, due to emancipation). LCSA case closure simply means that the LCSA has stopped providing services, and support matters are to be heard in regular family law court. The current regulations regarding case closure by the LCSA can be found at 22 Cal Code Regs §118203.

#### **b. [§5.4] LCSA as Managing County**

The DCSS statewide child support enforcement computer system (CSE) now allows for assignment of a different LCSA (*i.e.*, an LCSA from a different county) to operationally manage a case internally in their system, even though the court case has not moved. Notice must be given both to the court and the parties when there is a change in managing county responsibility by filing Judicial Council form FL-634. A change in managing LCSA does not change the parties to the case, or the jurisdiction or authority of the court where the proceedings are heard or where pleadings must be filed. See also CSS letter 11-07.

- **JUDICIAL TIP:** The filing of form FL-634 has no impact on the court case (*i.e.*, it is simply a piece of information for the court). The form itself specifically tells the litigant there is a new managing county responsible for support activities, and all questions are to be directed to them, but that service of any pleadings and court filings need to be filed in the county of the existing court case and served on that LCSA county (not the county of the new managing county). The form does not allow the new “managing” county to make appearances or start filing pleadings in the existing court case under the managing county’s name, as that LCSA is not a party to the case. If the managing county determines there is a need to take court action, either a motion can be filed in the existing case by that court’s LCSA, or the managing county LCSA can register the order into their own county. See §§3.33–3.35 on intrastate registration.

### 3. [§5.5] Family Law Facilitator

Information regarding the establishment of the office of the family law facilitator, and the various free services they may provide to unrepresented litigants can be found in §§2.2–2.4.

Where Title IV-D funding is provided for family law facilitator services, the Act establishing the office of the family law facilitator allows either parent to utilize their services. However, it also states that in order for a custodial parent who is receiving services pursuant to Fam C §17000 to utilize the services of the facilitator relating to support, the custodial parent must obtain written authorization from the LCSA. Fam C §10008. This provision is not intended to limit the duties of the LCSA, nor does it limit or supersede any family code provisions with respect to temporary support.

See also §5.35 regarding need for any party to obtain consent from the LCSA before taking any enforcement action.

- **JUDICIAL TIP:** The general concept behind any requirements to obtain authorization from the LCSA is to ensure that the LCSA is aware of what a party who has sought their services is seeking to do outside of the LCSA’s actions on the case. In some instances, the LCSA may not want a particular process to be filed, *e.g.*, a contempt action or successive contempt actions, when they are trying to work with the other parent, and the process sought by one parent may have larger unintended consequences (particularly if the other parent has multiple cases).

### 4. Child Support Commissioner

#### a. [§5.6] In General

Each county must have a child support commissioner whose primary responsibility is to hear Title IV-D support matters. Fam C §4251(a). The commissioners are variously referred to as child support commissioners, Title IV-D commissioners, or AB 1058 commissioners, after the legislation establishing the commissioner system. See Stats 1996, ch 957 (AB 1058).

The Judicial Council is charged with the responsibility of determining the number of child support commissioners that each county will have, and with establishing the minimum qualifications as well as minimum educational and training requirements. Fam C §4252.

### **b. [§5.7] Duties and Responsibilities**

A child support commissioner has the same powers as other court commissioners under California law but is specifically responsible for hearing actions to establish paternity and to establish and enforce child support under Fam C §4251(a). CCP §259(f).

*Mandatory referral.* All Title IV-D–initiated paternity and support proceedings must be referred to a child support commissioner. The commissioner must also hear all enforcement and modification proceedings when the LCSA is “involved” (*i.e.*, providing services) in the case, whether the modification or enforcement request is brought by parties other than the LCSA itself, and in pre-1997 cases when the county is the only other party along with the respondent. These can include actions for paternity, establishment or modification of child support, including health insurance coverage, enforcement of spousal support in certain instances, interstate child support cases, as well as actions brought to set aside paternity and support judgments, quash wage assignment orders, or determine arrears. Fam C §4251(a).

*Priority of duties.* Child support commissioners are mandated to specialize in hearing child support cases, and their first priority is to hear Title IV-D child support cases. Fam C §4252(a). A child support commissioner may hear other contested issues, such as custody and visitation, only if the court has established procedures to segregate the costs of hearing Title IV-D matters from these other issues (*i.e.*, “time-study” non-IV-D issues).

### **c. [§5.8] Related Duties**

In addition to the duties and responsibilities of other court commissioners, a child support commissioner must, when appropriate, do the following (Fam C §4251(d)–(e)):

- Review and determine ex parte applications for orders and writs.
- Take testimony.
- Establish a record, evaluate evidence, and make recommendations or decisions.
- Enter judgments or orders based on the voluntary acknowledgments of support liability and parentage and stipulated agreements regarding the amount of child support to be paid.
- Enter default orders and judgments under Fam C §4253.
- In actions in which paternity is at issue, order the mother, child, and alleged father to submit to genetic tests.
- On a party’s application, join issues of child custody, visitation, and protective orders to the action filed by the LCSA and, after joinder, refer the parties to mediation, accept stipulated agreements concerning these issues, and refer contested issues of custody, visitation, or protective orders to a judge or another commissioner, absent a specific procedure to segregate the time spent on those issues from the Title IV-D matters.

### **d. [§5.9] Status as Temporary Judge**

A child support commissioner must act as a temporary judge absent an objection from the LCSA or any other party. Fam C §4251(b). A specific notice to this effect is contained on the

Judicial Council summons and complaint forms filed by the LCSA, and this notice will be used in other forms regarding Title IV-D proceedings.

The child support commissioner must advise the parties before the start of a hearing that the matter is being heard by a commissioner who acts as a temporary judge unless any party objects. Fam C §4251(b). The preferred method of giving this advisement is by oral announcement at the start of any Title IV-D support proceeding or calendar. However, this advisement may be given in writing. This writing can be provided to the litigant or attorney and may include a signature block for that individual to acknowledge that they have been so advised. The advisement may also be posted in a conspicuous location in or outside the courtroom, but posting—by itself—is not sufficient. See *Foosadas v Superior Court* (2005) 130 CA4th 649, 653–655, 30 CR3d 358; *In re Frye* (1983) 150 CA3d 407, 409, 197 CR 755; but see *Kern County DCSS v Camacho* (2012) 209 CA4th 1028, 147 CR3d 354 (substantial evidence litigant fully aware of right to object; any error not prejudicial). Procedures vary from county to county. For sample scripts, see §§2.75–2.76.

#### e. [§5.10] Special Considerations

Ordinarily, a temporary judge only hears a matter on the stipulation of the parties. In the absence of a stipulation, however, an objection to a commissioner acting as a temporary judge may be deemed waived by the actions of the parties. *In re Horton* (1991) 54 C3d 82, 90–91, 248 CR 305; *Stein v Hassen* (1973) 34 CA3d 294, 298–299, 109 CR 321.

No stipulation is necessary in order for a child support commissioner to hear a Title IV-D support matter. Once the general advisement is given, unless one of the parties objects, the child support commissioner hears the matter as a temporary judge. The commissioner may continue to act as a temporary judge until the final determination of that proceeding, *i.e.*, no new advisement is necessary where a hearing is continued for further hearings(s). *Anderson v Bledsoe* (1934) 139 CA 650, 651, 34 P2d 760. The advisement must be given before each new motion is filed. However, a separate notification is not required to hear a motion to set aside a ruling made by the same commissioner. *Kern County DCSS v Camacho* (2012) 209 CA4th 1028, 147 CR3d 354.

Ancillary proceedings, such as contempt and other enforcement actions, are not a continuation of the original cause; the commissioner does not have the power to hear them as a temporary judge without giving the parties a new opportunity to object. *Reisman v Shahverdian* (1984) 153 CA3d 1074, 1095, 102 CR 194.

Parties are free, of course, to use other statutory challenges to the child support commissioner, including the procedures set forth in CCP §§170.1 et seq.

#### 5. [§5.11] Objections and Reviewing Judge

If a party objects to the child support commissioner hearing the matter as a temporary judge, the commissioner can still hear the matter and make findings and a recommended order, using Judicial Council form FL-665 (Findings and Recommendation of Commissioner). A party has 10 court days to object, using Judicial Council form FL-666 (Notice of Objection).

Within 10 court days, a judge must ratify the recommended order, unless there is an objection from a party or an error in the recommended order. If there is an objection or an error, the judge must issue a temporary order and set a *de novo* hearing within 10 court days. Judicial Council form FL-667 (Review of Commissioner’s Findings of Fact and Recommendation) must

be used for this process. Under the de novo standard of review, the judge must hear the case “anew,” as if it had not been previously tried. Any party may waive the right to the review hearing at any time. Fam C §4251(c).

- **JUDICIAL TIP:** Given the short time frames, and in order to have control over how to frame your own findings and recommendation, it is highly recommended that you prepare your own Findings and Recommendation on the appropriate form (and not direct the LCSA to do so). The matter can then be better tracked so as to not run afoul of the time deadlines if a trial de novo must be set. Some commissioners have also found it to be helpful—at the end of the hearing—to inquire of the litigant who objected, if they wish to withdraw their objection to your sitting as a temporary judge (as perhaps they are fine with the end result). If the objection is withdrawn, then an Order After Hearing can be prepared as if no objection had been made, and it is no longer necessary to go through the Findings and Recommendation process.

## **6. [§5.12] Custody and Visitation in Title IV-D Cases**

Custody and visitation issues generally cannot be heard in actions filed before 1977 by the district attorney (because the other parent is not a party). Instead, the parties are required to file separate actions under the Uniform Parentage Act or actions for dissolution or legal separation in order to deal with these issues. In some counties, however, the court will allow it but only if the other parent is joined in the action and personally served (or served in the same manner as a summons and complaint) with the order to show cause for custody and visitation.

In actions filed after January 1, 1997, once a support order has been entered and the custodial parent is joined, custody, visitation, and restraining orders may be raised in Title IV-D initiated cases (with proper service). Orders regarding custody and visitation issues may be made only if no other orders for custody or visitation exist, and the court is the proper venue for such determinations. Fam C §17404(e)(4). The LCSA will not participate in the litigation of these issues. A IV-D commissioner can refer the matter to mediation, and is allowed to take a stipulation from the parties on custody and visitation; however, holding a hearing on any disputed custody or visitation issues is not considered a title IV-D activity, and the hearing must be referred to a judge or another commissioner, absent a specific procedure to segregate the time spent on those issues from the Title IV-D matters.

## **7. [§5.13] Spousal Support in Title IV-D Cases**

Occasionally, a party to a Fam C §17400 action may file a motion to establish or modify spousal support. Although federal funding limits a child support commissioner to enforcing spousal support (see 45 CFR §302.17), Fam C §4251(a) provides that a child support commissioner may establish, modify, or enforce spousal support.

- **JUDICIAL TIP:** The commissioner may need to keep separate time records to delete time spent on establishing and modifying spousal support from any federal funding reimbursement.

There are a number of reasons, however, why motions to establish or modify temporary or permanent spousal support filed by a party in a Fam C §17400 proceeding should be transferred

to the family law judge hearing the dissolution action. Family Code §2330.3(a) states that all decisions in a family law case must be made by the same judicial officer to the greatest extent possible, unless significant delay will result, in which case the parties may still stipulate otherwise. Moreover, the establishment of spousal support should not be determined in a vacuum.

Unlike the calculation of guideline child support, the determination of a spousal support order is often intertwined with other financial issues in a dissolution case, such as debt management, control and responsibility for payment of the family residence, and asset management, all issues properly and exclusively within the province of the family law judge. The adjudication of permanent spousal support is also based on a panoramic view of the parties' circumstances and the application of factors listed in Fam C §4320, factors properly considered by the family law judge. See §§1.113–1.128 for the criteria and procedures for adjudicating permanent spousal support.

DCSS will enforce spousal support only if there is a current child support obligation that they are enforcing. See Fam C §17604 and 45 CFR §302.31.

## **B. Procedures in LCSA Proceedings**

### **1. Pleadings**

#### **a. [§5.14] Complaint**

Most LCSA support matters are initiated by the filing of a complaint under Fam C §§17400 et seq. There are specific Judicial Council forms for these governmental complaints. See, *e.g.*, form FL-600. The complaint is usually filed in the name of the county against the parent or alleged parent against whom a support order is sought. The complaint may seek to establish one or more of the following:

- Parentage;
- Child support;
- Arrears (which may include reimbursement for aid expended on a child's behalf); or
- Healthcare coverage for a child (to be provided by one or both parents).

The LCSA must serve the summons and complaint on the respondent, along with a statement of rights, a proposed judgment (form FL-6130), a blank simplified answer (form FL-610), a blank income and expense declaration (form FL-150) or simplified financial statement (form FL-155), and a booklet explaining support establishment and enforcement. Fam C §§17400, 17434. Information concerning how a respondent can obtain appointed counsel in parentage cases must also be contained in these documents.

If the other parent is receiving Title IV-D services, the other parent must also be served with a copy of the summons and complaint and all other pleadings relating to the action. Service on the other parent may be made personally or by mail. Fam C §§17404(e), 17406(l)(1).

No fee may be charged to file a first paper or any subsequent pleading or document on issues relating to parentage or support in a case in which the DCSS or LCSA is providing services. Govt C §70672.

**b. [§5.15] Supplemental Complaint**

Supplemental complaints are used by LCSAs and other family law practitioners as a way to address all basic support and custody issues concerning all the children of the same mother and father in one case. Supplemental complaints may be filed in any case in which paternity or support for a child of the same parents is an issue. These complaints can be filed either before or after judgment. Fam C §17428. Supplemental complaints may be filed in a family law action, including dissolution, Uniform Parentage Act, and even Uniform Interstate Family Support Act cases, but that will happen far more rarely than the filings in actions under Fam C §§17400 et seq and Fam C §2330.1.

The supplemental complaint will generally list all the children, including those for whom parentage and support have already been adjudicated. Because the purpose of supplemental complaints is to have support for all children established in the correct amounts in a single case, it is likely that a judgment on a supplemental complaint will change the amount of any previously awarded support due to the standard allocation set forth in the Statewide Uniform Child Support Guideline.

The supplemental judgment forms provide that the judgment “does not modify or supersede any prior judgment or order for support or arrearage, unless specifically provided.” See form FL-630. Therefore, both the original and supplemental judgments are enforceable with regard to arrears, and the supplemental judgment will only supersede the original judgment with regard to current support and healthcare coverage.

**c. [§5.16] Answer**

The respondent has 30 days from the date of service to file an answer to the complaint. See form FL-610. This specific form used in LCSA cases is different from the form used in Uniform Parentage Act cases. It is served on the respondent with the summons and complaint.

**d. [§5.17] Declaration for Amended Proposed Judgment**

The LCSA must file a declaration for an amended proposed judgment if, within 30 days of service of the complaint, it receives income information that would result in a support order different from that contained in the proposed judgment. If such a declaration is filed, it and the amended proposed judgment must be served by mail, and the time to answer or otherwise appear is extended by 30 days from the date of service. Fam C §17430(c).

**e. [§5.18] Stipulated Judgment**

The court must accept a stipulation to judgment in LCSA-initiated cases on the issue of parentage, provided the stipulation is accompanied by an executed advisement and waiver of rights. Fam C §17414. No appearance is needed to establish parentage in this instance. See, *e.g.*, form FL-615.

A stipulated agreement to child support is not valid unless the LCSA joined in the stipulation by signing it in any case in which the LCSA is providing support enforcement services. Fam C §4065(c). The LCSA is an indispensable party to any proceeding that would reduce, suspend, or terminate a child support obligation when the county was providing public assistance to the obligee parent. *Marriage of Mena* (1989) 212 CA3d 12, 17–19, 260 CR 314.

The LCSA is also an indispensable party to a stipulation to terminate parental rights when the child was receiving public assistance. *In re Olivia A.* (1986) 181 CA3d 237, 241, 226 CR 382.

## 2. [§5.19] Default

If the respondent fails to file an answer within 30 days of having been properly served or at any time before a default judgment is entered, the proposed judgment (or amended proposed judgment, if a proper declaration is filed and served) will become the judgment. When there is no timely answer filed, and proof of service of all required documents is filed, a judgment must be entered without hearing and without presentation of any other evidence or further notice to the respondent. Fam C §17430(a)–(b). A judicial officer may not refuse to approve a default judgment that complies with the statutory scheme. *County of Yuba v Savedra* (2000) 78 CA4th 1311, 1322, 93 CR2d 524.

The default in LCSA-initiated cases is usually initiated by filing a request to enter default, which is not required to be served on the respondent. See form FL-620. A declaration in support of default judgment will also generally be filed. See form FL-697.

If the LCSA does not have information about the respondent's income or income history, the income of the respondent is presumed to be the amount of the minimum wage, at 40 hours per week. Fam C §17400(d)(2); see Lab C §1182.11.

- **JUDICIAL TIP:** The state DCSS has issued a policy letter for LCSAs regarding uniform pleading practices. CSSP Letter 17-02. Courts are not bound by such letters. In addition, while courts are not allowed to set a default hearing or require further evidence prior to approving a default, the court is allowed to reject a default package submitted that is not drawn in conformity with the laws of the state. The defect should be pointed out so that the matter can be re-submitted for approval. In the alternative, the court can issue an order to show cause (requesting the LCSA to show cause/explain the defect).

## 3. [§5.20] Motion for Judgment

Rather than filing an at-issue memorandum, the LCSA may file a motion for judgment in order to obtain judgments in its cases. Fam C §17404. This motion may accompany the original complaint or may be filed after an answer has been filed.

If a respondent appears at the hearing on the motion, the court must ask whether the respondent wants to subpoena witnesses or evidence, whether paternity is an issue, whether genetic tests have been done or are requested, and whether the respondent wants a trial. Fam C §17404(b). A respondent who wants a trial is entitled to one continuance as a matter of right, but the continuance cannot be for more than 90 days from the date of the service of the motion. Fam C §17404(b). If a continuance is granted, the court may make a temporary support order pending the next hearing. A prima facie case for parentage must be made in order to set temporary support.

## 4. [§5.21] Child Support Arrears

The LCSA is required to seek reimbursement for public assistance expended on behalf of a minor child from an absent parent or parents. California does not have the statutory authority to establish retroactive child support orders before the date of the filing of the petition, complaint,

or other initial pleading for non-public assistance (non-welfare) cases. Fam C §4009. Effective January 1, 2005, Fam C §17402 was amended to make it consistent with Fam C §4009 by eliminating the authority to establish a retroactive child support order in public assistance cases. Before January 1, 2005, child support orders in public assistance cases could be established for no more than 1 year before filing (or 3 years in cases before January 1, 2000).

*Reimbursement for aid paid to minor mother.* Child support cannot be pursued against a parent whose child willfully left home when the parent was ready, willing, and able to provide support. *County of San Diego v Lamb* (1998) 63 CA4th 845, 850–851, 73 CR2d 912. Minor children who become parents cannot (absent some special circumstances, *i.e.*, abuse, abandonment) obtain their own public assistance grant. However, the LCSA will generally seek a child support order against the baby's other parent.

*Foster care and juvenile placement reimbursement.* Any petition to commence proceedings to declare a child a dependent child or a ward of the court under Welf & I C §300, §601, or §602 must contain a notice to the father, mother, spouse, or other person liable for support of the child regarding the statutes making such persons liable for the costs to the county for the placement, maintenance, care, and other costs rendered to the child. Welf & I C §§332(h), 656(h). Required referrals are thereafter made to LCSAs by the agency that has expended moneys or incurred costs on behalf of the child under a detention or placement order or voluntary placement regarding these expenses.

The LCSA may petition the court for an order for continuing support and reimbursement of costs. The order is enforceable as any other support order. Welf & I C §§903, 903.4, 903.41, 903.5.

On the topic of arrears generally, see further discussion in §§4.175–4.196.

### **5. [§5.22] Party Status of Custodial Parent**

Once a support order, including an order for temporary support or an order for medical support only, has been entered, the custodial parent becomes a party to the action only for issues relating to support, custody, visitation, and restraining orders. Fam C §17404(e)(1). Notice of the parent's status as a party is to be given by the LCSA. Fam C 17404(e)(2). Thereafter the custodial parent may take independent action to modify or enforce a support order. Fam C 17404(f). For further discussion of independent action taken by parent to modify or enforce a support order when DCSS is involved, see §5.35. For information on when a custodial parent is a minor, see §2.61.

The LCSA is not required to serve or receive service of any documents relating to custody or visitation issues and is not required to attend any hearings on those issues. This presents some difficult problems when the LCSA may be the only party that has access to the custodial parent's address for service purposes. For more discussion regarding confidentiality of records and access to locate information, see §§2.19–2.29.

### **6. [§5.23] Death of Custodial Parent**

Upon the verification of the death of a custodial parent the LCSA policy, where there are no assigned arrears, is to follow its case closure procedures, as continuing to collect on behalf of an estate is considered to be a non-IV-D activity. When the case closes, all enforcement activities

are terminated. However, if there are assigned arrears, the LCSA's case must remain open and the LCSA is to continue the collection of assigned arrears only. See CSS letter 11-13.

If a new party obtains legal guardianship and requests IV-D services, or a new IV-A (public assistance) referral is received, the LCSA can open up a new internal case and proceed with providing services.

#### **7. [§5.24] Application or Allocation of Payments**

Payments, other than intercepts of the IRS or Franchise Tax Board refunds in public assistance cases, are applied first to current child support. If no public assistance has been paid, payments towards any arrears owing are first applied to the principal amount, and then to the interest. In general, when there are "mixed" arrears (public assistance and non-public assistance), once a family no longer receives public assistance, payments received will be applied to current support first, then to arrears owed to the family (non-aid arrears), and finally to arrears owed to the county. For those still receiving public assistance, payments to arrears are applied first to permanently assigned principal and interest, and then to temporarily assigned principal and interest. See CCP §695.221.

#### **8. [§5.25] Emancipated Children**

The LCSA is required to provide services for the purposes of collecting accrued child support arrears on the behalf of a custodial parent after the child(ren) have emancipated. See CSS letter 14-03, explaining such policy is consistent with the federal requirements in 45 CFR §302.33(a)(1)(i). The applicant for services is required to fill out a Declaration of Support Payment History, signed under penalty of perjury. Fam C §17524(a). The LCSA shall enforce only those arrears. According to the policy letter, the LCSA is not required to obtain an order setting arrears as a condition to open their case.

#### **9. [§5.26] Venue**

Notwithstanding any other law, venue for actions or proceedings brought under the support services division (Fam C §§17000 et seq) is set forth in Fam C §17400(n)(1)(A)–(E):

- Venue shall be in the superior court in the county that is currently expending public assistance.
- If public assistance is not being expended, venue shall be in the superior court in the county where the child entitled to current support resides or is domiciled.
- If current support is no longer payable through, or enforceable by the LCSA, venue shall be in the superior court in the county that last provided public assistance for actions to enforce arrearages assigned pursuant to Welf & I C §11477.
- If none of the above applies, venue shall be in the superior court in the county of residence of the support obligee.
- If the support obligee does not reside in California, and none of the above applies, venue shall be in the superior court of the county of residence of the obligor.

Notwithstanding the above venue rules, if a child becomes a resident of another county after an action under this part was filed, venue may remain in the county where the action was filed

until the action is completed. Fam C §17400(n)(2). The LCSA of one county may appear on behalf of the LCSA of any other county in an action under this part. Fam C §17400(o).

For information on the proper venue for orders that are registered, see [§3.34](#).

## C. Title IV-D Hearings

### 1. [§5.27] Discovery

The same discovery rules apply in Title IV-D proceedings as in regular family law proceedings. See [§§2.13–2.15](#). In addition, for UIFSA cases, courts can request the assistance of another tribunal outside of CA in obtaining discovery, and upon request, compel a person over whom it has jurisdiction to respond to a discovery order issued by the outside tribunal. Fam C §5700.318. See [§3.15](#).

#### a. [§5.28] LCSA Discovery Tools

Special discovery tools are also available to the LCSA, including:

- The Employment Development Division must provide access to information to the LCSA to verify employment of applicants and recipients of aid for enforcement purposes. Fam C §17508(a).
- Employers and labor organizations must provide employment and income information in their possession to the LCSA for purposes of establishing, modifying, or enforcing a support obligation. Fam C §17512(a).
- All state, county, and local agencies must cooperate with the LCSA in the enforcement of any support obligations and must supply the LCSA with all information in their possession relative to the location, income, or property of any parents, putative parents, spouses, or former spouses of persons who have fraudulently obtained aid for a child. The statewide child support automation system is entitled to the same cooperation and information provided to the California Parent Locator Service, and to criminal offender record information to the extent access is allowed by law. Fam C §17505(a)–(c).
- LCSAs may now inspect juvenile court case files for the purpose of establishing paternity and establishing and enforcing child support orders. Welf & I C §827(a)(1)(N).
- Special evidence rules under UIFSA and Fam C §5700.316 are discussed in [§3.14](#).

### 2. [§5.29] Confidentiality

The same confidentiality rules apply in Title IV-D proceedings as in regular family law proceedings. With the exception of UPA cases, and items previously noted in Ch. 2, court proceedings and documents are generally considered to be public. See [§§2.19–2.29](#).

In contrast, information gathered and records kept by either the state DCSS or the LCSAs are considered confidential, and exclusive authorization for disclosure of such information gathered by such public entities are governed by specific statutory authority. See [§5.44](#).

- **JUDICIAL TIP:** There seems to be some confusion as to whether the statutory scheme applicable to the information and records kept by the state DCSS and LCSAs also

applies to the court itself, or filings with the court. It would not appear so for the following reasons:

- There is a presumption of court records being open to the public absent specific statutory authority *clearly* stating otherwise. The statutory authority governing DCSS records does not mention courts, other than to say that, under specified circumstances, someone can file a noticed motion with the court to get the state DCSS or the LCSA to release certain information held by those public entities.
- The statutory scheme described in §5.44 directs the DCSS and LCSAs to omit certain information when filing pleadings with the court (*e.g.*, if protective order exists, or release of information may cause harm), and specifically authorizes them to disclose information for purposes of administering its duties (with redactions of Social Security information and address information where documents were served, for example). Therefore, there is no need for Fam C §17212(b)(1) and its identical counterpart, Welf & I C §11478.1(b)(1), to be applied directly to the court itself, or the documents filed in the court by the LCSAs, because doing so essentially makes all Title IV-D filings confidential.
- In addition, many courts currently do *not* read the statutory scheme applicable to the state DCSS and LCSAs as applying to court filings, regardless of whether the case was started by the LCSA or whether the LCSA stepped into an existing family law case. LCSAs can easily step into (and out of) cases multiple times, including cases they filed, meaning a court would have to keep track of certain documents filed in a public dissolution case, for example, and segregate only those documents as confidential. When cases or certain filings treated as confidential in one county are transferred through a change in venue, or via the registration process, to another county that does not treat such filings as confidential, then the case and filings are back to being public records, unless there is a protective order or some *other* statutory reason to make such records confidential, creating a logistical nightmare.

### 3. [§5.30] Telephone Appearances in IV-D Proceedings

In contrast to the general rule regarding telephone appearances at Cal Rules of Ct 3.670, there is a specific rule—Cal Rules of Ct 5.324—that applies to all Title IV-D hearings and conferences and requires the use of form FL-679 to request a telephone appearance. Courts that do not have the technical equipment for appearances are exempt from this rule. Cal Rules of Ct 5.324(k).

“Telephone appearance” includes any appearance by telephone, audiovisual, videoconferencing, digital, or other electronic means. Cal Rules of Ct 5.324(b). The rule permits telephone appearances on request, and in the court’s discretion, in any hearing or conference related to an action for child support when the LCSA is providing services under IV-D, with the following exceptions (Cal Rules of Ct 5.324(d)):

- Contested trials;
- Contempt hearings;
- Orders of examination;

- Any matters when the party or witness has been subpoenaed to appear in person; and
- Any hearing or conference when the court, in its discretion and on a case-by-case basis, decides that a personal appearance would materially assist in a determination of the proceeding or in resolution of the case.

*Interstate cases.* Courts cannot require a personal appearance in interstate cases brought under UIFSA. Fam C §5700.316(a). There are special rules of evidence and procedure in such cases set forth in Fam C §5700.316, including permitting a party or witness to testify by telephone. Fam C §5700.316(f); see §3.14.

#### **a. [§5.31] Who Can Make Request**

The request to appear by telephone can be made by a party, an attorney, a witness, a parent who has not been joined to the action, or a representative of a local child support agency or government agency. An LCSA appearing in a Title IV-D support action may request a telephone appearance on behalf of a party, parent, or witness. The court may also allow a telephone appearance on its own motion. Cal Rules of Ct 5.324(e)(1).

#### **b. [§5.32] Required Procedure**

Individuals or any agency representatives who want to appear by telephone must file a request (form FL-679) with the court at least 12 court days before the hearing and serve it on the other parties, the LCSA, and any attorneys in the case. An LCSA filing a request for a party, parent, or witness also must file the request at least 12 court days before the hearing. Service must be by personal delivery, fax, express mail, or other means reasonably calculated to ensure delivery by the close of the next court day. Cal Rules of Ct 5.324(e)(2)–(3); see form FL-679-INFO.

Any opposition to the request must be made by declaration under penalty of perjury and must be filed with the court and served at least 8 court days before the court hearing. Service on the person requesting the appearance and all parties, including the other parent or a parent who has not been joined, the local child support agency, and any attorneys, must be done using one of the same methods listed above. Cal Rules of Ct 5.324(f).

At least 5 court days before the hearing, the court must notify the requestor, the parties, and any attorneys of its decision. The court can direct the clerk, the court-approved vendor, the local child support agency, a party, or an attorney to provide the notification. The notice can be given in a variety of ways, including in person or by telephone, fax, express mail, email, or other means reasonably calculated to ensure notification by the 5 court days required. Cal Rules of Ct 5.324(h).

Each court must publish a notice providing the parties with the particular information necessary to appear by telephone in covered proceedings. Cal Rules of Ct 5.324(j), 3.670(q).

#### **c. [§5.33] Additional Court Authority**

The court has express authority to shorten the time limits to file, submit, serve, respond, or comply with any of the procedures set forth below. Cal Rules of Ct 5.324(g). Further, if at any time during the hearing, the court determines that a personal appearance is necessary, the court

may continue the matter and require a personal appearance. Cal Rules of Ct 5.324(i). The court may use a private vendor for teleconferencing that charges a reasonable fee (Cal Rules of Ct 5.324(j), 3.670(m)), but the court must ensure that all participants can be heard and that the statements made by a participant are identified as being made by that participant. Cal Rules of Ct 5.324(j), 3.670(n). For telephone appearance fees and fee waivers generally, see Cal Rules of Ct 3.670(k)–(l). Your court may not charge a fee for telephone appearance services in a Title IV-D child or family support proceeding brought by or otherwise involving a LCSA. Cal Rules of Ct 5.324(j), 3.670(m). The proceedings must be reported to the same extent and manner as if the participants had appeared in person. Cal Rules of Ct 5.324(j), 3.670(o).

- **JUDICIAL TIP:** Use of telephone appearances can be an effective tool in managing certain types of cases, especially on high-volume calendars, *e.g.*, review hearings and certain compliance review hearings. Many courts use an outside call provider, designated by local rule, who verify, manage, and “cue” the calls, while other courts have their own system, including initiating the call for verification purposes and then requiring the person to call right back to pay for the call. Some providers also have a policy of waiving costs in approved fee-waiver cases. This rule does not prevent courts from tailoring the order, such as allowing telephone appearances until the privilege is revoked so as to minimize the need for multiple motions, and from making conditional orders, such as allowing the appearances on certain reasonable conditions.

#### **4. Motions Generally**

##### **a. [§5.34] Modification—Who Can File and Notice**

A parent who has requested or is receiving support enforcement services of the LCSA may take independent action to modify a support order while support enforcement services are being provided by the LCSA. The parent must serve the LCSA with notice of any action filed to modify the support order and provide the LCSA with a copy of the modified order within 15 calendar days after the date the order is issued. Fam C §17404(f)(1).

The LCSA is required to provide written notice to recipients of its services of the initial date and time, and purpose of every hearing for paternity or support. Fam C §17406(f)(1)(A). Failure to give this notice does not affect the validity of any order. Fam C §17406(f)(3). Once a recipient becomes a party to the action pursuant to Fam C §17404(e), then in lieu of the notice requirement above, the LCSA must serve on a parent, all pleadings relating to paternity or support that has been served on the LCSA by the other parent, within 5 days of receipt by the LCSA. In both instances, the exact notice required to be provided is set forth in Fam C §17406(f)(1)(C).

When an LCSA receives certain information that may impact a support order, it can trigger an automatic review for adjustment. The LCSA must notify the parties and request that the parent(s) provide financial information. Failure to provide such information does not prevent the LCSA from proceeding and filing its own motion to modify, with notice to all parties. 22 Cal Code Regs §115525. The types of changes in circumstances that can trigger an automatic review are set forth in 22 Cal Code Regs §115530, and include things such as:

- Incarceration of an obligor or obligee;

- An obligor's sole source of income is SSI, CalWORKS, or other public assistance program based on need, or an obligor stops receiving such needs based income;
- An obligor becomes permanently disabled or institutionalized;
- An order was based on presumed income and actual income becomes known;
- Health insurance premiums were not previously included; or
- An obligor is a reservist in the military and is called to active duty.

At least once every 3 years, the LCSA is required to mail a written notice to each party with a current support obligation subject to enforcement by the LCSA, that they have a right to request a review for either an upward or downward adjustment. 22 Cal Code Regs §115503.

Any time a parent contacts the LCSA to request a modification of an order, the LCSA has a review and adjustment process that it must follow. The process can take up to 180 days (possibly longer) to complete before a motion is filed with the court, or a determination is made not to file. See 22 Cal Code Regs §115510. The types of changes in circumstances to be considered by the LCSA as a basis for its review are set forth in 22 Cal Code Regs §115520, and include things such as:

- Changes in employment status or income, parenting timeshare, child care costs, visitation travel expenses, and receipt of unemployment benefits, state disability, or Worker's Compensation;
- Changes in health insurance premiums, new child support obligations, and release from incarceration; or
- Other changes that would affect the amount of support.

Whether it is an automatic review or one requested by a party, additional timelines and presumptions to be applied during the process are set forth in 22 Cal Code Regs §§115535, 115540, 115545, and 115550.

☛ **JUDICIAL TIP:** Many self-represented litigants are not aware of the potential time-consuming review and adjustment process before a motion is filed in court on their behalf by the LCSA, which affects the commencement date of an order (as courts do not have jurisdiction to modify prior to the date of filing of a motion). It helps to know about this process to be able to explain to litigants why the court cannot go back to the time when they first contacted the agency to request support be changed, and to stress to litigants that going forward they can seek the services of the family law facilitator directly to file a motion on their own behalf anytime there is a substantial change in their circumstances.

See Chapter 1 of this handbook for substantive information on establishing support, as well as how to calculate support. For more information regarding modification motions in particular, including burdens of proof, required showing, and retroactivity, see [§§1.102, 1.105, and 1.106](#).

### **b. [§5.35] Enforcement Motions—LCSA Consent or Objection**

A parent who has requested or is receiving support enforcement services of the LCSA may take independent action to enforce a support order made while support enforcement services are

being provided by the LCSA with the written consent of the LCSA. Fam C §17404(f)(2). The statute provides:

- The parent must give at least 30 days' written notice to LCSA before filing an independent enforcement action that includes a description of the type of enforcement action to be filed.
- The LCSA must, within 30 days of receiving the notice, either give written consent, or notice that it objects to the filing of the independent action.
- The LCSA can only object if it is currently using an administrative or judicial method of enforcement, or if the proposed independent action would interfere with an investigation being conducted.
- LCSA consent is deemed to have been given if the LCSA does not respond to the parent's written notice within 30 days.

➤ **JUDICIAL TIP:** In some counties, the LCSA routinely consents (or uses a blanket consent form) and allows such actions. However, when this does not occur, and when the parent fails to provide the appropriate notice in the first instance, the parent's failure to follow the statute may be a ground for the court to deny (without prejudice) the independent relief requested. This can be helpful when a self-represented litigant repeatedly files motions while the LCSA is providing enforcement services, and can be particularly useful when a litigant tries to bring, for example, a contempt proceeding that was not sanctioned by the LCSA.

## 5. [§5.36] Private Agreements

DCSS must sign off on any private agreement that is made an order of the court if DCSS is providing enforcement services, or the order is voidable. This also applies to any order taken without notice being given to DCSS when they are providing services. Fam C §17404(f)(3).

When cash public assistance is being received, the recipient does not have the authority to enter into a private agreement for support, as such right has been assigned to the county providing the public assistance pursuant to Welf & I C §11477. See §1.87 for information on stipulated agreements for support.

## D. Transfer of Title IV-D Case to Tribal Court

### 1. [§5.37] Jurisdiction in General

Native American tribal governments are sovereign entities separate from both the state and federal government. The legal relationships between them can be quite complex based on the United States Constitution, treaties, statutes, and court decisions. California state courts do have concurrent jurisdiction with tribes in certain areas of criminal and civil law, including family law. See Pub L 280, codified and amended at 18 USC §1162, 28 USC §1360; *California v Cabazon Band of Mission Indians* (1987) 480 US 202, 207–208, 107 S Ct 1083, 94 L Ed 2d 244, superseded by statute on other grounds as stated in 134 S Ct 2024; *Sanders v Robinson* (9th Cir 1988) 864 F2d 630, 632–633.

Tribal governments are not subject to state court jurisdiction in actions involving collection of child support. (See generally *Bryan v Itasca County* (1976) 426 US 373, 388–389, 96 S Ct

2102, 48 L Ed 2d 710). However, a number of tribes in California have recently included provisions in their gaming compacts requiring tribes to honor wage withholding and medical support notices sent directly to casinos. In contrast, an individual tribal member can be subject to a state's jurisdiction. *County of Inyo v Jeff* (1991) 227 CA3d 487, 277 CR 841.

As of 2016, there are at least 110 federally recognized tribes in California with additional petitions pending, and many more federally recognized tribes in the United States. There are at least 20 tribal courts and/or tribal court consortiums operating in California, serving at least 40 of California's tribes. Each tribal court exercises the jurisdiction granted to it under the codes and constitution of the particular tribe, and each has its own rules of practice and procedure and forms. Currently, there is one tribe that has established a comprehensive tribal Title IV-D child support program (the Yurok tribe in Northern California), and there is another tribe in the process of doing so in Southern California.

A party is required to disclose in superior court whether there is any related action in tribal court in the first pleading, in an attached affidavit, or under oath. The disclosure must include the names and addresses of the parties, as well as the name and address of the tribal court where the action is filed, the case number, and the name of the judge assigned to the action, if known. Cal Rules of Ct 5.372(c).

- **JUDICIAL TIP:** If it appears that a person in a child support proceeding might be a member of a tribe or eligible for membership, or a tribal child support order is submitted, carefully check any notice requirements and other procedural steps. There may also be a separate agreement or memorandum of understanding (MOU) entered into between a particular tribe and the state DCSS, with provisions that may affect establishment or enforcement aspects of a case. See also 28 USC §1738B (full faith and credit for child support orders).

## 2. [§5.38] Procedures to Transfer

The procedure for transfer of Title IV-D child support cases from a California superior court to a tribal court are set forth in Cal Rules of Ct 5.372. Before the filing of any motion for case transfer, the party requesting the transfer, DCSS, or the tribal IV-D agency must provide the parties with notice of the right to object to the case transfer and the procedures to make such an objection. Cal Rules of Ct 5.372(d).

On its own motion or the motion of any party and after notice of the right to object, a superior court may transfer a child support and custody provision of an action in which the state is providing services under Fam C §17400 to a tribal court. The motion can be made in both prejudgment and postjudgment cases. Cal Rules of Ct 5.372(e)(1). The motion to transfer must contain the following information (Cal Rules of Ct 5.372(e)(2)(A)–(E)):

- Whether the child is a tribal member or eligible for tribal membership;
- Whether one or both of the child's parents are tribal members or eligible for tribal membership;
- Whether one or both of the child's parents live on tribal lands or in tribal housing, work for the tribe, or receive tribal benefits or services;
- Whether there are other children of the obligor subject to child support obligations;

- Any other factor supporting the child's or parent's connection to the tribe.

In ruling on the motion, the court must first make a threshold determination that concurrent jurisdiction exists, and if it is found to exist, the transfer will occur unless a party has objected in a timely manner. Evidence to support this determination may include evidence contained in the transfer motion, any evidence agreed to by stipulation of the parties, and other evidence submitted by the parties or by the tribe. The court may also request that the tribal child support agency or the tribal court submit information concerning the tribe's jurisdiction. There is a presumption of concurrent jurisdiction if the child is a tribal member or eligible for tribal membership. Cal Rules of Ct 5.372(e)(3)–(4).

An objection must be filed within 20 days after service of the notice of the right to object, and the objecting party has the burden of proof to establish good cause not to transfer to tribal court. Cal Rules of Ct 5.372(e)(4). On the filing of a timely objection, the court must conduct a hearing on the record and must consider all relevant factors specified in subdivision (f) of the rule. In making a determination on a motion to transfer, the superior court must consider the following factors (Cal Rules of Ct 5.372(f)(1)(A)–(D)):

- The identities of the parties;
- The convenience of the parties and witnesses;
- The remedy available in the superior court or tribal court; and
- Any other factors deemed necessary by the superior court.

In making its determination on the motion to transfer, the superior court may not consider the perceived adequacy of tribal court justice systems. Cal Rules of Ct 5.372(f)(2). The superior court, after notice to all parties, may attempt to resolve any procedural issues by contacting the tribal court concerning a motion to transfer. The court must allow the parties to participate in, and must prepare a record of, any communication made with the tribal court judge. Cal Rules of Ct 5.372(f)(3).

If the request for transfer is denied, the superior court must state on the record the basis for denial. If the request for transfer is granted, the superior court must issue a final order on the transfer request that includes a determination of whether concurrent jurisdiction exists. Cal Rules of Ct 5.372(g).

### **3. [§5.39] Procedures After Order Granting Transfer**

Once the application is granted and the superior court has received confirmation that the tribal court has accepted jurisdiction, the superior court clerk must deliver a copy of the entire file, including all pleadings and orders, to the clerk of the tribal court within 20 days of confirmation that the tribal court has accepted jurisdiction. Thereafter, except the situation where a tribal court seeks to transfer the case back to superior court, the superior court may not accept any further filings in the state court action in relation to the issues of child support and custody that were transferred to the tribal court. Cal Rules of Ct 5.372(h).

### **4. [§5.40] Transfer of Proceedings From Tribal Court**

If a tribal court determines that it is not in the best interest of the child or the parties to retain jurisdiction of a child support case, the tribe may, upon noticed motion to all parties and

the state child support agency, file a motion with the superior court to transfer the case to the jurisdiction of the superior court along with copies of the tribal court's order transferring jurisdiction and the entire file. Cal Rules of Ct 5.372(i)(1). No filing fee may be charged. The superior court must notify the tribal court upon receipt of the materials and the date scheduled for the hearing of the motion to transfer. If the superior court has concurrent jurisdiction, it must not reject the case. Cal Rules of Ct 5.372(i)(2)–(4).

## **E. Other Procedures Applicable to IV-D Proceedings**

### **1. Regulations and Policies**

#### **a. [§5.41] In General**

In addition to the operative federal and state laws and rules of court (Cal Rules of Ct 5.2 et seq, 5.300 et seq) governing LCSA proceedings, there are other rules and regulations that the court either must consider, or may at times consider, as noted below. The director of the state DCSS is charged with the responsibility to adopt uniform policies, forms, and procedures to be employed statewide by all local child support agencies. Fam C §§17306, 17310, 17312. The director also has the authority to adopt regulations, orders, or standards to implement, interpret, or make specific the law enforced by the department. Fam C §17312(a).

#### **b. [§5.42] Applicable Rules and Regulations**

The state DCSS has general rulemaking authority (Fam C §§17310, 17312). The general rulemaking authority of the state DCSS must be exercised in accordance with the Administrative Procedure Act (APA) in Govt C §§11340 et seq. Fam C §§17306(e)(1), 17310(a), 17312.

Under Fam C §17310(b), notwithstanding any other provision of law, “all regulations, including, but not limited to, regulations of the State Department of Social Services and the State Department of Health Services, relating to child support enforcement shall remain in effect and shall be fully enforceable by the department.”

The court must therefore consider, whenever appropriate, the California Code of Regulations (Cal Code Regs), including, in particular, the regulations contained in Title 22, Division 13, Department of Child Support Services. The Court may also consider policy letters issued by the state DCSS. They are considered to be policy directives to the LCSAs. However, they are not binding on the court. The policy letters, now designated as CSSP Letters (previously CSS Letters), can be found on the state DCSS website at <https://childsupport.ca.gov> (under “Our Agency” icon and “Current Child Support Policies” tab). The Cal Code Regs can be found at <https://oal.ca.gov/>.

#### **c. [§5.43] Other Policies and Information**

The state DCSS also releases and issues a number of other documents on its website for informational, clarification, and training purposes. These can be helpful to find contact information, learn about technical or other problems that may be occurring in the system, or locate other useful information such as a DCSS Master Aid Code List, or various resource guides (e.g., on real property liens, etc.).

## 2. [§5.44] Records of the Department of Child Support Services Agency

Family Code §17212(b)(1) and its identical counterpart, Welf & I C §11478.1(b)(1), provide the exclusive authorization for disclosure of information for records and documents established or maintained by a public entity, such as the state DCSS, or any local child support agency. Except as otherwise provided by these sections, “all files, applications, papers, documents, and records established or maintained by any public entity pursuant to the ... child and spousal support enforcement program ... shall be confidential, and shall not be open to examination or released for disclosure for any purpose not directly connected with the administration of the child and spousal support enforcement program.”

No information may be released or the whereabouts of a party or child disclosed when (Fam C §17212(b)(2); Welf & I C §11478.1(b)(2)):

- A protective order exists,
- A good cause claim under Welf & I C §11477.04 is pending or approved, or
- The public agency establishing or enforcing support has reason to believe that release of the information may result in physical or emotional harm to the party or child.

In all these situations, the agency must omit such information from pleadings and documents submitted to the court and cite those sections in its place. Such information can only be released by court order on noticed motion under Fam C §17212(c)(6) or Welf & I C §11478.1(c)(6) as noted below. Fam C §17212(b)(2); Welf & I C §11478.1(b)(2).

- **JUDICIAL TIP:** Despite statutory authority for the agency to omit the information on pleadings or documents filed with the court, the court has a right and responsibility to make inquiry, and examine as needed, the actual address or locate information for purposes of determining due process issues and whether service was proper in any given case.

Disclosure of agency files, records, or information is authorized as follows (Fam C §17212(c)(1)–(9); Welf & I C §11478.1(c)(1)–(8)):

- For agency use in administering its duties.
- If requested by a person or designee who wrote, prepared, or furnished the document to the agency.
- The payment history of an obligor under a support order may be examined by or released to the court, the obligor, or the person on whose behalf enforcement actions are being taken or that person’s designee.
- Income and expense information of either parent to the other for purposes of establishing or modifying a support order.
- Public records subject to disclosure under the California Public Records Act under Govt C §§6250 et seq.
- On noticed motion, when the court finds that release or disclosure is required by due process, and after the court has inquired if there is a reason to believe release of the information may result in physical or emotional harm.

- Information relating to an imminent threat or crime against a child or the location of a concealed or abducted child (or of a person concealing or abducting) may be released to an appropriate law enforcement agency or judicial proceeding on the same issue, to extent not prohibited by federal law.
- Release of Social Security Number, most recent address, and place of employment of the absent parent may be released to an “authorized person” as defined in 42 USC §653(c), on request and only if the information has been provided to the California Parent Locator Service (CPLS) by the Federal Parent Locator Service (FPLS). See also CSS Letter 09-04 (request and authorization for release of specified information to authorized person or agency).

The circumstances under which a person, agency, or court can access information in the FPLS or a state PLS are outlined in chart form in [Appendix K](#). FPLS information can only be accessed by making a request through a state’s parent locator service.

- **JUDICIAL TIP:** Courts often face the situation of a parent seeking “locate information” for service of a related OSC or motion (RFO) involving custody or visitation when the child support agency is enforcing support and knows where the other parent is located but is not willing to release it. When appropriate, the court may consider authorizing the release of information to a single specified source—*e.g.*, the child abduction unit or sheriff—for purposes of service only, with an express provision that the information is not to be disclosed to the other parent, nor put on any proof of service submitted for filing. The filed proof of service can state it was served “at the address on file with the child support agency under Fam C §17212(b)(3) and/or (c)(6) [or Welf & I C §11478.1(b)(3) and/or (c)(6)]” with the address available for the court to view in camera as needed. Note that the LCSA is required to release to a party who was served the address where service was effected. Welf & I C §11478.1(b)(3). However, this is very different than a party seeking to locate information of another parent.

### 3. [§5.45] Cooperation From Other State Agencies

All state, county, and local agencies must cooperate with the LCSA in exchanging and providing locate and other information for enforcement purposes to the support agency or to the California Parent Locator Service (CPLS), notwithstanding any other confidentiality laws. Fam C §17505. CPLS is authorized to collect and disseminate a variety of locate, financial, and other identifying information, and there are provisions to protect the information providers, as well as the information itself. Fam C §17506.

Generally, the collection, maintenance, and dissemination of personal data by agencies is governed by the Information Practices Act of 1977 (CC §§1798 et seq). When such records are used to make any determination about the individual, the agency must maintain them accurately and as completely as possible. When a record is transferred out of state government (*e.g.*, credit reporting), the agency must correct, update, withhold, or delete any portion of the record that it knows or has reason to believe is inaccurate or untimely. CC §1798.18. Failure to maintain records accurately or other violations of the Information Practices Act can lead to a civil action

against the agency and the imposition of attorney's fees and costs, as well as injunctive relief. See CC §§1798.45 et seq.

#### **4. [§5.46] Complaints Against LCSA**

- Family Code §17800 requires each LCSA to maintain a complaint resolution process to resolve all complaints received from custodial and noncustodial parents. To that end, DCSS has set up an ombudsperson program within each LCSA. The ombudsperson can assist an individual who needs help with a problem (informal resolution), as well as provide information and assistance to an individual on the formal complaint resolution process. Litigants can find the ombudsperson by either calling or going to their LCSA's website. JUDICIAL TIP: Referring a litigant to an ombudsperson of the LCSA can sometimes help diffuse a situation where a litigant is frustrated about how an LCSA is handling his or her case (versus the situation in which a referral to the family law facilitator may be appropriate as described in §5.5).

### **F. [§5.47] Arrears**

#### **1. [§5.48] In General**

Please refer to §§4.175–4.196 for a detailed discussion covering the situations in which a request for determination of arrears arises, along with the theories a court may encounter or consider regarding such requests. This part will only cover more limited issues that relate in particular to Title IV-D proceedings.

#### **2. [§5.49] Statement of Arrearages**

Every applicant seeking enforcement services pursuant to Fam C §17400 shall be requested to give the LCSA a statement of arrearages stating whether any arrearages are owed. If the applicant alleges arrearages are owed, the statement must be signed under penalty of perjury. Fam C §17524(a).

For all cases opened after December 31, 1995, the LCSA shall enforce only arrearages declared under penalty of perjury (on statement of arrearages), arrearages accrued after the case was opened, or arrearages determined by the court in the child support action. Arrearages may be determined by judgment, noticed motion, renewal of judgment, or registration of the support order. Fam C §17524(b).

For all cases opened on or before December 31, 1995, the LCSA shall enforce only arrearages that have been based upon a statement of arrearages signed under penalty of perjury or where the LCSA has some other reasonable basis for believing the amount of claimed arrearages to be correct. Fam C §17524(c).

In addition, whenever the LCSA issues a notice of support delinquency, the notice must state the date upon which the amount of delinquency was calculated, that the amount may or may not include accrued interest, and that the obligor has a right to an administrative determination of arrears. Fam C §17525.

### 3. [§5.50] Review and Judicial Determination of Arrearages

Upon request of an obligor or obligee, the LCSA must review the amount of arrearages alleged in a statement of arrearages. The LCSA must complete the review in the same manner and pursuant to the same timeframes as a complaint submitted under Fam C §17800. See §5.46 regarding complaints against the LCSA. The LCSA must consider all evidence and defenses submitted by either parent on the issues of the amount of support paid or owed. Fam C §17526(a).

The LCSA has discretion to suspend the enforcement or distribution of arrearages, if it believes there is a substantial probability that the result of the administrative review will result in a finding that there are no arrearages. Fam C §17526(b).

Any party to an action involving child support enforcement services provided by the LCSA may request a judicial determination of arrears. The party may request an administrative review beforehand, which the LCSA must complete in the same timeframe as specified in Fam C §17526(a). Any motion to determine arrearages filed with the court shall include a monthly breakdown showing amounts ordered and amounts paid, in addition to any other relevant information. Fam C §17526(c).

### 4. [§5.51] Administrative Adjustment Due to Incarceration

A local child support agency enforcing a child support order may administratively adjust account balances for a money judgment or order for support of a child suspended pursuant to Fam C §4007.5(a) & (c). Once the agency verifies that arrears and interest were accrued during the period of incarceration or involuntary institutionalization, it must also verify that the obligor is not otherwise disqualified under Fam C §4007.5(a)(1)–(2). Fam C §4007.5(c)(1)(A)–(B). The LCSA must give written notice of the proposed adjustment to the support obligor and obligee with a blank form for the obligor or obligee to use to object to the adjustment. Fam C §4007.5(c)(1). If either obligor or obligee objects to the adjustment, the agency shall not adjust the order, but shall file a motion with the court to seek to adjust the arrears and shall serve copies of the motion on the parties, who may file an objection with the court. An obligor's arrears shall not be adjusted until the court has approved the adjustment. Fam C §4007.5(c)(2). The section applies to every money judgment or child support order issued or modified on or after October 8, 2015. Fam C §4007.5(f).

*Note: Section 4007.5 has a sunset date of January 1, 2020, unless a later enacted statute (enacted before the sunset date), deletes or extends that date. Fam C §4007.5(i).*

An administrative adjustment of arrears due to incarceration is not an exclusive remedy under the statute. An obligor can still file a request for order to modify support based on a change in circumstances (due to incarceration or any appropriate reason), and anyone can petition the court for a determination of child support or arrears amounts. Fam C §4007.5(b), (d).

### 5. [§5.52] Compromise of Arrears

There are two different statutory provisions and situations that allow for DCSS to compromise arrears owed to a county. One provision pertains to support arrears that accrued during times when public assistance (cash aid) was being paid out on behalf of the child, *i.e.*,

welfare arrears. Fam C §17560. This program is known as COAP, which stands for the Compromise of Arrears Program. The other provision pertains to the situation where aid or foster care monies were being paid out on behalf of the child who was with a relative or guardian, or who went into the dependency system, and the child is returned to a parent. Fam C §17550. This program is known as FR-COAP, which stands for Family Reunification-Compromise of Arrears Program. Both programs are statewide programs.

**a. [§5.53] Compromise of Arrears Program (COAP)**

The COAP program creates an opportunity for obligors to compromise child support arrears (including interest) that are owed to the government, so long as certain conditions are met. Fam C §17560(f).

If the obligor owes current child support, the offer in compromise has to require the obligor to be in compliance with the current support order for a set period of time before any arrears and accrued interest could be compromised. Fam C §17560(b). The conditions for an acceptance of any offer of compromise require an obligor to provide evidence of income and assets to establish that the offer is the most that can be expected to be paid or collected, within a reasonable period of time, that the obligor does not have reasonable prospects of acquiring increased assets or income to enable the obligor to satisfy a greater amount of arrears than the offer within such time, and that the obligor has not withheld payment of child support in anticipation of the offers in compromise program, among other things. Fam C §17560(f)(1)–(3).

An arrears compromise may be paid off all at once in a lump sum, or over time in a payment plan (*i.e.*, 36 months), depending upon the details of the case. The COAP program does not forgive an entire debt (but an offer can be as low as 10% of the debt). It does not apply to spousal support. The compromise can not include any arrears owed a custodial parent without that parent's consent. Fam C §17560(d). A determination made on an offer is not subject to the provisions of Fam C §17800 (complaint process against an LCSA) nor subject to judicial review. Fam C §17560(g).

The offer will be rescinded, with no portion paid being refunded, and all compromised liabilities will be reestablished if it is determined that an obligor concealed his or her income or assets, intentionally withheld, destroyed, or falsified any financial information, or if the obligor fails to comply with any of the terms and conditions of the offer in compromise. Fam C §17560(c).

Any offers in compromise must be filed with the court, and the LCSA is also required to notify the court if the compromise is rescinded. Fam C §17560(h).

**b. [§5.54] Family Reunification Compromise of Arrears Program (FR-COAP)**

This program was established by AB 1449 (Stats 2001, ch 463), and requires DCSS and the Department of Social Services to establish regulations to administer it. The purpose of the program is to reduce the financial hardships on an obligor parent in cases where either (1) foster care monies had been paid out on behalf of the child, and the child has been reunified with the obligor by court order out of dependency court, or (2) in cases where the child had been receiving aid while with a guardian or relative caregiver, and the child is returned to the obligor with whom the child was previously living. Fam C §17550(a)(1). The obligor must have an income of less than 250 of the current federal poverty level, and the LCSA must determine

pursuant to department regulations that the compromise is necessary for the child's support. Fam C §17550(a)(2)–(3).

For cases that qualify, the compromise agreement can reduce the court ordered child support debt (arrearages and interest) which accrued during the time the child was separated or was considered deserted by the child's parent, which resulted in aid paid for the child.

- **JUDICIAL TIP:** These compromise programs are an important tool for obligors who have arrearages with no current ability to pay the entire amount. Although there is no judicial oversight of the programs, bench officers need to be aware of them and make appropriate referrals. The DCSS *COAP Policy and Procedures Manual* (September 2011) contains some background and informational material on the COAP program generally. A search on the state DCSS website (<https://childsupport.ca.gov>) for “COAP” will provide results listing the manual, as well as some other pages describing the different programs (COAP, FR-COAP), including results for an eligibility list, and a COAP Application Review page. This latter page also mentions other possible arrearages management processes that may apply to a case.

## **G. Enforcement Tools Unique to DCSS**

### **1. [§5.55] Civil Enforcement in General**

There are many civil enforcement remedies that are applicable irrespective of whether the proceeding is in a regular family law court or in a Title IV-D court. For a detailed discussion of these civil remedies, see the entire section on Civil Enforcement in Ch. 4, §§4.2–4.117. The remainder of the sections in this part contain a more detailed discussion on the enforcement tools that are unique to DCSS.

### **2. Levy**

#### **a. [§5.56] Lien Enforcement by Levy**

Under Fam C §17522, if an obligor is delinquent in the payment of support for at least 30 days and the LCSA is enforcing under Fam C §17400, then the LCSA may collect or enforce any lien by levy. The levy may be issued by the LCSA, on proper notice, advising the obligor of the amount of arrearages, the right to administrative review of a determination of arrearages under Fam C §17800 (complaint resolution), and the right to seek a judicial determination of arrearages under Fam C §17526. Fam C §17522(c).

The LCSA may collect the delinquency or enforce any lien by levy served on all persons having in their possession, or who will have in their possession or under their control, any credits or personal property belonging to the delinquent support obligor, or who owe any debt to the obligor at the time they receive the notice of levy. Fam C §17522(a).

#### **b. [§5.57] Exemption Processes**

If the levy causes an undue financial hardship, the Federal Tax Board (FTB) may be willing to conduct an analysis of the obligor's income, expenses, and assets. The FTB Information Directory can be found at <https://www.ftb.ca.gov/forms/misc/1240.html>.

An obligor may also apply for a claim of exemption under CCP §§703.510 et seq for an amount that is less than or equal to the total amount levied. The sole basis for a claim of exemption is the financial hardship for the obligor and the obligor's dependents. Fam C §17453(j)(3). The process works as follows:

- \* The obligor contacts the LCSA who is the levying officer (Fam C §17453(j)(5)), or obtains a claim form from the FTB.
- \* The obligee must file the claim within 10 days of levy and must include a financial statement with the claim. CCP §§703.520, 703.530.
- \* The LCSA must notify FTB within 2 business days after the claim is filed (Fam C §17432(j)(6)) to place a 45-day hold on the account. If it opposes the claim, the LCSA, within 10 days of claim filing, must file with the court a notice of opposition (see mandatory form FL-677), the claim, and a request for hearing. CCP §703.550.
- \* The funds remain on hold until the court grants, grants in part, or denies the claim.

### c. [§5.58] Bank Levies

This enforcement mechanism is unique to DCSS. Obligors who are delinquent in paying their current child support or who owe arrears and are not paying are submitted by the LCSA to the FTB for full collection, which can include bank levies for obligor account holders. Fam C §§17500 et seq.

A "child support delinquency" means an arrearage or otherwise past-due amount that accrues when an obligor fails to make any court-ordered support payment, which is more than 60 days past due, and an aggregate amount that exceeds \$100. Fam C §17500(c). A "compliant" obligor is an individual who is meeting his or her current support obligations (*i.e.*, making regular payments on current support and on arrears as ordered by the court), but still owes arrears. A "non-compliant" obligor is an individual who is delinquent in paying his or her current support obligations, or someone who owes arrears and is not paying.

The FTB bank levy Financial Institution Data Match (FIDM) program is a process whereby delinquent obligors (even if "compliant" as to current support obligations) are matched with accounts in financial institutions for purposes of collecting delinquent support. Fam C §17453.

In general, no referral is to be made when:

- A jurisdiction other than California is enforcing (Fam C 17453(i));
- The obligor has filed bankruptcy;
- The obligor is receiving SSI/State Supplementary Program benefits;
- The obligor is receiving SSDI (see *Marriage of Hopkins* (2009) 173 CA4th 281, 289–291, 92 CR3d 570); or
- The obligor is deceased.

There is an automatic exemption of \$3500 from the FIDM levy without filing a Claim of Exemption for "compliant" obligors. Fam C §17453(j)(2). It applies to the total of all accounts held in financial institutions, not each individual account; obligors with accounts in multiple institutions qualify for one \$3500 exemption in a 12-month period. For "non-compliant" obligors there is no automatic exemption, and all monies in the account can be taken.

This levy process is not limited to banks. Other financial institutions such as brokerage firms are included.

DCSS does not need to provide notice to the obligor and does not need to obtain a court order authorizing the levy. *Marriage of Lamoure* (2011) 198 CA4th 807, 818–819, 132 CR3d 1.

#### **d. [§5.59] Personal Property Liens**

This enforcement mechanism is unique to DCSS. Family Code §17523 establishes a procedure whereby a personal property lien is created by operation of law on the obligor's personal property for all amounts of unpaid support when a LCSA is enforcing under Fam C §§17400, 17402. The lien is perfected by filing with the Secretary of State and has the same force and priority as a judgment lien.

#### **e. [§5.60] Liquidation of Financial Assets**

After a levy, DCSS has specific authority to order the party levied on to liquidate the financial assets and turn the proceeds over to the LCSA or the DCSS to satisfy a support obligation. Fam C §17522.5.

### **3. [§5.61] Tax Refund Intercept**

This enforcement mechanism is unique to DCSS. DCSS submits obligor delinquency data to the state and federal taxing authorities electronically for the purpose of intercepting state and federal tax refunds. The application of these funds to amounts owed is governed by federal regulations, and they differ from funds received from other sources. Tax intercept funds are generally applied first to arrears for aid reimbursement versus non-aid amounts on account. See 26 USC §6402(c); 42 USC §664; 26 CFR §301.6305-1(b)(4)(iii).

- **JUDICIAL TIP:** If there is a question about the amount of arrears or the appropriateness of the intercept, the court can order the intercept terminated or modified or, if the intercept has taken place, can order the funds refunded in whole or in part, or held in trust (an exceptions account) pending further determination.

### **4. Licenses**

#### **a. [§5.62] Suspension**

This enforcement mechanism is unique to DCSS. Various state licensing boards may suspend or withhold state-issued licenses for obligors who are not in compliance with support orders registered in, or issued by, a California court. See Fam C §17520. Licenses that may be suspended or withheld include drivers' licenses, professional licenses, sales licenses, real estate licenses, and guards' licenses. Fam C §17520(a)(5). DCSS periodically consolidates lists of noncompliant obligors received from the LCSAs into one certified list, which it submits to the various licensing boards, such as the DMV. Fam C §17520(a)(2), (b), (c). Each board sends notice of intent to withhold issuance or renewal of a license to noncompliant obligors. Fam C §17520(e)(2). Licenses of obligors listed on a supplemental list for being noncompliant for more than 4 months are subject to suspension. Fam C §17520(a)(3)(A). Board notices must emphasize the necessity of obtaining a release from the LCSA. Fam C §17520(f).

Obligors may file a written request for review with the LCSA. Fam C §17520(h). They may seek judicial review of license denials. Fam C §17520(k). In both the LCSA review and the judicial review, the standard for releasing the license is whether the obligor is in compliance with the order. Fam C §17520(a)(4).

Previously, obligors had to go to each LCSA that had submitted the obligor's name for license suspension for a release. In 2009, DCSS issued a new statewide policy (see CSS Letter 09-07) that allows a person whose license has been administratively suspended in multiple counties to obtain an administrative license release in all cases by applying at any one LCSA (even if that LCSA does not have "managing county" responsibility for all cases).

For Judicial Council forms of motion and order to seek judicial review of a license denial, see forms FL-670 and FL-675.

### **b. [§5.63] Judicial Review**

Judicial review of an LCSA license decision must comply with the following procedures (Fam C §17520(k)):

- The obligor must file a request, stating the grounds for review.
- An evidentiary hearing must be held within 20 calendar days of the request's filing.
- Service of the request must be made on the LCSA within 7 calendar days of the filing.

The LCSA is required to mail a copy of the pleading to any nonmoving party within 5 days of receipt by the LCSA. Fam C §17404(e)(3).

The court has authority to uphold the action, grant an unconditional release, or grant a conditional release of the license. Fam C §17520(k)(4)(B). The court's review at the hearing is limited to determining the following (Fam C §17520(k)(1)–(4)(A)):

- Existence of a support judgment, order, or payment schedule on arrearages or reimbursement.
- Whether applicant is the obligor covered by the judgment or order.
- Whether the obligor is in compliance.
- Whether a conditional release is warranted, after taking into account the extent of the needs of the obligor, the obligor's payment history, and the current circumstances of both the obligor and the obligee.

If the court grants a conditional release, it must (Fam C §17520(k)(4)(C)):

- Make findings of fact stating the basis for the relief. The court should state the factors considered above as to needs of obligor, payment history, and the parties' circumstances.
- State the payments necessary to satisfy the unrestricted release without prejudice to a later determination of support arrearages, including interest.
- Specify the payment terms that are necessary to allow the release to remain in effect.

The court may set up terms for continuing release and must base its decision on the facts in each particular case. Fam C §17520(g)(2). Once a court has made a finding and order regarding the release of the hold on a license, it is DCSS's statewide policy that even though courts do not

have statewide jurisdiction, the finding of the court “should be honored statewide.” See CSS Letter 09-07.

- **JUDICIAL TIP:** Although not required by the code, a review date can be set by the court to review the obligor’s compliance with conditions. The court may also wish to consider “step-up” type conditional terms on a payment schedule, as appropriate.

## 5. [§5.64] Passports

This enforcement mechanism is unique to DCSS. The passport denial program was introduced through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and Pub L 104–193, and added section 652(k) to the Social Security Act. 42 USC §652(k). This section requires the Secretary of State to refuse to issue a passport to any person certified by the Secretary of Health and Human Services as owing a child support arrearage in an amount greater than \$2500. Further, the Secretary of State may take action to revoke, restrict, or limit a passport previously issued to an individual owing such an arrearage. Currently, the State Department is only denying passports at the time of application or renewal.

An obligor to whom the issuance of a passport has been denied may seek an administrative release of the passport through the LCSA, based on a variety of exemptions. Instructions relating to the passport program can be found in DCSS regulations and through DCSS Letters. See, *e.g.*, CSS Letter 07-20 located on the DCSS website at <https://childsupport.ca.gov>.

There is no law that specifically gives the state court jurisdiction to release the passport. It is a federal issue, and thus, arguably, legal action could be brought in federal court. Although there is currently no case law directly on point, the state court presumably has jurisdiction over DCSS (state action, including administrative and ministerial duties). Because DCSS has the ability to request the release of a passport from the State Department, it follows that the state court has authority to issue orders directed at DCSS to take all steps necessary to release the obligor’s passport. Judicial review of administrative action may also be available through the writ process under the provisions of CCP §§1085, 1094.5 (administrative writs).

## 6. [§5.65] State Disability, Unemployment, and Workers’ Compensation Benefits

This enforcement mechanism is unique to DCSS. DCSS can garnish up to 25 percent of State Disability Insurance (SDI) or health insurance program benefits for support. CCP §704.130; Fam C §5206(e).

DCSS can garnish unemployment insurance benefits (UIB) at the rate of 25 percent of each weekly payment, or a lesser amount by written agreement, or as ordered by the court. CCP §704.120; Fam C §17518(c).

DCSS can garnish up to 25 percent of Workers’ Compensation temporary disability benefits for ongoing support and can impose a lien on the final lump-sum award. CCP §704.160; Fam C §5206(d).

- **JUDICIAL TIP:** DCSS’ automated system is set up to collect the 25 percent; however, they do have the ability to lower the percentage (generally in increments of 5 percent), both to address the situation where the amount needed to be collected is less than 25

percent, and where a court has issued an order staying enforcement activity to no more than a sum certain.

#### **7. [§5.66] Social Security**

This enforcement mechanism is unique to DCSS. DCSS can garnish up to 25 percent of Social Security Administration benefits for support. 20 CFR Part 404 *ff*.

DCSS can garnish up to 50 percent of Social Security Disability (SSDI) benefits for ongoing support and up to 5 percent for child support arrears. 20 CFR Part 404 *ff*; see also Fam C §5246(d)(3) and [Appendix D](#).

Supplemental Security Income (SSI) cannot be garnished or used for child support because it is awarded based on need. 20 CFR Part 416 *ff*.

#### **8. [§5.67] Enforcement Action Taken in Error**

Any person claiming that any support enforcement actions taken against that person, or his or her wages or assets, in error, shall file a claim of mistaken identity with the local child support agency. The LCSA must take appropriate steps to terminate all enforcement activities if it determines that the claim is meritorious. Fam C §17530(a)–(c). If the claim is rejected, or the agency fails to take any of the remedial steps, the claimant may file an action with the court to establish his or her mistaken identity or to obtain the remedies provided, or both. Fam C §17530(d). Filing a false claim pursuant to this section is a misdemeanor. Fam C §17530(e).



**Script A**  
**Establishing Marital Presumption/Registered Domestic Partner**  
**Under Family Code Section 7540**

[Were/Are] you married to respondent?

[Or]

[Were/Are] you registered as a domestic partner with respondent?

*[If yes to either question, ask the following:]*

1. When were you [married/registered]?
2. When did you separate?
3. When was this child born?
4. Between the date of [marriage/registration] and the date of separation, did you continuously live together as [husband and wife/registered domestic partners]?
5. During that time, to your knowledge, was respondent ever impotent or sterile?
6. Were you living together at the time of conception? At time of birth?

*[If satisfied that the conclusive marital presumption applies, make the following findings]*

The court finds that there is a factual basis to support the marital presumption under [Family Code section 7540](#) and, based on that conclusive presumption, finds that respondent is the [father/mother] of child John Doe, and a judgment of parentage is now entered.

*[If not satisfied (e.g., the parents were not continuously living together during the conception time frame or otherwise), make the following findings]*

The court is not satisfied that the marital presumption under Family Code section 7540 applies because [state reason(s)]. Therefore, unless the Petitioner is ready to prove up another basis to establish parentage, the court will order the parties to submit to genetic testing under [Family Code section 7551 or 7558](#). The Petitioner is ordered to serve the genetic testing order on the respondent with the additional notice that a party's refusal to submit to the test is admissible in evidence in any proceeding to determine paternity under [Family Code section 7551 or 7558\(e\)](#). The matter is now continued to receive the genetic testing results. The new date and time for hearing is [date/time.]

**Script B**  
**Establishing Biological Parentage**

1. Are you the [mother/father] of child John Doe?
2. What is the child's date of birth?
3. Whom do you believe to be the biological [father/mother] of child John Doe?
4. Was the child born full term?
5. Approximately 9 months [*or other date if not full term*] before the child's birth, did you have sexual intercourse with the respondent, which resulted in the conception of the child John Doe?
6. At one month before or one month after the date of conception, did you have sexual intercourse with anyone else?
7. Could the [father/mother] of John Doe be anyone other than the respondent?

**Script C**  
**Parentage Under Family Code Section 7611(a)**

1. What is the child's date of birth?
2. Are you married to the child's natural mother?
3. What is the date when you and the child's natural mother married?
4. Was the child born during your marriage to the child's natural mother?
5. [*If the answer to number 4 is "no," ask the following:*] When was the marriage terminated or a judgment of separation entered by a court?

**Script D**  
**Parentage Under Family Code Section 7611(d)**

1. Has the child lived in your home? When and for how long?
2. Even if not having lived in your home, has the child spent significant time in your home?  
For what purpose?
3. Have you represented to others that you are the child's parent? If so, to whom?
4. How have you communicated to other people that you are the child's parent?

## **Script E**

### **Parentage Findings**

*[If parentage was established by a preponderance of the evidence]*

Based on the evidence presented to the court, the court finds that [petitioner/respondent] [name] is the [father/mother] of the minor child(ren), [name(s)], born on [date(s)], who are the subject of this action, and [petitioner/respondent] is therefore responsible for [his/her/their] financial support.

*[If parentage was not established by a preponderance of the evidence]*

Based on the evidence presented to the court, the court finds that the [petitioner/respondent] [name] is not the [father/mother] of the minor child(ren), [name(s)], born on [date(s)], who are the subject of this action, and enters a judgment of [nonpaternity/nonmaternity].

## Script F Departure From Guideline Formula

[Under [Fam C §4056](#), whenever you order an amount for support that differs from the guideline formula, you must state in writing, or on the record, the following information]

1. The guideline formula amount is \$[amount].
2. The court finds the application of the guideline formula would be unjust or inappropriate because [recite one or more of the following factors/grounds]:

**Stipulated Agreement** [[Fam C §4057\(b\)\(1\)](#)]. The parties have stipulated to an amount below guideline under [Family Code §4065\(a\)](#), and the court finds the agreement to be in the best interest of the children. The parties have declared [or have agreed that]:

They've been informed of their rights concerning child support;

The order is being agreed to without coercion or duress;

The agreement is in the best interests of the children involved; and

The needs of the children will be adequately met by the stipulated amount.

**Special Circumstances** [[Fam C §4057\(b\)\(5\)](#)]. Application of the formula is unjust or inappropriate due to the following special circumstance(s):

The parents have different time-sharing arrangements for different children.

Both parents have substantially equal time-share of the child[ren], and one has a much [lower/higher] percentage of income used for housing than the other.

The child[ren] [has/have] special medical or other needs that could require child support that would be greater than the formula amount.

The child[ren] [has/have] more than two parents.

[Other; specify]:

[Example; see [City & County of San Francisco v Miller \(1996\) 49 CA4th 866, 56 CR2d 887](#)]: After paying guideline support, the obligor's remaining disposable income is insufficient to meet [his/her] necessary basic monthly living expenses [and provide for basic necessary expenses arising during obligor's custodial time with the children and/or considering the needs of obligor's other child(ren)].

[Example; see [County of Lake v Antoni \(1993\) 18 CA4th 1102, 22 CR2d 804](#)]: Consideration of high consumer debt incurred for purpose of "living needs" of other child(ren) is a special circumstance rendering guideline inappropriate.

[Example; see *Edwards v Edwards (2008) 162 CA4th 136, 143–144, 75 CR3d 458*]:  
The child has reached the age of majority and is supporting [*himself/herself*] in college, and neither parent retains primary physical responsibility.

[ ] **High Income of Payor and Needs Exceeded** [Fam C §4057(b)(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.

[ ] **Disparity Between Support and Custodial Time** [Fam C §4057(b)(4)]. A party is not contributing to the needs of the children at a level commensurate with that party's custodial time.

[ ] **Deferred Sale of Home Order** [Fam C §4057(b)(2)]. Sale of the family residence where the children reside is deferred by court order, and the court finds its rental value exceeds the mortgage payments, insurance, and property taxes. [*Note: Amount of adjustment must not be greater than the excess amount.*]

3. The reasons the support amount ordered is consistent with the best interests of the child[ren] are: [*specify*].

4. [*On request by any party, you must state in writing, or on the record, the following under Fam C §4056(b)*]: The following information was used in determining guideline amount:

- The net monthly disposable income of each parent: [*specify*].
- The actual federal income tax filing status of each parent: [*specify*].
- The deductions from gross income for each parent: [*specify*].
- The approximate percentage of time each parent has primary physical responsibility for the child(ren) compared to other parent: [*specify*].

## **Script G Advisement of Rights**

It is alleged that you are the parent of the child John Doe and you seek a judgment of parentage. If a judgment of parentage is established, then you will be considered the legal parent resulting in various obligations, including the responsibility to support the child. In that regard, you have certain rights.

1. You have the right to be represented by an attorney:
  - You may select and pay for an attorney, or
  - You may represent yourself, or
  - If you cannot afford an attorney, you may ask the court to appoint one for you at no expense to you. If I appoint an attorney to represent you, the scope of representation is limited to the parentage issue, and no other issue.
2. You have the right to a trial on the issue of parentage at which you must prove you are the father by admissible evidence. The standard of proof is a preponderance of the evidence.
3. Under [Family Code section 7551](#), and depending on the circumstances, you may have the right to request genetic testing to prove or disprove biological parentage.
4. To prepare for trial, you have the right to subpoena witnesses and documents into court and at trial.
5. During the trial, you have the right to:
  - Confront and cross-examine any witnesses that may be called against you,
  - Present evidence on the issue of parentage, and
  - Testify or remain silent, and if you exercise your right to remain silent, your silence will not be used against you.
6. Finally, you may decide to waive or give up one or more of the rights I have announced, and knowing your rights, you may elect to admit you are the [father/mother] of the child[ren].
7. Do you understand the rights and options I have announced?
8. How do you want to proceed?

## **Script H**

### **Oral Advisement—Status as Judge Pro Tem**

Before I call the cases individually, I need to make a general advisement. I am the Commissioner assigned to hear all cases in this Department. I have also been appointed by the Presiding Judge [*or*: I am authorized by statute] to act as a Judge pro tem and will be so acting in your case unless you object, on the record, *before* I hear your case.

The reason I distinguish between a Commissioner and a Judge pro tem is that under California law, a Court Commissioner cannot enter final judgments or orders in contested matters unless the Commissioner also sits as a Judge pro tem [*or*: a Child Support Commissioner by law sits as a Judge pro tem unless an objection is made]. If you do object today, I will still hear the case today and would then make written findings and recommendations that are sent to a judge for review. You would only be entitled to a new hearing, however, if you then filed written objections within 10 days of those findings.

Counsel (for LCSA), are you ready to proceed?

## **Script I**

### **Oral Advisement and Opening Statement**

*[Sample script—exact procedures vary from court to court]*

Good Morning everyone. I am Commissioner \_\_\_\_\_. Before I call the calendar, I need to make some announcements and introductions.

As a Court Commissioner, California law gives me authority to hear cases, take evidence, and make findings of fact and proposed rulings. Those rulings are then reviewed by a judge, except when there is a stipulation that I sit as a judge pro tem with the full powers of a superior court judge, or when I sit on a child support calendar such as this one. When I preside over this calendar, it is presumed that I sit with the full powers of a judge, unless someone objects. If you want a judge to hear your case instead of a court commissioner, you need to object when I first call your case. You cannot wait until later appearances or part way through today's hearing. If you do object, your matter will likely not be heard today, but may be continued until another date to be heard by a judge.

I have two agencies present in court today to help you. Present is *[name]*, our family law facilitator. *[He/She]* is an attorney but does not represent any party. *[He/She]* is here to answer your questions and give you information about the child support process. *[He/She]* can help you identify the forms you may need, where to get them and file them, and where to get information that goes on the forms. *[He/She]* can explain how child support is established and collected, and the formula that the State Legislature has adopted for calculating child support.

Also present are representatives from the *[name of county]* County Department of Child Support Services. If you have a file with that office, and almost everyone here should, they are here to answer any questions concerning that file. They can also answer questions about the child support process and what their office can and cannot do.

Feel free to talk with any of these people to get help and answers to your questions.

**Script J**  
**Order for Child Support**

The court orders [name] to pay to [name] child support in the amount of \$\_\_\_\_\_ per month commencing [date], and continuing on the first day of each month thereafter until further court order or statutory termination. The court's findings are set forth in the computer printout attached to the court's child support order [*or, if not providing a computer printout, state the specific findings*].

## Appendix A Index of Family Code Sections

*Note: Major changes to the Voluntary Declaration of Parentage sections (§§7570–7581) of the Family Code are scheduled to become effective on January 1, 2020. See AB 2684 of the 2017–2018 Legislative Session.*

Subject	Family Code Section	Description
ABSTRACT OF JUDGMENT	4506	<b>Abstract of judgment:</b> (a) Certification by clerk; (c) Recording notice of support judgment by Local Child Support Agency (LCSA) has same force and effect as certified abstract.
ACCESS TO INFORMATION	17508	<b>Access to information collected by law:</b> EDD to share info with LCSA.
ADULT CHILD (AGREEMENT)	3587	<b>Court order to effectuate agreement for support for adult child:</b> Court has authority to approve, and make an order to effectuate, a stipulated agreement to continue child support after the age of 18 years.
ADULT CHILD (INCAPACITATED)	3910	<b>Duty to maintain incapacitated child:</b> (a) Father and mother have an equal responsibility to maintain, to the extent of their ability, a child of any age who is incapacitated from earning a living and without sufficient means.
AGREEMENT FOR SUPPORT	3585	<b>Support order based on parents' agreement:</b> Severable from all other provisions relating to property or spousal support; order based on agreement shall be imposed by law and made under court's power to order child support.
AID CASES: OBLIGATION OF PARENT	17402	<b>Obligation of noncustodial parent:</b> Obligation of noncustodial parent in cases of separation or desertion that results in aid by county.
ALLOCATION: ADD-ON EXPENSES ( <i>i.e.</i> , child care, uninsured health insurance, educational costs, and travel expenses)	4062	<b>Additional expenses:</b> (a) The court <i>must</i> order as additional child support: (1) Child care costs related to employment or reasonably necessary education or training for employment skills, (2) Uninsured health care costs; (b) The court <i>may</i> order the following as additional child support: (1) Education costs or other special needs of the children, (2) Visitation travel expenses. Apportionment to be one-half unless requested otherwise and appropriate.
APPLICATION FOR EXPEDITED SUPPORT ORDER	3622	<b>Application for order:</b> The court may make an expedited support order. Guideline or MBSAC (minimum basic standards of adequate care).
ARREARAGES: AGENCY REVIEW OF STATEMENT; REQUEST FOR JUDICIAL DETERMINATION	17526	<b>Review and judicial determination of arrearages:</b> (a) Administrative review of statement of arrearages; (c) Request for judicial determination of arrearages (must include monthly breakdown of amounts ordered and paid).
ARREARAGES: STATEMENT OF	17524	<b>Statement of arrearages:</b> (a) Statement of arrearages mandatory with application for services from LCSA.
ARREARS RECOVERY	4503	<b>Limitation period for recovery of arrearages in child support not affected by child attaining age of 18.</b>
ATTORNEY'S FEES		<b>SEE APPENDIX G: Attorney's Fees Chart in this Handbook.</b>
ATTORNEY'S FEES (GOVERNMENT AGENCY)	273	<b>No award of attorney's fees against governmental agency in family law matter, except when appropriate under CCP §128.5 or Fam C §271.</b>
ATTORNEY-CLIENT RELATIONSHIP	17406	<b>Actions involving parentage or support:</b> (a) No attorney-client relationship may be deemed to have been created between LCSA and any party.
CHANGE OF EMPLOYMENT: DUTY TO NOTIFY	5281	<b>An assignment order shall include a requirement that the obligor notify the obligee of change of employment within 10 days.</b>
CHILD CUSTODY AND VISITATION: LCSA NOT INVOLVED	17404	<b>Parties to actions; Hearing and judgment; Pleadings; Actions under other code provisions; Independent action to modify support order:</b> (e)(4) Child support agency does not handle child custody or visitation issues.

<b>Subject</b>	<b>Family Code Section</b>	<b>Description</b>
CHILD SUPPORT ORDER (DURATION)	3601	<b>Child support order continues in effect until terminated by court or by operation of law.</b>
CHILD SUPPORT ORDER (EXPEDITED)	3621	<b>Child support order during pendency of action:</b> The court may, without a hearing, make an order requiring a parent to pay child support during the pendency of that action, pursuant to expedited process.
CHILD SUPPORT ORDER: SOME PRINCIPLES OF STATEWIDE UNIFORM GUIDELINES	4053	<b>Child support according to parent's circumstances and station in life:</b> (a) A parent's first and principle obligation is to support minor children according to the parent's circumstances and station in life; (b) Both parents are mutually responsible for support; (d) Each parent should pay for the support of the children according to that parent's ability; (f) Children should share in the standard of living of both parents; child support may therefore improve the standard of living of the custodial household to improve the lives of the children; (j) Child support must ensure that children receive fair, timely, and sufficient support reflecting the state's high standard of living and high costs of raising children compared to other states.
CHILD SUPPORT ORDER: EARNINGS ASSIGNMENT ORDER REQUIRED	5230	<b>Support order must include earnings assignment order.</b>
CHILD SUPPORT: PARENT ON WELFARE	4200	<b>Child support payable to parent receiving welfare:</b> (a) Direct payment to State Disbursement Unit; (b) Direct LCSA to appear on behalf of welfare recipient. See also Fam C §17309.
CHILD SUPPORT REGISTRY; CHILD SUPPORT REGISTRY FORM	17391 4014	<b>Statewide registry for all IV-D and all child support orders:</b> Judicial Council form FL-191 to be used for all non-IV orders.
COMMISSIONERS	4251	<b>Provision of sufficient commissioners: Commissioner as temporary judge; Duties:</b> (a) All actions or proceeding in which enforcement services are being provided for an order to establish, modify, or enforce child support must be heard by a commissioner. The parties must be advised as such.
CONSOLIDATION OF ORDERS	17408	<b>Consolidation of support orders.</b>
CREDIT REPORTING	4701	<b>Child support delinquency reporting:</b> Credit reporting agency information from Department of Child Support Services (DCSS). LCSA is not liable for any consequences for the failure of a parent to contest the accuracy of the information within the time allowed.
CUSTODY OR VISITATION RIGHTS (FAILURE OR REFUSAL)	3556	<b>Effect of failure to implement custody or visitation rights:</b> Duty of support not affected by a failure or refusal by CP to implement any rights as to custody or visitation granted by the court to the NCP.
DCSS AUTHORITY	17000	<b>Definitions.</b>
DURATION OF DUTY TO SUPPORT CHILD	3901	<b>Duration of duty:</b> (a) The duration of duty continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first; (b) Nothing limits a parent's ability to agree to provide additional support.
DUTY OF PARENTS (SUPPORT)	3900	<b>Duty of parents:</b> Both father and mother have an equal responsibility to support their minor child in manner suitable to child's circumstances.
DUTY OF PARENTS: MUST PROVIDE CURRENT INFORMATION ON EMPLOYER, ETC, NOTIFY COURT (SUBJECT TO CONFIDENTIALITY)	4014	<b>Notice of current employer; Personal information; Filing and updating; Forms:</b> In non IV-D cases, must provide (1) Residence and mailing address; (2) Social security number; (3) Telephone number; (4) Driver's license number; (5) Name, address, and telephone number by the employer. See JC form FL-191.
EARNINGS ASSIGNMENT ORDER	17420	<b>Earnings assignment order:</b> Court required to issue. See also FC 5320:
EMPLOYER AND LABOR ORGANIZATIONS	17512	<b>Employer and labor organizations must cooperate with LCSA.</b>
EMPLOYER DUTIES: WAGE ASSIGNMENT ORDERS	5235	<b>Employer to withhold and forward support.</b>
EMPLOYER DUTIES: PENALTIES	5241	<b>Penalty for employer failing to withhold and forward support pursuant to valid earnings assignment order.</b>

<b>Subject</b>	<b>Family Code Section</b>	<b>Description</b>
ENFORCEMENT BY COUNTY ON BEHALF OF MINOR CHILD	4002	<b>Enforcement by county on behalf of child:</b> (a) The county may proceed on behalf of a child to enforce the child's right of support against a parent; (b) If the county furnishes support to a child, the county has the same right as the child to secure reimbursement and obtain continuing support.
ENFORCEMENT: ERROR	17530	<b>Enforcement actions taken in error:</b> Misidentification.
ENFORCEMENT: LEVIES	17522	<b>Levies.</b>
ENFORCEMENT: LICENSE RENEWALS	17520	<b>Consolidated lists of persons not in compliance with support order; License renewals; Review procedures; Rules and regulations; Forms; Suspension or revocation of driver's license; Severability:</b> License renewals: process, hearing within 20 days; administrative remedy.
ENFORCEMENT: LIENS	17523	<b>Lien for child support.</b>
ENFORCEMENT: RETIREMENT SYSTEMS	17528	<b>Actions to enforce obligations; Retirement systems.</b>
ENFORCEMENT: UNEMPLOYMENT COMPENSATION	17518	<b>Actions to enforce support obligations:</b> Twenty-five percent of weekly unemployment compensation, unless written agreement w/LCSA or court order.
FORWARDING SUPPORT	3555	<b>Forwarding support paid through designated county officer:</b> DCSS must forward support to the payee within mandates of guidelines.
FOSTER CARE FORMULA	17402	<b>Obligation of noncustodial parent:</b> (c)(3) Foster care formula.
GENETIC TESTS TO DETERMINE PATERNITY	7541	<b>Use of blood tests to determine paternity:</b> (b) The notice of motion for blood tests may be filed no later than 2 years from the child's date of birth by the husband; (d) The notice of motion for blood tests must be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity of the child before the court.
GENETIC TESTS: ADMINISTRATIVE ORDER FOR TESTING	7558	<b>Administrative order requiring genetic testing; Costs; Motion for relief; Additional test:</b> LCSA may issue administrative order for genetic tests. Payment of genetic testing costs. Effect of refusal to submit to testing.
GENETIC TESTS: COMPENSATION OF EXPERT WITNESS	7553	<b>Compensation of expert witness:</b> (a) Compensation set by court at reasonable amount. Court apportions between parties and/or county, and determines what amount, if any, is taxed as costs; (b) Compensation of expert witness appointed for court's needs shall be paid by the court.
GENETIC TESTS: OBJECTION TO RESULTS	7552.5	<b>Results of genetic tests:</b> (b) Genetic tests shall be admitted into evidence unless a written objection is filed with the court and served no later than 5 days before hearing.
GENETIC TESTS: PATERNITY	7551	<b>Order for genetic tests in civil proceeding involving paternity; "Genetic tests" defined.</b>
GENETIC TESTS: PATERNITY	7552.5	<b>Service of copies of results of genetic tests:</b> (a) No later than 20 days before hearing; (b) Shall be admitted without foundation unless written objection filed at least 5 days before hearing.
GENETIC TESTS: REQUEST FOR GENETIC TESTS AND SET ASIDE OF VOLUNTARY DECLARATION OF PATERNITY	7575	<b>Rescission of voluntary declaration of paternity; Setting aside declaration.</b> (a) Either parent may file rescission of POP within 60 days. (b)(3)(a) The motion for genetic tests may be filed no later than 2 years from the child's date of birth. (c)(1) Set aside of paternity declaration. CCP §473. The period within which the action or motion to set aside the voluntary declaration of paternity must be filed begins on the date that the court makes an initial order for custody, visitation, or child support based on voluntary declaration of paternity.
HARDSHIP DEDUCTIONS	4071	<b>Circumstances evidencing hardship and maximum amount.</b>

<b>Subject</b>	<b>Family Code Section</b>	<b>Description</b>
HEALTH INSURANCE	3751	<b>Health insurance for supported child:</b> (a)(1) Requires a provision in all support orders to keep IV-D agency informed of whether the obligor has health insurance coverage at a reasonable cost, and if so, the policy information; (a)(2) When current support is set, court must require that health insurance be maintained on the child by either or both parents if available at no cost or reasonable cost. Rebuttable presumption cost (defined as difference between self-only and family coverage) is reasonable if it does not exceed 5% of gross income of responsible party. If cost found not to be reasonable, state reasons on record.
HEALTH INSURANCE	3752	<b>District attorney (DCSS) designated as assigned payee; Information on policy for custodial parent.</b>
HEALTH INSURANCE	3752.5	<b>Support order must require obligor and obligee to provide information about health insurance.</b>
HEALTH INSURANCE	3753	<b>Health insurance cost in addition to child support amount.</b>
HEALTH INSURANCE	3763	<b>Time of making and effect of assignment order; Modification of order:</b> The health insurance coverage assignment order may be ordered at the time of trial or entry of a judgment ordering health insurance coverage. The assignment is binding on any existing or future employer.
HEALTH INSURANCE	3765	<b>Motion to quash assignment.</b>
HEALTH INSURANCE	3773	<b>National Medical Support Notice in lieu of health insurance coverage assignment:</b> Title IV-D cases only.
INCOME: ALLOWABLE DEDUCTIONS AND EXPENSES	4059	<b>Annual net disposable income of each parent:</b> Lists allowable deductions from gross income, including (e) Any child or spousal support actually being paid by the parent under a court order, to or for the benefit of any person who is not a subject of the order to be established by the court. In the absence of a court order, any child support actually being paid, not to exceed the amount established by the guideline, for natural or adopted children of the parent not residing in that parent's home, who are not the subject of the order to be established by the court. Parent must prove payment of the support.
INCOME: DEFINED	4058	<b>Annual gross income of each parent defined.</b>
INCOME: SUBSEQUENT SPOUSE OR NONMARRIED PARTNER	4057.5	<b>Income of subsequent spouse or nonmarital partner not considered except in extraordinary circumstances:</b> (b) Extraordinary circumstances may include a parent who voluntarily or intentionally quits work or reduces income, or who intentionally remains unemployed or underemployed and relies on subsequent spouse's income.
INCOME AND EXPENSE DECLARATION	3664	<b>Request for production of income and expense declaration:</b> (a) At any time following a judgment of dissolution of marriage or legal separation, or a determination of paternity that provides for a payment of support, either party, without leave of court, may serve a request on the other party for the production of a completed current income and expense declaration; (b) If no response within 35 days of service or if response is incomplete as to wage information, pay stubs, and income tax returns, the requesting party may serve a request on the employer of the other party for information limited to the income and benefits provided to the party on Judicial Council form.
INDEPENDENT ACTION	17404	<b>Parties to actions; Hearing and judgment; Pleadings; Actions under other code provisions; Independent action to modify support order:</b> (f)(1) Party may take independent action to modify; (f)(2) Party must give notice to LCSA before taking independent action to enforce (LCSA can consent or object). Title IV-D cases.
INEQUITABLE ORDER	3692	<b>Finding of inequitable order:</b> Support order may not be set aside simply because the court finds the order inequitable when made or subsequent circumstances caused the order to become excessive or inadequate.
JOINDER OF ACTIONS	17404	<b>Parties to actions; Hearing and judgment; Pleadings; Actions under other code provisions; etc.:</b> (a), (c) No joinder of actions, except pursuant to (e). Title IV-D cases.
JURISDICTION (Uniform Interstate Family Support Act) (UIFSA)		<b>See UIFSA: JURISDICTION.</b>

<b>Subject</b>	<b>Family Code Section</b>	<b>Description</b>
LACHES DEFENSE	291	<b>Exemption from renewal of judgment for support:</b> (d) In an action to enforce a judgment for child, family, or spousal support, the respondent may raise and the court may consider the defense of laches only with respect to any portion of the judgment owed to the state. See also FC 4502.
LOCAL CHILD SUPPORT AGENCY (LCSA)	17400	<b>Obligation of county to maintain local child support agency; Summons, complaint, and answer forms; Outreach program; Order for temporary support; "Enforcing obligations"; Intervention by agency:</b> Local child support agency's obligations and actions.
LOCAL CHILD SUPPORT AGENCY (LCSA): DUTIES	17500	<b>Obligations of LCSA under the Title IV-D of Social Security Act.</b>
LOCAL CHILD SUPPORT AGENCY (LCSA): DUTY TO MONITOR CASES	3680.5	<b>Local agency's duty to monitor child support cases:</b> (a) LCSA must monitor child support cases and seek modifications, when needed.; (b) At least once every 3 years, LCSA must review and seek modification, if appropriate, of each child support case for which assistance is provided under CalWORKs.
LOCAL CHILD SUPPORT AGENCY (LCSA): LIMITATION ON STIPULATING TO REDUCE PAST DUE SUPPORT	17406	<b>Limitation on stipulation to reduce past due support:</b> (k) LCSA may not enter into a stipulation that reduces the amount of past due support, on behalf of a person who is receiving support enforcement services and who is owed support arrearages that exceed unreimbursed public assistance, without consent of the person receiving services on own behalf or on behalf of the child.
MEDICAL: STATE INSURANCE FORM	17422	<b>State medical insurance form.</b>
MODIFICATION	3603	<b>Modification or termination of order:</b> An order may be modified or terminated at any time except as to an amount that accrued before the date of filing of the notice of motion or order to show cause to modify or terminate.
MOTION TO QUASH ASSIGNMENT ORDER	5270	<b>Grounds for motion to quash</b> (assignment order).
MULTIPLE SUPPORT ORDERS (UIFSA)		<b>See UIFSA: MULTIPLE SUPPORT ORDERS.</b>
NOTICE TO LCSA	4251	<b>Required notice:</b> (f) Moving party must serve notice on LCSA of any proceeding in which support is at issue. Without proper notice, any order is voidable on motion of the LCSA.
OPERATIVE DATE	4	<b>Transitional provision for amendments, additions, and repeals:</b> (c) New law applies whether an event occurred on or after operative date; (d) Proceedings taken after the operative date are governed by new law.
ORDER/NOTICE TO WITHHOLD INCOME	5246	<b>Order/notice to employer to withhold income for child support:</b> Alternative to earnings withholding order.
PARENTAGE: ACTION TO ESTABLISH (Uniform Parentage Act) (UPA)	7630	<b>Action to determine existence or nonexistence of parent and child relationship.</b>
PARENTAGE: CONCLUSIVE PRESUMPTION (CHILD OF MARRIAGE)	7540	<b>Presumption arising from birth of child during marriage.</b>
PARENTAGE: FINDING THAT CHILD HAS MORE THAN TWO PARENTS	7612(c)	<b>More than two parents:</b> Court may find that more than two persons with a claim to parentage are parents if the court finds that recognizing only two parents would be detrimental to the child.
PARTY TO ACTION	17404	<b>Parties to actions; Hearing and judgment; Pleadings; Actions under other code provisions; Independent action to modify support order:</b> (e)(1) Parent who requested or is receiving services becomes a party to the action after support order entered.
PATERNITY: EFFECT OF DECLARATION OF PATERNITY	7573	<b>Effect of declaration of paternity:</b> The establishment of paternity for a child has the same force and effect as a judgment of paternity issued by a court of competent jurisdiction and must be recognized as a basis for the establishment of an order for custody, visitation, or child support (with certain exceptions).
PATERNITY: ESTABLISHED IN ANOTHER STATE	5604	<b>Effect of previous determination of paternity by another state:</b> Full faith and credit.
PATERNITY: POP DECLARATION	7571	<b>Declaration of paternity:</b> POP Declaration.

<b>Subject</b>	<b>Family Code Section</b>	<b>Description</b>
PATERNITY: POP DECLARATION INVALID	7612(f)	<b>When voluntary declaration invalid:</b> Voluntary declaration invalid if any specified condition exists when declaration signed.
PLEADINGS RELATED SOLELY TO SUPPORT	17404	<b>Parties to actions; Hearing and judgment; Pleadings; Actions under other code provisions; Independent action to modify support order:</b> (e)(3) The local child support agency must, within 5 days of receipt, mail to the nonmoving party all pleadings relating solely to the support issue. Rebuttable presumption constitutes good service.
PRESUMPTION OF PARENTAGE (UPA)	7611	<b>Presumption of parentage:</b> (a) The presumed parent and the child's natural mother have been married to each other, and the child was born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, divorce, or after a judgment of separation is entered by a court. (Other subdivisions provide other presumptions as well.)
PRESUMPTION OF PARENTAGE: HOLDING OUT	7611(d)	<b>Presumed parent status:</b> (d) The presumed parent receives the child into the home and openly holds out the child as a natural child.
PRESUMPTION OF PATERNITY: SET ASIDE POP DECLARATION	7612(e)	<b>Petition to set aside voluntary declaration:</b> Person presumed to be parent may petition to set aside voluntary declaration within 2 years of execution; court considers declaration's validity and child's best interest as defined.
PRIORITY OF CHILD SUPPORT PAYMENTS	4011	<b>Priority of child support payments:</b> Child support ordered by court must be made before any debts owed to creditors.
PRIORITY OF PAYMENTS ON ASSIGNMENT ORDERS	5238	<b>Priorities when order includes both current support and arrearages; Multiple assignment orders for same employee.</b>
PUBLIC ASSISTANCE	3029	<b>Order for support when custodial parent is receiving public assistance:</b> Order granting custody to CP receiving assistance must include a child support order. (Support matter should be heard in Title IV-D court).
PUBLIC ASSISTANCE	4004	<b>Child receiving public assistance:</b> Where child support is an issue, court shall require parties to reveal whether a party is currently receiving or intends to apply for public assistance.
PUBLIC ASSISTANCE: CONDITIONS FOR COMPROMISE OF PUBLIC ASSISTANCE (FOSTER CARE) DEBT	17550	<b>Establishing regulations for compromising obligor parent's liability for public assistance debt in certain cases; Conditions to be met:</b> Compromise of public assistance debt conditions in foster care setting.
RECONCILIATION (INTACT FAMILY)	3602	<b>Order not enforceable when parties are reconciled and living together.</b>
REGISTRATION: JURISDICTION TO PROCEED (OUT-OF-COUNTY ORDER)	5601	<b>Procedures on registration; no further proceedings regarding obligor's support may be filed in other counties.</b>
REGISTRATION: OUT-OF-COUNTY ORDER	5600	<b>Registration of order obtained in other county.</b>
REGISTRATION: VACATE (OUT OF COUNTY ORDER)	5603	<b>Motion for vacation of registration or for relief; Hearing:</b> Twenty days after service of notice of registration.
REGISTRATION (UIFSA)		<b>See UIFSA: REGISTRATION.</b>
SPOUSAL SUPPORT	4320	<b>Court must consider all of the circumstances listed: (a) through (n).</b>
SPOUSAL SUPPORT: EFFECT OF CO-HABITATION	4323	<b>Rebuttable presumption of decreased need for spousal support if cohabitating with nonmarital partner.</b>
SPOUSAL SUPPORT: ENFORCEMENT (ORDER OF RESORT FROM PROPERTY)	4338	<b>Court to resort to property for enforcement of spousal support, in the following order:</b> (a) earnings, income after date of separation; (b) community property; (c) quasi-community property; (d) other separate property of payor.
SPOUSAL SUPPORT: ENFORCEMENT (SECURITY FOR PAYMENT)	4339	<b>Court has authority to order reasonable security.</b>
SPOUSAL SUPPORT: PROVISION FOR SUPPORT AFTER DEATH OF SUPPORTING PARTY	4360	<b>For purposes of FC 4320, court may, where just and reasonable, include an amount sufficient to purchase an annuity or maintain insurance for the benefit of the support spouse.</b>
SPOUSAL SUPPORT (STANDARD OF LIVING)	4332	<b>Court must make specific findings as to standard of living during marriage.</b>

Subject	Family Code Section	Description
UIFSA: JURISDICTION	5700.201	<b>Nonresidents:</b> (a) In a proceeding to establish, enforce, or modify a support order or to determine parentage, this state may exercise personal jurisdiction over a nonresident under circumstances listed.
UIFSA: JURISDICTION (CONTINUING EXCLUSIVE)	5700.205	<b>Continuing exclusive jurisdiction.</b>
UIFSA: MINOR PARENTS	5700.302	<b>Minor parents:</b> Minor parent, or a guardian or other legal representative of minor parent, may maintain proceeding for benefit of child.
UIFSA: MODIFICATION OF REGISTERED ORDER	5700.611	<b>Requirements for modification:</b> Modification of a registered order issued in another state.
UIFSA: MULTIPLE SUPPORT ORDERS (CONTROLLING ORDER)	5700.207	<b>Multiple support orders:</b> Procedures for determining controlling order(s).
UIFSA: MULTIPLE SUPPORT ORDERS (MULTIPLE OBLIGEEES)	5700.208	<b>Enforcement of multiple orders for two or more obligees.</b>
UIFSA: NOTICE OF REGISTRATION OF ORDER	5700.605	<b>Notification of registration</b> (support order or income withholding order).
UIFSA: REGISTRATION (CONFIRMATION PRECLUDES CONTEST)	5700.608	<b>Precluding a contest:</b> Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.
UIFSA: REGISTRATION (CONTEST)	5700.606	<b>Contesting a registered order:</b> A nonregistering party must request a hearing within 20 days after notice of the registration. Failure by the nonregistering party to request hearing to contest the validity or enforcement of the registered order in a timely manner, results in order being confirmed by operation of law.
UIFSA: REGISTRATION (DEFENSES AND BURDEN OF PROOF)	5700.607	<b>Defenses and burden of proof:</b> Grounds for contesting registration or enforcement of an order for child support; burden on contesting party.
UIFSA: SUPPORT PROCEEDING UNDER HAGUE CONVENTION	5700.701	<b>Application and proceedings under convention.</b>

**Appendix B**  
**Voluntary Declaration of Paternity (“POP”) Chart**  
**Family Code §§7570–7577, 7612**

(Effective until January 1, 2020)

§7572(b)(1)	A signed POP (Paternity Opportunity Program declaration) that is filed with DCSS legally establishes paternity.
§7572(b)(4)	By signing the POP, the father is voluntarily waiving his constitutional rights.
§7573 & §17412(b)	A completed and filed POP has the same force and effect as a judgment of paternity issued by a court of competent jurisdiction.
§7612(f)	POP is invalid if, when signed (1) Child already had a presumed parent under §7540, (2) Child already had a presumed parent under §7611(a), (b), or (c), or (3) Man signing declaration is a sperm donor, consistent with §7613(b).
§7575(a)	<b>Setting Aside POP (4 ways):</b> <b>(1) 60 days from execution of POP:</b> Filing a rescission form with DCSS within 60 days of execution of the declaration, unless a court order for custody, visitation, or child support has been entered in an action.
§7575(b)(3)(A)	<b>(2) 2 years from child’s date of birth:</b> Filing request for order for genetic tests no later than 2 years from the date of the child’s birth.
§7575(b)(4)	The request for order for genetic tests must be supported by a declaration under oath submitted by the requesting party stating the factual basis for putting the issue of paternity before the court.
§7575(c)(1)	<b>(3) Setting aside POP under CCP §473:</b> CCP §473 time period begins to run when court makes an initial order for custody, visitation, or child support based on a POP. Must prove mistake, inadvertence, surprise, or excusable neglect in signing POP.
§7575(c)(3)	<b>If POP set aside:</b> Custody, visitation, or child support order remains in effect until court orders POP set aside.
§7575(c)(5)	Order CP, MC, and NCP to genetic testing.
§7575(b)(1)	If genetic tests demonstrate that the man who signed the POP is not a genetic parent of the child, then the court may still deny the request after finding it is in the best interest of the child to deny the request to set aside the POP.
§7612(e)	<b>(4) Setting aside POP under Fam C §7612(e):</b> Person presumed to be parent under §7611 may file petition to set aside voluntary declaration of paternity within two years of its execution.

	Court must take into account declaration's validity and child's best interest, based on factors in §7575(b) and on nature, duration, and quality of petitioner's relationship with child and the benefit or detriment of continuing that relationship. If any conflict between presumption and declaration, weightier considerations of policy and logic control.
§7576(a)	<b>POPs signed on/before December 31, 1996:</b> The child of a woman and man executing a POP on or before December 31, 1996, is conclusively presumed to be the man's child.
§7576(d)	Filing request for order for genetic tests no later than 3 years from date of mother or father's signature, whoever signed last.
§7577(a)	<b>POPs signed by minor parents:</b> POP establishes paternity 60 days after both parents have reached the age of 18 or are emancipated, whichever occurs first.
§7577(b)	Minor parent can rescind POP at any time up to 60 days after the parent reaches the age of 18 or becomes emancipated, whichever occurs first.

## Voluntary Declaration of Parentage (“POP”) Chart

### Family Code §§7570–7581, 7612

(Effective from and after January 1, 2020)

§7572(b)(1)	A signed POP (Paternity Opportunity Program declaration) that is filed with DCSS legally establishes parentage.
§7572(b)(4)	By signing the POP, the father is voluntarily waiving his constitutional rights.
§7573(d) & §17412(b)	A completed and filed POP has the same force and effect as a judgment of parentage issued by a court of competent jurisdiction.
§7573.5	POP is void if, when signed, (1) a person other than the woman who gave birth to the child or a persona seeking to establish parentage through a voluntary declaration of parentage is a presumed parent under Sections 7540 or 7611 (a), (b) or (c), (2) a court has entered a judgment of parentage of the child, (3) another person has signed a voluntary declaration of parentage, (4) the child has a parent under Sections 7613 or 7962 other than the signatories, (5) the person seeking to establish parentage is a sperm or ova donor under Section 7613(b) or (c), or (6) the person seeking to establish parentage asserts that he or she is a parent under Section 7613 and the child was not conceived through assisted reproduction.
§7575(a)	<p><b>Setting Aside POP (4 ways):</b></p> <p><b>(1) 60 days from execution of POP:</b>            Filing a rescission form with DCSS within 60 days of execution of the declaration, unless a court order for custody, visitation, or child support has been entered in an action.</p> <p><b>(2) 2 years from effective date of POP:</b>            Filing an action to challenge a valid POP no later than 2 years from the effective date of the POP.</p> <p>The petition challenging a POP must be supported by a declaration under oath alleging specific facts to support standing to bring the action as alleged genetic parent, a presumed parent under Section 7611, or a person who has standing under Section 7630.</p> <p><b>(3) Setting aside POP under CCP §473:</b>            CCP §473 time period begins to run when court makes an initial order for custody, visitation, or child support based on a POP. Must prove mistake, inadvertence, surprise, or excusable neglect in signing POP.</p> <p><b>(4) Setting aside by signatory</b>            Not less than two years after the effective date of the POP, a signatory may commence a proceeding to challenge the POP on the basis of fraud, duress, or material mistake of fact.</p>
§7577(d)	
§7577(a) & (b)	
§7577(k)	
§7576	

<p>§7581(a)</p> <p>§7581(d)</p>	<p><b>POPs signed on/before December 31, 1996:</b></p> <p>The child of a woman and man executing a POP on or before December 31, 1996, is conclusively presumed to be the man's child.</p> <p>Filing request for order for genetic tests no later than 3 years from date of mother or father's signature, whoever signed last.</p>
<p>§7580(a)</p> <p>§7580(b)</p>	<p><b>POPs signed by minor parents:</b></p> <p>POP establishes parentage 60 days after both parents have reached the age of 18 or are emancipated, whichever occurs first.</p> <p>Minor parent can rescind POP at any time up to 60 days after the parent reaches the age of 18 or becomes emancipated, whichever occurs first.</p>

## Appendix C Work Search Order Form

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address)  TELEPHONE NO: _____ FAX NO: _____ E-MAIL ADDRESS: _____ ATTORNEY FOR: _____	For court use only
<b>Superior Court of California County of San Francisco</b> 400 McAllister Street San Francisco, CA 94102	
Petitioner/Plaintiff:  Respondent/Defendant:  Other Parent:	
<b>WORK SEARCH ORDER</b>	CASE NUMBER

1.  Petitioner  Respondent  Other Parent is ordered to look for work, **and to:**

spend a *minimum* of \_\_\_\_\_ **hours per week in job search related activities.**

apply for a *minimum* of \_\_\_\_\_ **jobs per week.**

No more than \_\_\_\_\_ applications can be done online.

Other conditions: \_\_\_\_\_

**You are responsible for** maintaining (1) a *written log* of your weekly activities (see local form: weekly search log) and (2) *copies* of all paperwork/correspondence related to your job search (letters, job applications sent, responses, contact information / business cards, etc.)

Activities should include *most or all* of the following:

- A. Networking with personal and professional contacts
- B. Interviewing for information, advice and job leads (“informational interviewing”)
- C. Reviewing prior contacts and following up regularly
- D. Conducting computer research (company, industry, job/current openings)

Examples *include*:

- Company-specific websites
- *Google* searches for relevant industry information
- [www.monster.com](http://www.monster.com) / [www.craigslist.org](http://www.craigslist.org)
- E. Searching local newspaper job ads for relevant openings
- F. Responding to and following up on advertised job openings (online, in-person, newspaper)

- G. Job search-related communication (resume revision, cover letters, following up on job leads, e-mail communications, thank-you notes, etc.)
- H. Contacting/working with placement agencies
- I. Contacting/attending alumni groups
- J. Attending career counseling / job coaching sessions
- K. Participating in job search clubs and/or job search skills training
- L. Participating in professional organizations
- M. Job skills training (computer/vocational classes relevant to job objective)
- N. Preparing for and attending job interviews
- O. Contacting a union, obtain placement on list, attend roll calls, and track placement on list.

2. You must serve a copy of the logs once per month and within the first 10 days of each month, starting \_\_\_\_\_, to:

- Opposing counsel or party
- Department of Child Support Services (DCSS)  
617 Mission Street, San Francisco, CA 94102
- \_\_\_\_\_

3. You must bring the signed, original weekly logs and all paperwork/correspondence related to your job search to court with you. Copies of all paperwork/correspondence related to your job search must be available for review if requested by opposing party within 10 days of request.

4. If you find work before the next court date, you must notify opposing party and counsel (if any) and (if checked)  the Department of Child Support Services (DCSS), in writing *within ten days*, providing name, address, and telephone number of employer, salary or wage level, job title, copies of any employment contract, hiring letter, or employment agreement, and first month's paycheck stub upon receipt.

5. The court reserves jurisdiction to retroactively modify support to the earliest date permitted by law, and to impose sanctions for any failure to comply with this order, including imputing income.

**SPOUSAL SUPPORT:** It is the goal of this state that each party will make reasonable good faith efforts to become self-supporting as provided in Family Code §4320. The failure to make reasonable good faith efforts may be one of the factors considered by the court as a basis for modifying or terminating spousal or partner support.

The parties are ordered to return to court for review on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_, in Dept. \_\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_  
Judge/Commissioner

(This can be completed by hand or re-created in a word processing table or database spreadsheet)

NAME: \_\_\_\_\_ CASE # \_\_\_\_\_ WEEK OF: \_\_\_\_\_

<b>DATE</b>	<b>ACTIVITY</b>	<b>Contact/Organization (include name, title and phone number)</b>	<b>RESULTS</b>	<b>Follow Up Steps (describe what you're going to do next and when)</b>	<b>Time Spent (start/end time)</b>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(signature) \_\_\_\_\_ (date) \_\_\_\_\_ Page \_\_\_ of \_\_\_

## Appendix D Benefits Chart

Use this chart to determine if a benefit is income for support purposes, is taxable, and is payable to supported children.

Program	Law	Eligibility	Dependent Benefits	Time Limits	Child Support	Rehabilitation	Federal Income Tax	State Income Tax	FICA	SDI
Social Security (Title 2) SSA	20 CFR Part 404	62 yrs and sufficient money paid in [full retirement starts at 65 yrs, or 66 if born 1943–1954, or 67 if born after 1960]	Spouse also eligible under certain conditions	None	50% maximum withholding or garnishment; can use to set support [CCP §706.052; Fam C §5246; 22 CCR §116100]	No	Partially taxable per formula (up to 50% or 85% based on amount of other income)  IRC §§86, 861(a)(8)	Not taxable  Rev & Tax C §17087(a)	Exempt	Not deducted
Social Security Disability (Title 2) SSDI	20 CFR Part 404	Disabled and sufficient money paid in (5-month wait)	Dependents may be eligible for benefits	None if remain disabled or at age 62	50% maximum withholding or garnishment and 5% for arrears; can use to set support [CCP §706.052; Fam C §5246; 22 CCR §116100]	Refer for rehab—no additional money	Partially taxable per formula (up to 50% or 85% based on amount of other income). IRC §§86, 861(a)(8)	Not taxable  Rev & T C §17087(a)	Exempt	Not deducted

<b>Program</b>	<b>Law</b>	<b>Eligibility</b>	<b>Dependent Benefits</b>	<b>Time Limits</b>	<b>Child Support</b>	<b>Rehabilitation</b>	<b>Federal Income Tax</b>	<b>State Income Tax</b>	<b>FICA</b>	<b>SDI</b>
Supplemental Security Income (Title 16) SSI	20 CFR Part 416	Disabled and indigent; no possible gainful employment	Death benefit to surviving spouse	None if remain disabled or age 62	No garnishment; can't use to set support [Fam C §§4058 (c), 17156; Welf & I C §10051]	Refer for rehab—no additional money	Not taxable	Not taxable Rev & Tax C §17087(a)	Exempt	Not deducted
Workers' Compensation	Labor Code	Injured in course of employment	Death benefit or if worker is incarcerated	Depends on medical severity of injury	25% garnishment; temp. disab. or lien on lump sum; can use to set support [CCP §704.160]	Rehab services available	Not taxable IRC §104(a)(1)	Not taxable Rev & Tax C §17131	Exempt	Not deducted
Unempl. Compensation Insurance	Un Ins C	Fired for other than misconduct, left for good cause, or laid off for lack of work (paid in 100% by employer)	None	6 months (may be extended depending on national unempl. figures)	25% garnishment; can use to set support [Fam C §17518; Un Ins C §§1255.7, 2630]	Limited extensions for approved school/work training	Taxable IRC §85(a)	Not taxable Rev & T C §17083	Exempt	Not deducted

Program	Law	Eligibility	Dependent Benefits	Time Limits	Child Support	Rehabilitation	Federal Income Tax	State Income Tax	FICA	SDI
State Disability Insurance	Un Ins C	Disability preventing return to previous job (money paid in by employee)	None	12 months maximum	25% garnishment; can use to set support [Fam C §17518; Un Ins C §§1255.7, 2630]	Refer for rehab—no additional money	Not taxable IRC §§104(a)(3, 105(e)(2)	Not taxable	Exempt	Not deducted
Military Pay		Active duty military, Coast Guard, USPHS, NOA, etc.	Yes	None	50% of net disposable; can be used to set support		Taxable	Taxable	Not exempt	Not deducted
Military Allowances		Active duty military, Coast Guard, USPHS, NOA, etc.	Yes	None	No garnishment; can be used to set support		Not taxable	Not taxable	Exempt	Not deducted
Military Retired Pay		Retired military, Coast Guard, USPHS, NOA, etc.	Yes	None	50% of net disposable; can be used to set support		Taxable (other)	Taxable (other)	Exempt	Not deducted
VA Disability Insurance Compensation	38 USC Pt II, Ch 11; 42 USC §659; 38 CFR	General or honorable discharge or retired from military, Coast	Yes	None	Up to amount of waived retirement pay; can be apportioned by VA on applic.;	Yes	Not taxable	Not taxable	Exempt	Not deducted

<b>Program</b>	<b>Law</b>	<b>Eligibility</b>	<b>Dependent Benefits</b>	<b>Time Limits</b>	<b>Child Support</b>	<b>Rehabilitation</b>	<b>Federal Income Tax</b>	<b>State Income Tax</b>	<b>FICA</b>	<b>SDI</b>
	§§3.450, 3.451	Guard, USPHS, NOA, etc.			can be used to set support					
VA Disability Pension (treated same as SSI)	38 USC Pt II, Ch 15; 42 USC §659; 38 CFR §§3.450, 3.451	Nonservice connected disability, wartime service, and need-based	Yes	None	No garnishment; can be apportioned by VA on applic.; can't be used to set support	Yes	Not taxable	Not taxable	Exempt	Not deducted

## Appendix E 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

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

**Definitions**

Weekend	6 p.m. Friday to 6 p.m. Sunday (2 days)
Extended Weekend	School closing Friday to school opening Monday (60 hours; 3 nights, 2 days)
Evening	After school to after dinner (6 hours; 1 evening/week = 13 days/yr)
Overnight	School close midweek to 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)
School Vacations	Summer (10 weeks), 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 Noncustodial Parent's ordinary alternating weekend and midweek visits and Custodial Parent's cross visits)

## Appendix F Sample Spousal Support Worksheet

### Spousal Support Worksheet – Family Code §4320

<b>Marital Standard of Living:</b>	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:		<b>Petitioner:</b>	<b>Respondent:</b>
(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):	

## Appendix G Attorney's Fees Chart

Provision	Section	Criteria
<b>Attorney's Fees Under the Family Code</b>		
General Rule	§270	Ability to pay—must determine first if fees or costs are ordered under Fam C
Sanctions	§271	Frustrate settlement or not reduce cost of litigation; cannot award if unreasonable financial burden; no requirement of need
Government Agencies	§273	No attorney's fees against government agencies except under CCP §128.5 or Fam C §271
<b>Marital Cases</b>		
General Rule	§2030	Must award reasonable attorney's fees (AF) if court finds fees appropriate, there is a disparity in access to funds to retain counsel, and an ability to pay for both parties
Notice or Oral Motion	§2031	AF award after notice or oral motion; no notice if default entered; §270 ability required
Equalize Litigating Power	§2032	AF award where just and reasonable under relative circumstances; must consider need for award to enable sufficient resources to present case adequately; payor must have ability to pay; can order from any type of property
Attempt to Murder Spouse	§274	AF as sanction to injured spouse who is entitled to remedy under Fam C §4324; not need based; notice required
Recovering for Assigned Debt	§916	Debt assigned to spouse; money taken from other spouse by judgment by creditor; may award AF for enforcing right of reimbursement; §270 ability required
Breach of Fiduciary Duty	§1101	Breach of fiduciary duty; mandatory AF sanction as noted in addition to remedies; §270 ability required
Compel Declaration of Disclosure	§2107	Mandatory monetary sanctions on motion to compel for failure to comply with disclosure declaration requirements; unless noncompliance was with substantial justification or sanction is unjust
Void or Voidable Marriages	§2255	May award AF in void or voidable marriages where party applying innocent of wrongdoing and lacked knowledge of problem; §270 ability required
County Enforcement of Spousal Support	§4303	Discretionary AF to county for enforcing duty to support spouse; §270 ability required

Provision	Section	Criteria
<b>Uniform Parentage Act Actions</b>		
General Rule	§7640	May award reasonable AF in proportion and at times determined by court; §270 ability required
<b>Domestic Violence Restraining Orders</b>		
General Rule	§6344	May award AF to prevailing party; must determine based on respective income and needs of the parties, and any factors affecting the parties' respective abilities to pay; notice and hearing required
Appointed Counsel	§6386	May appoint counsel to petitioner to enforce protective order and may order respondent to pay AF; §270 ability required
<b>Specific Child Custody Proceedings</b>		
False Abuse or Neglect Allegations	§3027.1	May award sanctions and AF incurred for defending knowingly false allegations; order to show cause required; §270 ability required
Thwarting Parenting	§3028	Financial compensation for non-assumption of care-taking responsibility or thwarting visitation; AF to prevailing party; §270 ability required
Minor's Appointed Counsel	§3153	Court apportions all or part of reasonable fee unless parties determined unable to pay in motion by court or party (Judicial Council guidelines to assist court)
Declining Jurisdiction Because of UCCJEA Violation	§3428	Where court declines UCCJEA jurisdiction due to unjustifiable conduct; must assess necessary and reasonable expenses, including AF, unless clearly inappropriate; §270 ability required
Hague Proceedings	§3452	Must award necessary and reasonable expenses, including AF, to the prevailing party unless clearly inappropriate; §270 ability required
<b>Specific Support Provisions</b>		
Enforcing Child/Spousal Support Order	§3557	Absent good cause, must award AF for enforcing existing support order if court finds fees appropriate, there is a disparity in access to funds to retain counsel, and an ability to pay for both parties
Modifying Child/Spousal Support Order	§3652	May award AF to prevailing party for order modifying, terminating, or setting aside support order; §270 ability required
False Income and Expense Declaration	§3667	May award costs as sanction against responding party on motion to modify if Income and Expense Declaration incomplete, inaccurate, or missing tax returns; §270 ability required

Provision	Section	Criteria
Government Enforcement	§4002	County may be awarded AF in securing child support award; §270 ability required
Foreign Support Order	§5700.305	Discretionary authority of responding court to award AF in Uniform Interstate Family Support Act (UIFSA) proceedings; §270 ability required
Resisting Foreign Support Order	§5700.313	Obligor fails in resistance to order; may award AF to obligee as prevailing party; §270 ability required
<b>Attorney's Fees Under the Civil Code</b>		
Violating Information Practices Act	§§1798.46, 1798.48	Must assess reasonable AF against agency in favor of prevailing party, for agency's failure to comply with inspection request, properly maintain records or comply with other provisions of the Act
<b>Attorney's Fees Under the Code of Civil Procedure</b>		
Violating Lawful Court Order	§177.5	Sanctions payable to court; \$1500 maximum; written findings required; notice and opportunity to be heard
Civil Contempt	§1218	If adjudged guilty may award reasonable AF to party who initiated the contempt; if contempt sought by DA or City Attorney for violation of DVPA order, AF ordered must be paid to specific designated fund
Bad-Faith Conduct	§128.5	Actions or tactics made in bad faith that are frivolous or solely intended to cause unnecessary delay; findings required; notice and opportunity to be heard; not applicable to disclosures or discovery requests; applies to actions or tactics in civil case filed on or after 1/1/15
Bad-Faith Conduct	§128.7	General bad-faith conduct with statute outlining specific conduct; 21-day notice to correct or withdraw; notice and opportunity to be heard; against party or attorney; post 1994 actions
Set Aside Defaults Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect	§473	May award AF whenever relief granted under statute; must award AF where relief granted based on attorney affidavit of fault, to be paid by attorney at fault
TRO re Harassment	§527.6	May award AF and costs to prevailing party
Failure to Comply with Local Rules	§575.2	Local rules may provide that reasonable AF may be awarded for violation of local rules
Discovery Violations	§§2023.010 et seq	Noncompliance with discovery requests and misuse of discovery process; notice required

## **Appendix H**

### **Contempt and Probation Revocation Checklists**

#### **1. Arraignment—With Counsel**

- Call case and ask the citee to state true name.
- Record counsel's general appearance.
- Accept and record stipulation for commissioner sitting as temporary judge.
- Have counsel acknowledge receipt of petition and waive reading and further advisement of rights.
- Allow citee to reserve on all motions.
- Accept not guilty plea.
- Set date for pretrial and/or trial.
- Take time waiver if trial not held within 30 days (if in custody).
- Set bail if citee in custody or release on own recognizance.
- Take time waiver if trial not held within 45 days (if out of custody).
- Ask DCSS if contempt purgeable.
- Order citee to return.

#### **2. Arraignment—Without Counsel and Citee Out of Custody**

- Call case and ask citee to state true name.
- Advise citee of constitutional rights:
  - Right to counsel:
    - Right to be represented by counsel you employ or if you need time to retain, the court will continue arraignment, or
    - Right to act as your own attorney, or
    - If you desire the assistance of counsel and are indigent, the court will appoint counsel for you without charge:
      - If you claim to be indigent, you must fill out and submit under penalty of perjury a financial affidavit.
      - Appointed counsel can only represent you on the contempt, nothing else.
  - Presumption of not guilty and entitled to a public and speedy trial within 45 days of being arraigned.
  - Right to a (court) hearing.
  - Right to subpoena the attendance of witnesses and have documents produced to aid in your defense.
  - Right to confront and cross-examine witnesses called against you.
  - Right to remain silent. You cannot be compelled to answer any questions, and no inference drawn should you decide not to testify.

- Do you understand your rights?
  - How do you want to proceed with regard to counsel?
  - If citee requests appointed counsel, citee to submit a financial affidavit. See form MC-210.
  - Court finding as to indigent status.
  - If citee will employ private counsel, delay arraignment.
  - If self-represented, take *Faretta* waiver and continue with arraignment.
- Do you stipulate to commissioner sitting as temporary judge?
  - If no, continue arraignment and then refer matter to a judge for further proceedings.
- Do you want the court to read you the petition?
- Accept not guilty plea.
- Set date for pretrial and/or trial.
- Take time waiver if trial beyond 45 days.
- Ask DCSS if contempt purgeable.
- Order citee to return.

### **3. Guilty Plea Hearing**

- Review plea agreement written on Judicial Council findings and order regarding contempt (see form FL-415) and signed by citee and counsel (if applicable).
- Confirm citee's wish to enter a change of plea.
- Advise of Fifth Amendment right to remain silent. Ask if the citee wants to give up that right and answer the court's questions during the change of plea hearing. If so, clerk to administer oath.
- Advise citee of constitutional rights:
  - Right to speedy and public trial.
  - Right to confront and cross-examine witnesses.
  - Right to remain silent and not incriminate oneself.
  - Right to subpoena witnesses and produce evidence.
  - Right to be sentenced by a judge.
- By pleading guilty, you will be waiving all these rights.
- Inquire about voluntary and intelligent waiver:
  - Are you under the influence of anything that clouds or impairs your judgment?
  - Do you need any more time to reconsider your plea?
  - If represented, are you satisfied with counsel?
  - Do you have any mental or physical condition that may impair your ability to understand the proceedings or make a sound decision?
  - Go through terms and conditions contained in form with citee, specifically focusing on the factual basis for the plea.
- Ask citee to confirm.

- If represented, ask if counsel joins in the waivers and agrees there exists a factual basis for the plea.
- Review maximum punishment: 120 hours custody per count, \$1000 fine, or both.
- Review plea agreement. Ask if citee has read and understands the plea agreement and agrees to its terms and consents to the probationary terms.
- Take plea.
- Make findings:
  - Knowingly, intelligently, and voluntarily waived rights.
  - Factual basis for plea.
  - Court accepts plea and finds citee guilty.
    - On motion by DCSS, counts \_\_\_ to \_\_\_ are dismissed.
- Ask if citee waives time for sentencing. If represented, ask counsel if the citee waives time for sentencing or if there is any legal cause why sentence should not now be imposed.
- Impose negotiated sentence per plea:
  - Impose confinement and order execution of sentence suspended and place citee on negotiated term of probation under the conditions set forth in the plea agreement, including the condition that he or she pay current support and a payment on arrears, per plea agreement.
  - Mention that the current support is subject to modification on the filing of a proper motion and proof of a change of circumstances.
  - Order citee to appear on specified date to review compliance.
- Relieve any court-appointed counsel, if no further appearances.
- Order citee to return for probation review hearing (if applicable).

#### **4. Probation Revocation**

For specific scripts see California Judges Benchguide 84: *Probation Revocation* (Cal CJER). The general process involves the following:

- County requests revocation:
  - Summarily revoke probation.
  - Order county to prepare, file, and serve petition to revoke (if not done).
  - Appoint counsel (if requested and citee qualifies).
  - Order citee to return for arraignment.
- Arraignment (see above—same as Contempt).
- Revoke and reinstate probation agreement (same as plea agreement on Contempt; review written agreement).

## Appendix I Interest Rates Chart\*

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
ALABAMA	YES	7.5% per month (eff. 9/1/11); before that date, 12% per month App C	Ala. Code 1975 §8-8-10
ALASKA	YES	6% per year from 10/1/96; 12% on back support from 1/1/83 to 10/1/96; no interest prior to 1/1/83	A.S. §§25.27.020(a)(2)(B), 25.27.025
ARIZONA	YES	10% simple interest per year for arrears not reduced to final written judgment and arrears reduced to final written judgment prior 9/26/08; no interest accrues for arrears reduced to final written judgment after 9/2/08	A.R.S. §44-1201(A); see A.R.S. §25-510(E)
ARKANSAS	YES	10% per year on amounts that become due and remain unpaid, unless the owner of the judgment or the owner's counsel of record requests prior to the accrual of the interest that the judgment may not accrue interest; no interest on retroactive support	A.C.A. §9-14-233(a)
CALIFORNIA	YES	10% per year on the principal amount of a judgment remaining unsatisfied. 7% per year prior to 1/1/84	C.C.P. §§685.010(a), 685.020(a); Fam. C. §17433.5
COLORADO	YES	12% compounded interest (eff. 7/1/86); different rates pre-7/1/86; county CSE offices can choose whether to enforce (must give notice—interest begins only from notice; then must update interest calc. every 6 months, with notice)	C.R.S.A. §§5-12-101, 14-14-106

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
CONNECTICUT	NO		
DELAWARE	NO		
DISTRICT OF COLUMBIA	NO		
FLORIDA	YES (Title IV-D agency does not assess or collect interest on past-due support unless reduced to judgment in private action or judgment for interest is provided by another state)	Interest rate on judgments is determined annually by Chief Financial Officer; additional information— <a href="https://www.myfloridacfo.com/Division/AA/LocalGovernments/Current.htm">https://www.myfloridacfo.com/Division/AA/LocalGovernments/Current.htm</a>	F.S.A. §§55.03, 742.08
GEORGIA	YES (Georgia Office of Child Support Services will enforce interest on registered orders; but for orders issued in GA, it will only enforce interest on orders it established)	7% per year simple interest (eff. 1/1/07) on arrears; prior to that rate was 12% per year. No interest charged on retroactive support; interest charged on adjudicated arrears	Ga. Code Ann. §§19-11-7(e), 7-4-2(a)(1)(A)
HAWAII	NO (Hawaii’s Child Support Agency does not compute or collect interest)	But can recover 10% per year post judgment if get a court order	HRS §478-3; <i>Doe v Doe</i> (2001) 97 Haw. 160, 162–163
IDAHO	NO	But can recover 5% plus base rate in effect at the time of entry of judgment (base rate determined by Idaho state treasurer by 7/1 each year)	Idaho Code Ann. §28-22-104(2); <i>Worthington v Thomas</i> (2000) 134 Idaho 433, 437 App C
ILLINOIS	YES	One-twelfth of current statutory rate (9% per year) on unpaid balance at end of each month	735 ILCS §5/12-109(b); 735 ILCS §5/2-1303; 750 ILCS §5/505(b)
INDIANA	YES	If requested, court may order not more than 1.5%	Ind. Code Ann. §§31-16-12-2, 24-4.6-1-101

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
		per month on delinquent support, or 8% on money judgment unless otherwise provided by statute	
IOWA	YES (Iowa's Child Support Recovery Unit indicates interest not commonly applied or enforced for child support)	10% per year 30 days after periodic payment is due and owing; interest on retroactive support only if adjudicated	Iowa Code Ann. §535.3(2)
KANSAS	NO (Kansas IV-D program will not enforce unless parent obtains an interest judgment from court)	Judgment interest is permitted (beginning 7/1/96 it is presumed that 10% per year is correct) program	KS ST §16-204(e)(3)
KENTUCKY	NO (Kentucky IV-D program will not enforce unless parent obtains an interest judgment from court)	But can get interest of 12% compounded annually from date of judgment	KRS §360.040; <i>Thurman v Com., Cab. for H.R.</i> (1992) 828 SW2d 368, 371; <i>Young v Young</i> (1972) 479 SW2d 20, 22 (interest runs as each payment comes due but court can disallow if inequitable)
LOUISIANA	NO		
MAINE	NO	State does not charge, but 6% per year may be collected by commissioner for administrative debt owed to department; T-Bill plus 6% post-judgment interest.	19-A MRSA §2354; 14 MRSA §1602-C); <i>Walsh v Cusack</i> (2008) 946 A2d 414, 417-418 (post-judgment interest on total arrearages only; no evidence presented on each missed payment)
MARYLAND	NO (Maryland IV-D program indicates	Law allows 10% per annum on judgments	MD Code Ann., Cts. & Jud. Proc. §11-107(a)App C

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
	interest applied in limited cases only)		
MASSACHUSETTS	YES	0.5% per month on missed arrears, retroactive support or adjudicated arrears when obligor owes more than \$500 in past due support, eff. 7/1/10 (1% prior to 7/1/10); some limited exemptions apply, plus an equitable adjustment is possible on arrears owed to the state	Mass. Gen. Laws Ann ch. 119A, §6(a); 830 CMR §119A.6.1(3)
MICHIGAN	NO	No interest, but from 1/1/11, a surcharge for past due arrears may be assessed if court finds failure to pay is willful. Surcharge calculated at 6-month intervals at annual interest rate equal to 1% plus the average interest rate paid at auctions of 5-year US Treasury notes without compounding)	M.C.L.A. §§552.603(6)(a), (11), 552.603a(1), (6)
MINNESOTA	YES	Currently 4% per annum on arrears and judgments (since 1/1/08) but can go higher, not to exceed 18% interest rate based on secondary market yield of 1 year U.S. T-bills, calculated on a bank discount basis determined annually	M.S.A. §§548.091, subd. 1a, 549.09, subd. 1(c); subsections (b)–(c) of the former allows the court to order interest to stop accruing under certain circumstances ( <i>e.g.</i> , making timely payments for 12 mos., significant disability, receipt of needs based public assistance, or incarceration)
MISSISSIPPI	NO	Judge authorized to set a per annum rate. (When ordered by court, usually 8%, which is general legal rate of interest as noted)	Miss. Code Ann. §75-17-7 (discretionary); [Note—under §75-17-1 legal rate is 8% in general for contracts]

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
MISSOURI	YES	1% per month simple interest, for judgments entered on or after 9/1/82; (9% per annum 9/79-8/82, 6% per annum prior to 9/29/79)	VAMS §454.520 (Obligee must compute and file with clerk to be entered; obligor has right to request hearing)
MONTANA	Authorized, but generally NOT charged/enforced (IV-D program not required to maintain interest accounts)	Simple interest on civil judgments at rate for bank prime loans published by the federal reserve system, plus 3% (bank prime loans must be set 1/1 of each year and remains in effect through 12/31)	MCA §25-9-205; 40-5-252; <i>Marriage of Steab &amp; Luna</i> (2013) 300 P3d 1168, 1172–1173 (10% interest applied in absence of decree with interest provision or stipulation for different rate)
NEBRASKA	YES	For judgments on or after 7/20/02, simple interest fixed at rate equal to 2 percentage points above the bond investment yield as published by the U.S. Sec. of Treasury, of the average auction price for first auction of each annual quarter of the 26-week T-bills in effect on date of judgment. (Prior to 7/20/02, figure lower).	Neb. Rev. Stats. 42-358.02 (eff. 9/6/91), 45-103
NEVADA	YES	Absent express contract, interest is set at prime rate at largest Nev. bank, plus 2%, adjusted every 6 months	NRS §§99.040, 125B.140
NEW HAMPSHIRE	Authorized, but NOT charged or enforced (IV-D program does not charge or collect interest generally)	State code authorizes simple interest on civil judgments set by state treasurer as prevailing discount rate of interest on 26-week U.S. T-bills at the last auction preceding September 30 each year, plus 2 percentage points, rounded to nearest tenth of a percentage point	N.H. Rev. Stat. Ann. §336:1(II)

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
NEW JERSEY	NO		
NEW MEXICO	YES	4% (eff. 5/19/04); 8.75% (eff. 6/18/93–5/18/04); 15% (1/17/83–1/17/93)	N.M. Stat. Ann. §40-4-7.3
NEW YORK	YES	9% per annum on judgments generally unless otherwise provided by statute	NY MCL CPLR §§5003, 5004
NORTH CAROLINA	NO		
NORTH DAKOTA	YES (IV-D program may calculate interest accruing after 7/1/02; for prior dates, it may calculate interest eff. 1/1/04; otherwise will only enforce interest if court ordered it and approved amount)	Interest rate is equal to prime rate as published by Wall Street Journal first Monday every December, plus 3 percentage points rounded up to next one-half point (eff. 7/1/92) and cannot be compounded; for 2016 and 2017, 6.5% simple interest per year, for 2018, 7.5% simple interest per year	N.D. Cent. Code 28-20-34, 14-09-25
OHIO	YES (IV-D program indicates courts assess interest on arrears if failure to pay is determined to be willful and arrears accrued after 7/15/92)	Federal short-term rate, rounded to nearest whole number percentage, plus 3% on missed or adjudicated arrears	ORC Ann. §§1343.03, 5703.47
OKLAHOMA	YES	2% per year, eff. 11/1/16 (prior rate 10% per year)	43 Okl. St. §114
OREGON	YES (IV-D program only adds interest if requested and party provides calculation of it)	9% per year, unless parties agree otherwise	ORS §82.010
PENNSYLVANIA	NO		

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
RHODE ISLAND	YES	12% per annum or 1% per month	R.I. Gen. Laws §9-21-8
SOUTH CAROLINA	Authorized, but NOT enforced (IV-D program does not charge or calculate interest)	Where any sum must be ascertained and is due, the sum or sums draws interest at 8.75% per year. For judgments entered 7/1/05 or later, interest set at prime rate as listed in Wall Street Journal's first edition published each year, plus 4 percentage points, compounded annually.	S.C. Code Ann. §34-31-20; <i>Hopkins v Hopkins</i> (2000) 343 SC 301, 307 (no post-judgment interest if no money judgment; and no pre-judgment interest if not pled or requested)
SOUTH DAKOTA	YES (IV-D program does not charge or calculate interest)	1% per month if interest reduced to judgment in separate court action and copy provided to DCS	S.D. Codified Laws §§25-7A-14, 54-3-16
TENNESSEE	YES and NO - depending on timing, type of arrears, and if court finding	12% per year; but interest shall no longer accrue on or after 4/17/17 unless court makes written finding interest shall continue to accrue and sets rate upon consideration of relevant factors, but no more than 4% per year. On or after 1/1/18 interest of 6% per year on non IV-D cases, but court can reduce; on or after 1/1/18 no interest to accrue in IV-D cases, unless court makes written findings, but no more than 6% per year.	Tenn. Code Ann. §36-5-101(f)(1)(B)(ii), (iii)
TEXAS	YES	6% simple interest per year	Texas Family Code §§157.265, 157. 261
UTAH	Authorized, but not charged or enforced in IV-D program	Federal post-judgment interest rate as of January 1 of each year, plus 2% on final civil judgments	Utah Code Ann. §15-1-4(3); 28 USC §1961
VERMONT	YES	As of 1/1/12, a surcharge in lieu of interest imposed	15 VSA §606(b), (d); Vt. Rules of

STATE	INTEREST ON ARREARS	AMOUNT	AUTHORITY
		at rate of 6% per annum (simple, not compounded) on all past due arrears; 12% from 7/1/04–12/31/11	Appellate Procedure Rule 37
VIRGINIA	YES	Judgment rate of interest at 6% per year on arrearages, eff. 1-1-04 (9%: 1/1/91–6/30/04)	Va. Code Ann. §§20-78.2, 63.2-1951, 6.2-302
WASHINGTON	YES (IV-D program enforces if reduced to judgment)	12% on judgments for unpaid child support	Wash. Rev. Code Ann. §§4.56.110
WEST VIRGINIA	YES	5% simple interest per year; 10% 7/1/95 - 6/30/08	W. Va. Code §48-1-302(a)
WISCONSIN	YES	Simple rate of 0.5% per month (6% per year) on arrearages (effective 4/1/14 under pilot program); otherwise 1% per month	Wis. Stat. §767.511(6), (6m)
WYOMING	YES (IV-D program indicates interest is put in support orders by some courts, not others; obligee must file with clerk and compute interest)	Penalty assessed at 10% for any “judgment by operation of law” (which means a periodic or installment for child support) that remains unpaid within 32 days of date due; 10% on amount reduced to judgment (eff. 1/1/90)	Wyo. Stat. §1-16-103
GUAM	YES	6% per annum (eff. 1/1/08); before that date, 12% per annum	5 GCA §34114 (payments on arrears applied to interest first)
PUERTO RICO	YES	Legal rate, 6% per annum considered legal until other rate fixed	31 LPRA §3025; 32 LPRA App III, rule 44.3
VIRGIN ISLANDS	NO		

\*Chart based in part on the website maintained by the Office of Child Support Enforcement (OCSE). See [www.acf.hhs.gov/programs/css/irg-state-map](http://www.acf.hhs.gov/programs/css/irg-state-map).

## Appendix J

### Chart for Setting Aside Judgments or Orders

*Note: Major changes to the Voluntary Declaration of Parentage sections (§§7570–7581) of the Family Code are scheduled to become effective on January 1, 2020. See AB 2684 of the 2017–2018 Legislative Session.*

Statute	Grounds	Statute of Limitations	Application	Comments
<b>CCP §473(b)</b>	Mistake, inadvertence, surprise, excusable neglect.  Usually relief from default.  Mandatory setting aside if attorney declaration admits mistake, inadvertence, surprise, or excusable neglect (not client’s fault).	6 months from entry of default.	All judgments and orders (Title IV-D & non-IV-D cases).	Must file proposed <i>responsive pleading</i> with moving papers.  If attorney declaration admits fault, court may impose sanction on attorney.
<b>CCP §473(d)</b>	Void judgment.	None—can be raised at any time.	Any judgment obtained by improper service of summons (Title IV-D & non-IV-D; civil; family).	If summons is served in a manner other than that specified by statute, court acquires no jurisdiction over respondent, and any judgment rendered against him or her is void. <i>Wilson v Eddy</i> (1969) 2 CA3d 613, 616, 82 CR 826.
<b>CCP §473.5</b>	Lack of actual notice (service of summons did not result in actual notice).	No later than: 2 years after entry of default judgment, or 180 days after service of written notice of default, whichever is <i>earlier</i> .	Judgments (Title IV-D & non-IV-D cases).	Moving party must show no <i>actual</i> notice.

Statute	Grounds	Statute of Limitations	Application	Comments
<p><b>CCP §§583.210 et seq</b></p> <p><b>Mandatory dismissal for failure to timely serve</b></p>	<p>Failure to serve summons and petition within 3 years of filing. CCP §583.210(a).</p> <p>Failure to file proof of service within 60 days of service. CCP §583.210(b).</p>	<p>After 3 years, 60 days of filing action.</p> <p><i>Extension of time</i> to serve by (a) written stipulation or (b) oral agreement in court if entered in minutes or transcript is made. CCP §583.230.</p> <p><i>Exclude time</i> if (a) respondent not amenable to service, (b) there is stay of prosecution, (c) validity of service is litigated, or (d) service on defendant impossible, impractical, or futile due to causes beyond petitioner’s control. CCP §583.240.</p>	<p>Title IV-D &amp; non-IV-D cases.</p>	<p>Mandatory dismissal of entire case. CCP §583.250.</p> <p>Court can sua sponte set motion for dismissal. CCP §583.160.</p> <p>No dismissal if (a) support order in place in dissolution or legal separation action (<i>e.g.</i>, expedited CS order in DCSS case), or (b) dissolution status judgment was entered. CCP §583.161.</p>
<p><b>CCP §§583.310 et seq</b></p> <p><b>Mandatory dismissal for failure to timely bring action to trial</b></p>	<p>Failure of petitioner to bring action to trial within 5 years of commencement.</p>	<p>No judgment after case has been active for 5 years.</p> <p><i>Extension of time</i> to bring to trial by (a) parties’ written stipulation or (b) oral agreement in court if entered in minutes or transcript is made. CCP §583.330.</p> <p><i>Exclude time</i> if (a) jurisdiction was suspended, (b) trial was stayed or enjoined, or (c) bringing to trial was impossible, impractical, or futile. CCP §583.340.</p>	<p>Title IV-D &amp; non-IV-D cases.</p>	<p>Mandatory dismissal of entire case. CCP §583.360.</p> <p>Court can sua sponte set motion for dismissal. CCP §583.160.</p> <p>Only a stipulation between parties will revive an action after the 5-year period has expired. <i>Estate of Anastasio</i> (1989) 215 CA3d 486, 489, 263 CR 622.</p> <p>No dismissal if support order in place in dissolution or legal separation action. CCP §583.161.</p>

Statute	Grounds	Statute of Limitations	Application	Comments
<p><b>Fam C §§2120–2129</b></p>	<p>Fam C §2122:</p> <p>(a) Actual fraud.</p> <p>(b) Perjury.</p> <p>(c) Duress.</p> <p>(d) Mental incapacity.</p> <p>(e) Mistake—mutual or unilateral, of law or fact.</p> <p>(f) Failure to comply with disclosure requirements of Fam C §2104 and §2105.</p>	<p>(a) 1 year after discovery or when moving parent should have discovered fraud.</p> <p>(b) 1 year after discovery or when moving parent should have discovered perjury.</p> <p>(c) 2 years after date of entry of judgment if duress.</p> <p>(d) 2 years after date of entry of judgment if mental incapacity.</p> <p>(e) 1 year after date of entry of judgment if mistake.</p> <p>(f) 1 year after date party discovered or should have discovered failure to comply. (Applies to judgments that become final on or after January 1, 2002.)</p>	<p>Judgments of dissolution, legal separation, and nullity entered on or after January 1, 1993. Fam C §§2121(a), 2129.</p>	<p>Fraud must be extrinsic, not intrinsic. <i>Marriage of Stevenot</i> (1984) 154 CA3d 1051, 1068, 202 CR 116.</p> <p>Cannot set aside because judgment was inequitable. Fam C §2123.</p> <p>Attorney negligence not imputed to party seeking relief. Fam C §2124.</p> <p>Set aside only portions of judgment materially affected. Fam C §2125.</p> <p>Date of valuation subject to equitable considerations. Fam C §2126.</p> <p>Statement of decision mandatory on request. Fam C §2127.</p> <p>Other available remedies. Fam C §2128.</p>

Statute	Grounds	Statute of Limitations	Application	Comments
<p><b>Fam C §§3690 et seq</b></p>	<p>Fam C §3691:            (a) Actual fraud.            (b) Perjury.            (c) Lack of notice.</p>	<p><i>After</i> the 6-month time limit of CCP §473( b):</p> <p>(a) Within 6 months after date respondent knew or should have known of the fraud.</p> <p>(b) Within 6 months after date respondent discovered or should have discovered the perjury.</p> <p>(c) No later than 6 months after respondent obtains or reasonably should have obtained notice of the child support order or earnings assignment order.</p>	<p>Child support orders only (Title IV-D &amp; non-IV-D cases).</p>	<p><i>Lack of notice:</i> If respondent properly served with summons—no relief allowed. Fam C §3691(c)(3). Requires party declaration regarding lack of notice not due to own conduct or neglect, <b>and</b> copy of proposed answer.</p> <p>No setting aside if order simply inequitable when made, or later circumstances cause order to be excessive or inadequate. Fam C §3692.</p> <p>Court may only set aside the provisions materially affected by its decision to grant relief but has discretion to set aside entire order if necessary for equitable considerations. Fam C §3693.</p>

Statute	Grounds	Statute of Limitations	Application	Comments
<b>Fam C §7575</b>	Rescind or set aside POP declaration (voluntary declaration of paternity—Fam C §7571).	<p>(a) Rescind within 60 days after execution of POP declaration, unless court order entered for custody and visitation.</p> <p>(b) If genetic testing determines man who signed declaration is not parent, motion to set aside must be filed within 2 years of child’s date of birth.</p> <p>(c) Equity: no statute of limitation. If action or motion to set aside is required to be filed within specified time frame under CCP §473, then period to set aside POP declaration commences on date court makes an initial order for custody, visitation, or child support based on a POP declaration.</p>	Title IV-D & non-IV-D cases.	<p>Statute does not restrict court from acting as court of equity. Fam C §7575(c)(4).</p> <p>See Judicial Council forms FL-280, FL-281, FL-285, FL-290.</p>

Statute	Grounds	Statute of Limitations	Application	Comments
<p><b>Fam C §§7611, 7612 &amp; 7630</b></p>	<p>Rebuttal of presumption where 1) the child had a presumed parent as a child of a marriage (Fam C §7540), 2) the child had a presumed parent due to marriage before or after birth (Fam C §7611(a), (b), or (c), or 3) the man signing the VDOP is a sperm donor (Fam C §7613(b)).</p>	<p>Within 2 years from the execution of the Voluntary Declaration of Parentage.</p>	<p>Voluntary Declarations of Parentage.</p>	<p>Court must take into account the Voluntary Declaration of Parentage’s validity and the child’s best interest, based on factors in Fam C §7575(b) and the nature, duration, and quality of the relationship with the child, and the benefit or detriment of continuing that relationship. If there are conflicting presumptions, the weightier considerations of policy and logic control. May result in a finding that a child has more than 2 parents (Fam C §7612(c)).</p>

Statute	Grounds	Statute of Limitations	Application	Comments
<p><b>Fam C §§7645–7649.5</b></p> <p><b>Paternity disestablishment</b></p>	<p>Genetic tests (Fam C §7647.7) indicate previously established father is not biological father.</p> <p>Standing to bring motion (Fam C §7646(a)):</p> <p>(a) Previously established mother.</p> <p>(b) Previously established father.</p> <p>(c) Child.</p> <p>(d) Legal representative of (a)–(c).</p>	<p>(1) Within 2 years of date previously established father knew or should have known of a judgment, or knew of the existence of an action to adjudicate paternity, whichever is first.</p> <p>(2) Within 2 years of child’s birth if POP declaration.</p> <p>(3) Within 2 years of enactment of this section if paternity established by default. [Stats 2004, ch 849 (AB 252) effective January 1, 2005] Fam C §7646(a)(3).</p>	<p>Judgments of paternity (Title IV-D &amp; non-IV-D cases).</p>	<p>Not set aside if:</p> <p>(a) Paternity judgment from another state.</p> <p>(b) Prior genetic tests did not exclude previously established father as biological father. Fam C §7648.3.</p> <p>Arrearages set aside if respondent not biological father; but no right to reimbursement of child support paid. Fam C §7648.4</p> <p>Not exclusive; equitable remedies not excluded. Fam C §7649.</p>

Statute	Grounds	Statute of Limitations	Application	Comments
<b>Fam C §17416</b>	Stipulation to paternity is <i>voidable</i> if parent who was unrepresented by counsel can establish that (a) he was not advised of his right to trial, (b) he was unaware of that right, and (c) if he had been properly advised he would not have executed the agreement.	Promptly. Requires diligence and showing that agreement on which stipulation is based was not voluntary and intelligent in the constitutional sense.	Title IV-D cases only.	<i>County of Los Angeles v Soto</i> (1984) 35 C3d 483, 486, 198 CR 779.
<b>Fam C §17432</b>	Judgment based on presumed income (minimum wage at 40 hours per week).	1 year from date DCSS receives first collection.	Title IV-D CS judgments only (usually default).	Setting aside does <i>not</i> address issue of paternity—only income and amount of child support ordered. Court must consider various factors, including equitable ones, in ruling. Fam C §17432(h).
<b>Fam C §17433</b>	Mistaken identity of respondent.	None stated.	Title IV-D default child support judgments only.	If judgment set aside, respondent entitled to Fam C §17530 remedies (terminate enforcement activities, reimbursement of any funds or assets taken or seized, restoration of license(s)).

Statute	Grounds	Statute of Limitations	Application	Comments
<p><b>50 USC §§3901 et seq</b></p> <p><b>Service-members' Civil Relief Act</b></p>	<p>Violation of Act is grounds to vacate default judgment or order.</p>	<p>90 days after termination of military service. 50 USC §§3931(g) and 3934.</p> <p>For application to be granted, it must appear that:</p> <p>(1) respondent was materially affected by reason of military service in making a defense to the action; and</p> <p>(2) respondent has a meritorious legal defense to the action or some part of it.</p>	<p>All judgments (Title IV-D, non- IV-D, civil, family law, paternity), plus any order modifying a judgment of dissolution, nullity, or legal separation.</p> <p><i>Allen v Allen</i> (1947) 30 C2d 433, 436–437, 182 P2d 551.</p>	<p>If court aware of defendant's military status, it must stay proceedings until attorney appointed (50 USC §3931(b)(2) Petitioner must file affidavit showing respondent not in military service).</p>

Statute	Grounds	Statute of Limitations	Application	Comments
<p><b>Equitable Relief</b></p>	<p>Fraud or mistake. “Extrinsic mistake” generally refers to circumstances extrinsic to the litigation that have resulted in a party’s loss of a hearing on the merits. Fraud is extrinsic if it deprives a party of the opportunity to present a claim or defense.</p> <p>Under limited circumstances a court, sitting in equity, can set aside or modify a valid final judgment obtained by fraud, mistake, or accident. <i>City and County of San Francisco v Cartagena</i> (1995) 35 CA4th 1061, 1066–1067, 41 CR2d 797.</p> <p>To demonstrate extrinsic fraud, the moving party must show that the fraud could not reasonably have been discovered before entry of judgment. <i>City and County of San Francisco v Cartagena, supra</i>, 35 CA4th at 1068.</p>	<p>Promptly, on discovery of judgment or order.</p>	<p>All judgments (Title IV-D, non- IV-D [before January 1, 1993 or judgments that do not adjudicate support or property])</p> <p>Fam C §§2120 et seq</p> <p>superseded equitable relief for judgments entered on or after January 1, 1993.</p>	<p>See <i>County of Los Angeles v Navarro</i> (2004) 120 CA4th 246, 14 CR3d 905; compare <i>County of Fresno v Sanchez</i> (2005) 135 CA4th 15, 37 CR3d 192.</p> <p>Trial court in <i>Sanchez</i> denied relief because <i>Navarro</i> had not been decided and was not applicable law when court denied motion. Appellate court implied party still could apply for relief per new statute.</p> <p>Blood tests <i>cannot</i> be ordered before a paternity judgment is set aside. If extrinsic fraud is established, however, paternity judgment may be set aside and blood tests ordered, as in any other paternity action. <i>City and County of San Francisco v Cartagena</i> (1995) 35 CA4th 1061, 1069, 41 CR2d 797.</p>

**Appendix K  
Federal Parent Locator Service**

**ACCESS TO FPLS INFORMATION**

Who	Why	How	What	Exceptions
<p>Agent/Attorney of a State who has authority/duty to collect child support and spousal support, which may include a State IV-D agency. Resident parent, legal guardian, attorney or agent of a child not receiving IV-A benefits. § 453(c)</p>	<p>Establish paternity, establish, modify or enforce child support obligations. § 453(a)</p>	<p>Request filed in accordance with regulations, 45 CFR § 303.70. Only SPLS can request information from FPLS. —Must contain specified information including attestation. —Fee must be paid. § 453(d)</p>	<p>Information (including SSN, address, and name, address and FEIN of employer) on, or facilitating the discovery of, the location of any individual— —Who is under an obligation to pay child support, —Against whom a child support obligation is sought, —To whom a child support obligation is owed, —Who has or may have parental rights with respect to a child. Information on the individual's wages, other income from, and benefits of employment (including health care coverage). Information on the type, status, location and amount of any assets of, or debts owed by or to, the individual. § 453(a)</p>	<p>Disclosure would contravene national policy or security interests of the US, or confidentiality of census data. Notification from State of reasonable evidence of child abuse or domestic violence. § 453(b)</p>
<p>State Agency that is administering a program operated under a State Plan under subpart 1 of part B or a State plan approved under subpart 2 of part B or under part E. § 453(c)</p>	<p>To administer such program. § 453(a)</p>	<p>Same as above. § 453(d)</p>	<p>Same as above. § 453(a)</p>	<p>Same as above. § 453(b).</p>
<p>Court (or agent of the court) with authority to issue an order against an NCP for child support, or to serve as the initiating court in an action to seek a child support order. § 453(c)</p>	<p>Establish paternity, establish, modify or enforce child support obligations. § 453(a)</p>	<p>Request filed in accordance with regulations. § 453(b) Request must be processed through the SPLS, 45 CFR § 303.70 SPLS may process request from court to FPLS. 45 CFR § 302.35(c)(2)</p>	<p>Same as above, except can get it despite child abuse or domestic violence notification. § 453(b)</p>	<p>However, upon notification that FPLS has received notice of child abuse or domestic violence, court must determine whether disclosure of the information to any other person would be harmful. § 453(b)</p>
<p>Agent/Attorney of a State who has the authority/duty to enforce a child custody or visitation determination. Agent/Attorney of the US or a State who has authority/duty to investigate, enforce or prosecute the unlawful taking or restraint of a child. § 463(d)(2)</p>	<p>Make or enforce a child custody or visitation determination. Enforce any federal or State law regarding taking or restraint of a child. § 463(a)</p>	<p>Request filed in accordance with regulations. State agency receives request and transmits it to Secretary. § 463(b)—45 CFR § 302.35 SPLS made request to FPLS in standard format. SPLS shall identify these cases to distinguish them from other requests. 45 CFR § 303.15</p>	<p>Most recent address and place of employment of parent or child. § 463(c)</p>	<p>Disclosure would contravene national policy or security interests of the US, or confidentiality of census data. Notification from State of reasonable evidence of child abuse or domestic violence. § 463(c)</p>

## ACCESS TO FPLS INFORMATION—Continued

Who	Why	How	What	Exceptions
Court (or agent of court) with jurisdiction to make or enforce a child custody or visitation determination. § 463(d)(2)	Same as above. § 463(a)	Request filed in accordance with regulations. § 463(c) Request must be processed through the SPLS. 45 CFR § 303.70 SPLS may process request from court to FPLS. 45 CFR § 303.35 SPLS makes request to FPLS in standard format. SPLS shall identify these cases to distinguish them from other requests. Upon receipt of response from FPLS, SPLS shall send information directly to the requester, then destroy information related to the request. 45 CFR § 303.15	Same as above, except can get it despite notice of child abuse or domestic violence. § 463(c)	However, no disclosure shall be made to anyone else. However, upon notification that FPLS has received notice of child abuse or domestic violence, and receipt of information the court must determine whether disclosure of the information to any other person would be harmful. § 463(c) Above restrictions on information that would compromise national security still apply.
US Central Authority (under the Hague convention on international child abduction). § 463(e)	Locate any parent or child on behalf of an applicant to central authority in a child abduction case. § 463(e)	Upon request, pursuant to agreement between Secretary of DHHS and the central authority. No fee may be charged. § 463(e)	Most recent address and place of employment. § 463(e)	Restrictions under § 453 (national security etc., domestic violence). § 453(b) and § 463(c)
Secretary of the Treasury § 453(h)(3) and (i)(3)	Administration of federal tax laws. § 453(h)(3) and (i)(3)	Pursuant to procedures developed between the Secretary of Treasury and DHHS.	FCR data and NDNH data. § 453(h)(3) and (i)(3)	
Social Security Administration § 453(j)(1) § 453(j)(4) State IV-D agencies § 453(j) (2) and (3)	Verification. § 453(j)(1) For any purpose. § 453(j)(4) Location of individual in paternity or child support case. § 453(j)(2) Administration of IV-D program. § 453(j)(3)	Pursuant to procedure developed between the Social Security Administration and DHHS. Every 2 business days information comparison in NDNH with the FCR and report back to States within 2 business days after a match is discovered. This would be an automatic match with the statewide automated system. § 453(j)(2)(A & B) When the Secretary determines a data match would be necessary to carry out the purposes of the IV-D program. § 453(j)(3)	FPLS data. § 453(j)(1) NDNH data. § 453(j)(4) FPLS matches. § 453(j) (2) and (3)	Disclosure would contravene national policy or security interest of the US, or confidentiality of census data. Notification from State of reasonable evidence of child abuse or domestic violence. § 453(b)
Researchers. § 453(j)(5)	Research purposes found by the Secretary to be likely to contribute to achieving purposes of IV-A or IV-D programs. § 453(j)(5)	At Secretary's discretion. § 453(j)(5)	Data in each component of the FPLS.	Personal identifiers removed. § 453(j)(5)
State IV-A agencies. § 453(j)(3)	Administration of IV-A program. § 453(j)(3)	When the Secretary determines a data match would be necessary to carry out the purposes of the IV-A program. § 453(j)(3)	FPLS matches. § 453(j)(3)	Disclosure would contravene national policy or security interests of the US, or confidentiality of census data. Notification from State of reasonable evidence of child abuse or domestic violence. § 453(b)

APPENDIX A—LOCATING INDIVIDUALS THROUGH THE STATE PLS § 302.35

Authorized person/program	Authorized purpose of the request	Persons about whom information may be asked	Sources searched	Authorized information returned	Limitations <sup>1</sup>
<p>Agent/attorney of a State who has the duty or authority to collect child and spousal support under the IV-D plan. Tribal IV-D having in effect an intergovernmental agreement with a State IV-D agency, for the provision of Federal PLS services. Section 453(c)(1) and 454(7).</p>	<p>Establish paternity, establish, set the amount, modify, or enforce child support obligations and or to facilitate the location of any individual who is under an obligation to pay child support, against whom such an obligation is sought, or to whom such an obligation is owed.</p> <p>Locate a parent or child involved in a non-IV-D child support case to disburse an income withholding collection.</p> <p>Section 453(a)(2) .....</p>	<p>Noncustodial Parent Putative Father ..... Custodial Parent ..... Child ..... Section 453(a)(2)(A)</p>	<p>Federal Parent Locator Service. In-state sources in accordance with State law.</p>	<p>Six Elements: Person's Name, Person's SSN, Person's address, Employer's name, Employer's address, Employer Identification Number.</p> <p>Section 453(a)(2)(A)(iii). Wages, income, and benefits of employment, including health care coverage.</p> <p>Section 453(a)(2)(B) Type, status, location, and amount of assets or debts owed by or to the individual.</p> <p>Section 453(a)(2)(C)</p>	<p>See footnote.</p>
<p>Court that has the authority to issue an order against an NCP for the support and maintenance of child, or to serve as the initiating court in an action to seek a child support order. Section 453(c)(2).</p>	<p>To facilitate the location of any individual who is under an obligation to pay child support, against whom such an obligation is sought, or to whom such an obligation is owed.</p> <p>Locate a parent or child involved in a non-IV-D child support case.</p> <p>Section 453(a)(2) .....</p>	<p>Noncustodial Parent Custodial Parent ..... Putative Father ..... Child .....</p>	<p>Federal Parent Locator Service. In-state sources in accordance with State law.</p>	<p>Six Elements as above, plus. Wages, income, and benefits of employment, including health care coverage.</p> <p>Section 453(a)(2)(B) Type, status, location, and amount of assets or debts owed by or to the individual.</p> <p>Section 453(a)(2)(C)</p>	<p>No Internal Revenue Service (IRS) information provided for non-IV-D cases unless independently verified.</p> <p>No Multistate Financial Institution Data Match (MSFIDM) and no State Financial Institution Data Match (FIDM) information provided for non-IV-D cases.</p> <p>No required subsequent attempts to locate unless there is a new request.</p>
<p>Resident parent, legal guardian, attorney, or agent of a child not receiving IV-A benefits (a non-IV-D child support request). Section 453(c)(3)<sup>2</sup>.</p>	<p>To facilitate the location of any individual who is under an obligation to pay child support, against whom such an obligation is sought, or to whom such an obligation is owed, or who has or may have parental rights with respect to the child.</p> <p>Locate a parent or child involved in a non-IV-D child support case.</p>	<p>Noncustodial Parent Putative Father .....</p>	<p>Federal Parent Locator Service. In-state sources in accordance with State law.</p>	<p>Six Elements as above, plus. Wages, income, and benefits of employment, including health care coverage.</p> <p>Section 453(a)(2)(B) Type, status, location, and amount of assets or debts owed by or to the individual.</p> <p>Section 453(a)(2)(C)</p>	<p>Child not receiving IV-A benefits.</p> <p>No IRS information.</p> <p>No MSFIDM and no State FIDM information provided for non-IV-D cases.</p> <p>In a non-IV-D request, attestation and evidence is required as specified in § 302.35(c)(3)(i)-(iii).</p> <p>No required subsequent attempts to locate unless there is a new request.</p>

APPENDIX A—LOCATING INDIVIDUALS THROUGH THE STATE PLS § 302.35—Continued

Authorized person/program	Authorized purpose of the request	Persons about whom information may be asked	Sources searched	Authorized information returned	Limitations <sup>1</sup>
State agency that is administering a Child and Family Services program (IV-B) or a Foster Care and Adoption IV-E program. Sections 453(c)(4), 453(j)(3), and 454(B).	To facilitate the location of any individual who has or may have parental rights with respect to the child. Section 453(a)(2)(iv); and to assist states in carrying out their responsibilities under title IV-B and IV-E programs. Sections 453(j)(3) and 454(B).	Noncustodial Parent Putative Father ..... Custodial Parent Child. Sections 453(a)(2)(A), 453(j)(3), and 454(B).	Federal Parent Locator Service. In-state sources in accordance with State law.	Six Elements as above, plus. Wages, income, and benefits of employment, including health care coverage. Type, status, location, and amount of assets or debts owed by or to the individual. Section 453(a)(2)(C)	No IRS information unless independently verified. No MSFIDM information and no State FIDM information provided. Any information outside the purpose stated in Section 453(a)(2) and Section 453(j)(3) requires independent verification.
State agency that is administering a Child and Family Services program (IV-B) or a Foster Care and Adoption IV-E program. Sections 453(j)(3) and 454(B).	To assist states in carrying out their responsibilities under title IV-B and IV-E programs. Sections 453(j)(3) and 454(B).	Relatives of a child involved in a IV-B or IV-E case.	Federal Parent Locator Service. In-state sources in accordance with State law.	Six Elements as above.	No IRS information unless independently verified. No MSFIDM information and no State FIDM information provided. Any information outside the purpose stated in Section 453(j)(3) requires independent verification.

<sup>1</sup> No information shall be disclosed if the disclosure of such information would contravene the national policy or security interests of the United States or the confidentiality of census data. No information shall be disclosed if the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the CP or child. See sections 453(b)(2) and 454(26) of the Act for the process of releasing information to a court or agent of a court.

<sup>2</sup> No information shall be disclosed if the disclosure of such information would contravene the national policy or security interests of the United States or the confidentiality of census data. No information shall be disclosed if the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the CP or child. See sections 453(b)(2) and 454(26) of the Act for the process of releasing information to a court or agent of a court.

APPENDIX B—LOCATING AN INDIVIDUAL SOUGHT IN A CHILD CUSTODY/VISITATION OR PARENTAL KIDNAPPING CASE

Type of request	Authorized person/program	Authorized purpose of the request	About whom information may be requested	Sources searched	Authorized information returned	Limitations <sup>2</sup>
Locating an individual sought in a child custody or visitation case	Any agent or attorney of any State who has the authority/duty to enforce a child custody or visitation determination. § 463(d)(2)(A) A court, or agent of the court, having jurisdiction to make or enforce a child custody or visitation determination. § 463(d)(2)(B)	Determining the whereabouts of a parent or child to make or enforce a custody or visitation determination. § 463(a)(2)	A parent or child. § 463(a)	Federal Parent Locator Service In-state sources in accordance with State law.	Only the three following elements: Person's address, Employer's name, Employer's address, § 463(c)	See footnote. No IRS information provided. No MSFIDM or State FIDM information provided. No subsequent attempts to locate unless there is a new request.

APPENDIX B—LOCATING AN INDIVIDUAL SOUGHT IN A CHILD CUSTODY/VISITATION OR PARENTAL KIDNAPPING CASE—  
Continued

Type of request	Authorized person/program	Authorized purpose of the request	About whom information may be requested	Sources searched	Authorized information returned	Limitations <sup>2</sup>
Locating an individual sought in a parental kidnapping case	Agent or attorney of the U.S. or a State who has authority/duty to investigate, enforce, or prosecute the unlawful taking or restraint of a child. § 463(d)(2)(C)	Determining the whereabouts of a parent or child to enforce any State or Federal law with respect to the unlawful taking or restraint of a child. § 463(a)(1)	A parent or child. § 463(a)	Federal Parent Locator Service. In-state sources in accordance with State law.	Only the three following elements: Person's address, Employer's name; Employer's address, § 463(c).	See footnote. No IRS information provided. No MSFIDM or State FIDM information provided. No subsequent attempts to locate unless there is a new request.

<sup>2</sup> No information shall be disclosed if the disclosure of such information would contravene the national policy or security interests of the United States or the confidentiality of census data. No information shall be disclosed if the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the CP or child. See sections 453(b)(2) and 454(26) of the Act for the process of releasing information to a court or agent of a court.

APPENDIX C—AUTHORITY FOR STATE IV-D AGENCIES TO RELEASE INFORMATION TO NON-IV-D FEDERAL, STATE, AND TRIBAL PROGRAMS

Authority	Authorized purpose of request	Authorized person/program	Authorized information returned	Limitations <sup>3</sup>
Sections 453 and 454A(f)(3) of the Act, Section 1102 of the Act; and 45 CFR 307.13.	To perform State or Tribal agency responsibilities of designated programs.	State or Tribal agencies administering title IV, XIX, and XXI, and SNAP programs.	Confidential information found in automated system.	No Internal Revenue Service information unless independently verified. No MSFIDM or State FIDM information provided. No NDNH and FCR information for title XIX and XXI unless independently verified. For IV-B/IV-E, for purpose of section 453(a)(2) of the Act can have NDNH and FCR information without independent verification. — Any other purpose requires independent verification. For IV-A NDNH/FRC information for purposes of section 453(j)(3) of the Act without independent verification. — Need verification for other purposes.
Sections 453A(h)(2) and 1137 of the Act—State Directory of New Hires.	Income and eligibility verification purposes of designated programs.	State agencies administering title IV-A, Medicaid, unemployment compensation, SNAP, or other State programs under a plan approved under title I, X, XIV, or XVI of the Act.	SDNH information: Individual's name, address and SSN; employer's name, address, and Federal employer identification number.	

<sup>3</sup> No information shall be disclosed if the disclosure of such information would contravene the national policy or security interests of the United States or the confidentiality of census data. No information shall be disclosed if the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the CP or child. See sections 453(b)(2) and 454(26) of the Act for the process of releasing information to a court or agent of a court.

**Paperwork Reduction Act**

Section 302.35(c) contains an information collection requirement. As

required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Administration for Children and Families (ACF) has submitted a copy of

this section to the Office of Management and Budget (OMB) for its review in tandem with the final rule published on



## Table of Statutes

### CALIFORNIA

<b>CIVIL CODE</b>	585
1798.85	§2.34
§2.28	586
1798.86	§2.34
§2.28	695.221
4801(a)	§1.42
§1.121	708.170(a)(1)(A)–(B)
	§2.38
<b>CODE OF CIVIL PROCEDURE</b>	1008
128.5	§2.11
§§2.30–2.31	1008(d)
128.7	§2.34
§2.30	1048
177.5	§2.43
§2.30	1048(a)
284(1)	§§2.43, 2.45
§2.42	1209
284(2)	§2.38
§2.42	1209(5)
367.5	§2.38
§2.35	1209(9)
367.6	§2.38
§2.35	1209.5
372(c)(1)(A)	§2.38
§2.61	1212
372(c)(1)(D)	§2.38
§2.61	1213
372(c)(2)	§2.38
§2.61	1993
431.20(a)	§2.38
§1.11	1993(a)(1)
473	§2.38
§§1.29, 1.58, 1.97, 1.103	1993(a)(2)
583.161(a)	§2.38
§1.101	1993(b)
583.161(a)–(b)	§2.38
§1.101	2016.010 et seq
583.161(c)–(d)	§2.14
§1.101	2019.010
583.210	§2.14
§1.105	

2023.010 et seq	297.5(a)
§2.30	§1.123
<b>EVIDENCE CODE</b>	297.5(d)
351.3	§1.14
§1.151	299
351.3(a)	§1.101
§2.29	299(d)
351.3(b)(1)	§1.123
§2.29	700.305(b)(9)
351.3(b)(2)	§2.38
§2.29	721
351.3(c)	§2.14
§2.29	721(b)
<b>FAMILY CODE</b>	§2.14
45-6(a)	1100(e)
§2.28	§2.14
92	1101(g)
§1.98	§2.14
210	1101(h)
§2.43	§2.14
211	1612(c)
§2.35	§1.150
214	1615
§2.20	§1.150
217	1615(c)(2)
§2.8	§1.150
218	1800 et seq
§2.15	§2.20
270	2010(f)
§§2.31–2.32	§2.34
271	2024.5(a)
§§2.14, 2.31, 2.33–2.34	§§2.16, 2.28
271(a)	2030
§2.33	§§2.32, 2.34
271(b)	2030 et seq
§2.34	§2.31
273	2030(a)
§§2.31, 2.34	§§2.32, 2.34
290	2030(a)(1)
§1.82	§2.31
297.5	2030(a)(2)
§§1.14, 1.24	§2.32
	2031(a)(1)
	§2.34

2031(b)	3552
§2.34	§2.16
2032	3552(a)
§2.32	§§1.3, 2.16
2032(b)	3552(b)
§2.32	§1.3
2100(b)	3552(c)
§2.14	§§1.3, 2.16, 2.18
2102(a)–(b)	3556
§2.14	§1.71
2102(c)	3557
§2.14	§2.32
2103	3557(a)
§2.14	§2.32
2104	3558
§2.14	§1.59
2105	3587
§2.14	§1.99
2107(b)	3591(c)
§2.14	§1.147
2107(c)	3600
§2.14	§§1.95, 1.107, 1.109
2107(h)	3601
§2.14	§1.99
2250	3601(a)
§1.101	§1.95
2330	3602
§1.109	§§1.95, 1.109
2336	3603
§1.72	§§1.95, 1.102, 1.106, 1.110
3025.5(a)(1)–(4)	3604
§2.25	§1.95
3028	3620–3634
§1.71	§1.97
3103	3621
§1.71	§1.97
3103(g)(1)	3623(a)
§1.71	§1.97
3104	3623(b)
§1.71	§1.97
3104(i)(1)	3624
§1.71	§1.97
3111	3624–3525
§2.25	§1.105
3175 et seq	3624(c)
§2.20	§1.97

3625(a)	3653
§1.97	§2.68
3625(b)	3653(a)
§1.97	§§1.106, 1.146
3625(c)	3653(b)
§1.97	§§1.106, 1.146
3626	3653(c)
§1.97	§§1.106, 1.146, 2.68
3627	3653(d)
§1.97	§1.106
3628	3653(d)(1)–(4)
§1.97	§1.106
3629(a)	3654
§1.97	§1.81
3629(a)–(b)	3660 et seq
§2.17	§2.13
3629(b)	3662
§1.97	§2.13
3629(c)	3663
§2.17	§2.13
3629(d)	3664(a)
§§1.97, 2.17	§2.13
3630(b)	3664(b)
§1.97	§2.13
3632	3664(c)
§1.97	§2.13
3633	3665(a)
§1.97	§2.13
3651	3665(b)
§2.68	§2.18
3651(a)	3666
§§1.102, 1.140	§2.13
3651(c)	3667
§§1.102, 2.68	§2.13
3651(c)(2)	3691
§2.68	§1.103
3651(c)(3)	3692
§2.68	§1.103
3651(c)(4)	3693
§2.68	§1.103
3651(d)	3751(a)(2)
§1.147	§1.85
3652	3751(b)
§2.32	§1.85

3751(c)	4052.5(b)
§1.85	§§1.80, 1.93
3752.5	4053
§1.85	§§1.79–1.80, 1.86
3753	4053(a)
§1.85	§§1.57, 1.67
3830	4053(b)
§1.69	§1.67
3900	4053(c)
§1.96	§1.67
3901(a)	4053(d)
§§1.99, 1.141	§§157, 1.67
3901(b)	4053(e)
§1.99	§1.67
3910	4053(f)
§1.100	§§1.57, 1.67
3910(a)	4053(g)
§1.99	§1.67
3951	4053(h)
§1.96	§1.67
4005	4053(i)
§1.81	§1.67
4006	4053(j)
§§1.85, 2.9	§1.67
4007.5	4053(k)
§§2.12, 2.60	§1.67
4007.5(a)–(b)	4053(l)
§§1.54, 2.12	§1.67
4007.5(b)	4055
§§1.54, 2.12	§§1.3, 1.66, 1.86, 1.97
4007.5(c)	4055(a)
§§1.54, 2.12	§§1.31, 1.68, 1.84
4007.5(d)	4055(b)
§§1.54, 2.12	§1.85
4009	4055(b)(1)
§§1.7, 1.95, 1.105	§1.68
4010	4055(b)(1)(D)
§1.3	§§1.70, 1.93, 1.96
4050 et seq	4055(b)(2)
§§1.65, 1.97, 2.9	§§1.61, 1.73
4050–4076	4055(b)(3)
§§1.64, 1.66	§1.74
4052	4055(b)(4)
§1.86	§§1.3, 1.75
4052.5(a)	4055(b)(5)
§1.80	§§1.3, 1.78

4055(b)(6)	4057.5(a)
§1.72	§1.47
4055(b)(7)	4057.5(b)
§§1.79, 1.93, 2.9	§1.47
4055(b)(8)	4057.5(c)
§§1.63, 1.76	§1.47
4055(c)	4057.5(d)
§1.79	§1.47
4055(d)	4058–4059
§1.79	§1.73
4056(a)	4058–4060
§§1.3, 1.87, 1.91, 1.94, 1.102	§1.31
4056(b)	4058(a)
§§1.3, 1.81	§1.30
4057(a)	4058(a)(1)
§§1.65–1.66	§§1.33, 1.37, 1.60, 2.71
4057(a)(3)	4058(a)(2)
§1.91	§§1.33–1.34
4057(b)	4058(a)(3)
§§1.3, 1.60, 1.84, 1.86, 1.93–1.94	§§1.39–1.40, 1.60, 2.71
4057(b)(1)	4058(b)
§1.87	§§1.3, 1.50, 1.56
4057(b)(2)	4058(c)
§1.88	§1.60
4057(b)(3)	4059
§§1.89–1.90	§§1.3, 1.31
4057(b)(4)	4059(a)
§1.92	§§1.3, 1.47, 1.61
4057(b)(5)	4059(b)
§§1.40, 1.93, 2.51	§1.61
4057(b)(5)(A)	4059(c)
§1.93	§1.61
4057(b)(5)(A)–(D)	4059(d)
§§1.80, 1.93	§§1.61, 1.85
4057(b)(5)(B)	4059(e)
§1.93	§§1.61, 1.77
4057(b)(5)(C)	4059(f)
§1.93	§1.61
4057(b)(5)(D)	4059(g)
§1.93	§§1.61–1.63
4057(b)(7)	4060
§1.79	§1.37, 1.49, 1.61
4057.5	4061(a)
§§1.47, 1.61, 1.93	§1.84

4061(b)	4065(a)
§1.84	§§1.3, 1.87
4061(c)–(d)	4065(c)
§1.84	§1.87
4062	4065(d)
§§1.83–1.84	§§1.87, 1.102
4062(a)	4066
§§1.3, 1.82	§1.98
4062(a)(1)	4070
§1.82	§§1.62–1.63
4062(a)(2)	4070–4073
§1.82	§1.61
4062(b)	4071
§§1.3, 1.83	§§1.64, 1.76
4062(b)(1)	4071(a)(1)
§1.83	§1.62
4062(b)(2)	4071(a)(2)
§1.83	§1.63
4063	4071(b)
§1.82	§§1.63, 1.76
4063(a)	4072(a)
§1.82	§1.64
4063(b)	4072(b)
§1.82	§1.64
4063(b)(1)	4073
§1.82	§1.64
4063(b)(2)	4074
§1.82	§1.98
4063(b)(3)	4104
§1.82	§2.22
4063(b)(4)	4252(b)(4)
§1.82	§2.35
4063(c)	4300 et seq
§1.82	§1.151
4063(d)	4320
§1.82	§§1.107, 1.111–1.113, 1.118, 1.121–
4063(e)(1)	1.122, 1.129–1.130, 1.132, 1.141,
§1.82	1.144, 2.32
4063(e)(2)	4320(a)
§1.82	§§1.4, 1.114
4063(f)	4320(b)
§1.82	§1.115
4063(g)	4320(c)
§1.82	§1.116
4064	4320(d)
§§1.37, 1.49	§1.117

---

4320(e)	4326(a)
§1.118	§1.141
4320(f)	4326(b)
§1.119	§1.141
4320(g)	4326(c)
§1.120	§1.141
4320(h)	4326(d)
§1.121	§1.141
4320(i)	4330(a)
§§1.107, 1.122	§§1.111, 1.129–1.130
4320(j)	4330(b)
§1.123	§§1.4, 1.132, 1.139
4320(k)	4331
§1.124	§§1.132, 1.141
4320(l)	4332
§§1.112, 1.125, 1.139	§§1.4, 1.131
4320(m)	4333
§§1.107, 1.122, 1.127	§§1.135, 1.146
4320(n)	4334
§1.128	§1.138
4322	4334(a)
§1.118	§1.148
4323(a)(1)	4335
§1.143	§§1.134, 1.136, 1.148
4323(b)	4336
§1.145	§1.134
4324	4336(a)
§§1.107, 1.126	§§1.134–1.135
4324.5	4336(b)
§§1.122, 1.127	§1.134
4324.5(a)	4336(c)
§1.127	§§1.134–1.135
4325	4337
§§1.107, 1.122, 1.127	§§1.135, 1.148
4325(a)(1)	4338
§1.127	§1.116
4325(b)	4338(d)
§1.127	§1.118
4325(c)	4360(a)
§1.127	§1.111
4325.5(b)(2)	4501
§1.127	§1.98
4326	4504
§1.141	§1.42

4504(a)	7540
§1.42	§§1.7, 1.12, 1.14
4504(a)–(c)	7541(a)–(c)
§1.42	§1.15
4504(b)	7541(d)
§1.42	§§1.15, 1.23
4504(b)–(c)	7550 et seq
§1.42	§1.23
4504(c)	7550–7557
§1.42	§2.5
4505(a)	7551
§1.59	§§1.12, 1.23, 2.7
4506(a)	7552.5(a)
§2.28	§1.9
5700.101 et seq	7552.5(a)–(b)
§1.6	§2.7
5700.305(b)	7552.5(a)(1)–(4)
§2.38	§1.9
5700.312	7552.5(b)
§2.23	§1.9
5700.316(f)	7555(a)
§2.37	§1.9
5700.401(b)	7555(a)(1)
§1.5	§1.23
5700.703	7555(a)(2)
§1.6	§1.23
6211	7558
§1.122	§2.7
6223	7570 et seq
§1.6	§1.12
6306(c)(2)	7573
§2.26	§1.12
6306(d)	7575(a)
§2.26	§1.13
6320	7575(b)
§2.27	§1.29
6321	7575(c)
§2.27	§1.29
6322.5	7577(a)
§2.27	§1.12
6322.7(a)	7577(k)
§2.27	§1.29
6323(b)(2)	7580(a)
§1.11	§1.12
6346	7600
§1.6	§1.101

---

7600 et seq	7612(f)
§§1.6, 2.58	§1.12
7601	7613
§1.6	§§1.6, 1.12, 1.23, 1.28
7601(a)	7613(b)
§1.5	§1.12
7601(b)	7613(c)
§1.5	§1.12
7601(c)	7620(b)(1)
§1.5	§1.6
7601(d)	7630
§1.5	§§1.6, 1.13, 2.48
7610	7630–7644
§§1.6, 1.22	§1.6
7610–7611	7634(a)
§1.6	§1.6
7610(a)	7643(a)
§§1.16–1.17	§§2.19–2.20
7610(b)	7643(b)
§1.17	§2.19
7611	7645 et seq
§§1.18, 1.22, 1.26	§§1.29, 2.5
7611(a)	7650
§§1.12, 1.19	§§1.6, 1.24
7611(b)	7962
§§1.12, 1.19	§1.12
7611(c)	8617(a)
§§1.12, 1.19	§1.101
7611(d)	8617(b)
§§1.12, 1.20, 1.24, 1.26–1.27	§1.101
7611(f)	10000 et seq
§1.21	§2.2
7612	10002
§1.12	§2.2
7612(a)	10003
§1.26	§2.2
7612(b)	10004
§1.22	§2.3
7612(c)	10005
§1.25	§2.3
7612(d)	10008
§1.26	§2.2
7612(e)	10010
§§1.13, 1.26, 1.29	§2.2

10013	17452(c)
§2.4	§§2.16, 2.18
17000(f)(i)	17514
§1.6	§2.24
17212(a)(1)	17516
§1.6	§§1.42, 1.60
17400	17550
§2.22	§2.49
17400 et seq	17552
§2.44	§2.47
17400(d)(2)	17560
§1.58	§2.69
17402	17560(f)(1)(B)
§§2.5, 2.53	§2.69
17402(c)	
§1.96	<b>GOVERNMENT CODE</b>
17402(c)(2)	15160
§1.96	§2.26
17402(c)(3)	72190
§1.96	§2.38
17402(d)	72190.1
§1.96	§2.38
17404(a)	72190.2
§§1.6, 2.44	§2.38
17404(b)	100500 et seq
§§1.5, 2.6	§1.85
17408	
§2.45	<b>UNEMPLOYMENT INSURANCE</b>
17408(a)	<b>CODE</b>
§2.44	1256
17408(b)	§1.52
§2.44	
17408(c)	<b>PENAL CODE</b>
§2.45	667.5(c)(3)
17408(d)	§1.127
§2.45	667.5(c)(4)
17408(e)	§1.127
§2.45	667.5(c)(5)
17430	§1.127
§1.105	667.5(c)(11)
17432	§1.127
§1.58	667.5(c)(18)
17440	§1.127
§2.68	
17452(a)	
§2.16	

**PROBATE CODE**

249.5  
     §1.21  
 1500–1543  
     §2.56

**REVENUE AND TAXATION CODE**

14251  
     §2.16  
 19542  
     §2.16

**WELFARE AND INSTITUTIONS CODE**

302(c)  
     §2.48  
 316.2  
     §2.48  
 316.2(e)  
     §2.48  
 360 et seq  
     §2.51  
 366.26  
     §2.50  
 366.26(i)(2)  
     §2.50  
 366.26(i)(3)  
     §2.50  
 726.4  
     §2.48  
 726.4(e)  
     §2.48  
 727.31  
     §2.50  
 827  
     §2.55  
 827(a)(1)(L)  
     §2.47  
 827(a)(1)(N)  
     §2.47  
 903  
     §2.55  
 903 et seq  
     §2.47

903(e)  
     §2.55  
 11200 et seq  
     §1.59  
 11452  
     §1.97  
 11477  
     §1.87

**ACTS BY POPULAR NAME**

Civil Discovery Act  
     §§2.13–2.14  
 Domestic Violence Prevention Act (DVPA)  
     §§1.2, 2.45  
 Family Law Facilitator Act  
     §2.2  
 Uniform Interstate Family Support Act  
 (UIFSA)  
     §§1.5–1.6, 2.23, 2.37–2.38  
 Uniform Parentage Act (UPA)  
     §§1.2, 1.5, 2.19, 2.45, 2.61

**SESSION LAWS**

Stats 2013, ch 564, §1(b)  
     §1.25  
 Stats 2005, ch 154, §6  
     §2.69

**CALIFORNIA CODE OF REGULATIONS**

**Title 22**  
 112150  
     §2.47  
 112154  
     §2.47  
 112155  
     §2.47  
 115535(a)(3)  
     §§1.102, 2.10

**CALIFORNIA RULES OF COURT**

1.150  
     §2.20

1.150(c)	5.275
§2.21	§1.69
1.201	5.275(j)(1)
§2.28	§1.69
2.500 et seq	5.275(j)(2)
§2.21	§1.69
2.834	5.324
§2.20	§§2.35, 2.37
3.35–3.37	5.324(e)–(f)
§2.39	§2.37
3.350	5.330
§2.43	§2.22
3.670	5.330(c)
§2.35	§2.22
3.1362	5.330(g)
§2.42	§2.22
5.9	5.365
§§2.35–2.36	§2.43
5.9(b)	5.365(a)
§2.36	§§2.44–2.45
5.9(c)(1)	5.365(a)(1)(A)–(D)
§2.36	§2.45
5.9(c)(2)	5.365(a)(2)
§2.36	§2.45
5.9(d)	5.372
§2.36	§§1.33, 2.57
5.16	5.425
§2.43	§2.39
5.17	5.425(d)
§2.43	§2.41
5.92(a)(1)(B)	5.425(d)(2)
§1.1	§2.41
5.92(a)(3)	5.425(d)(4)
§1.1	§2.41
5.92(b)(1)	5.425(e)
§1.1	§2.42
5.111	5.425(e)(1)(A)–(C)
§1.1	§2.42
5.220	5.425(e)(2)(A)–(C)
§2.25	§2.42
5.260(a)	5.425(e)(2)(D)
§2.14	§2.42
5.260(a)(3)	5.425(e)(3)(A)–(E)
§2.14	§2.42
5.260(a)(4)	5.425(e)(3)(E)–(F)
§2.14	§2.42

5.425(e)(3)(G)	5.635(d)(1)
§2.42	§2.48
5.425(f)	5.635(d)(2)–(4)
§2.40	§2.48
5.425(f)(1)	5.635(e)
§2.40	§2.48
5.425(f)(2)	5.635(f)
§2.40	§2.48
5.427	5.635(g)–(h)
§2.34	§2.48
5.430	5.668(b)
§2.2	§2.48
5.552	5.695
§2.55	§2.51
5.635	
§2.48	
5.635(a)–(b)	
§2.48	

**LOCAL COURT RULES**

Alameda Ct R 5.70

§1.108

Santa Clara Ct R 3(C)

§1.108

**UNITED STATES****UNITED STATES CODE****Title 2**1400 et seq  
    §2.53215  
    §1.123**Title 4**300gg-11  
    §1.85651 et seq  
    §1.1659(a)  
    §2.73659(h)(1)  
    §2.73659(h)(1)–(2)  
    §2.73659(h)(1)(A)(ii)(V)  
    §2.7318001  
    §1.85**Title 5**393(b)(2)  
    §2.70521 et seq  
    §2.63901 et seq  
    §2.623911(2)(A)  
    §2.623912(a)–(b)  
    §2.623920  
    §2.623931(b)(1)  
    §2.633931(b)(2)  
    §2.643931(b)(3)  
    §2.64

3931(d)		<b>ACTS BY POPULAR NAME</b>
§2.66		Individuals With Disabilities Education Act
3931(g)		(IDEA)
§2.65		§2.53
3931(h)		Federal Insurance Contributions Act (FICA)
§2.65		§1.61
3932(b)(1)		Patient Protection and Affordable Care Act
§2.66		§1.85
3932(b)(2)		Personal Responsibility and Work
§2.66		Opportunity Reconciliation Act of
3932(c)		1996 (PRWORA)
§2.66		§5.64
3932(d)(1)		Servicemembers Civil Relief Act (SCRA)
§2.66		§§2.6, 2.62
3934		Social Security Act (SSA)
§2.67		§2.73
3937(a)(1)		Soldiers' and Sailors' Civil Relief Act of
§2.70		1940
3937(a)(2)		§§2.62, 2.64
§2.70		Tax Cut & Jobs Act
3937(b)(1)		§1.123
3937(c)		<b>PUBLIC LAWS</b>
§2.70		108–189
3937(e)		§2.62
§2.70		113–183
3937(f)		§3.1
§2.70		280
4001(a)–(b)		§2.62
§2.72		
4001(c)		<b>CODE OF FEDERAL REGULATIONS</b>
§2.72		<b>Title 38</b>
4001(e)		3.450(a)(1)(ii)
§2.72		§2.73
		3.451
		§2.73
<b>INTERNAL REVENUE CODE</b>		<b>Title 45</b>
71		302.56(a)
§1.98		§1.65
152(e)(2)(A)		302.56(f)
§1.104		§1.65
215		
§1.98		<b>TREASURY REGULATIONS</b>
		1.71–1T, Q-16, 17, and 18
		§1.98



## Table of Cases

- Adams v Bell (1933) 219 C 503, 27 P2d 757: [§4.101](#)
- Adams, Marriage of (1997) 52 CA4th 911, 60 CR2d 811: [§4.95](#)
- Adamson v Adamson (1962) 209 CA2d 492, 26 CR 236: [§4.172](#)
- Alameda, County of v Weatherford (1995) 36 CA4th 666, 42 CR2d 386: [§§4.182, 4.189](#)
- Alan S., Jr. v Superior Court (Mary T.) (2009) 172 CA4th 238, 91 CR3d 241: [§2.32](#)
- Albrecht v Superior Court (1982) 132 CA3d 612, 183 CR 417: [§4.20](#)
- Aldabe v Aldabe (1962) 209 CA2d 453, 26 CR 208: [§4.145](#)
- Allen v Allen (1947) 30 C2d 433, 182 P2d 551: [§2.65](#)
- Alter, Marriage of (2009) 171 CA4th 718, 89 CR3d 849: [§§1.38, 1.60, 1.102, 2.10, 4.177](#)
- Amber M., In re (2010) 184 CA4th 1223, 110 CR3d 25: [§2.66](#)
- American Express Centurion Bank v Zara (2011) 199 CA4th 383, 131 CR3d 99: [§4.156](#)
- Anderson v Bledsoe (1934) 139 CA 650, 34 P2d 760: [§5.10](#)
- Anna M. v Jeffrey E (2017) 7 CA5th 439, 212 CR3d 652: [§1.38](#)
- Anninger, Marriage of (1990) 220 CA3d 230, 269 CR 388, superseded by statute on other grounds at 59 CA4th 877: [§1.137](#)
- Aplanalp v Forte (1990) 225 CA3d 609, 275 CR 144: [§4.147](#)
- Armato, Marriage of (2001) 88 CA4th 1030, 106 CR2d 395: [§4.191](#)
- Armstrong v Armstrong (1976) 15 C3d 942, 126 CR 805: [§§4.139, 4.144](#)
- Armstrong v CIR (2012) 139 US Tax Ct 468: [§1.104](#)
- Asfaw v Woldberhan (2007) 147 CA4th 1407, 55 CR3d 323: [§§1.34, 1.61](#)
- Askmo, Marriage of (2000) 85 CA4th 1032, 102 CR2d 662: [§1.107](#)
- Ayo, Marriage of (1987) 190 CA3d 442, 235 CR 458: [§4.196](#)
- Bagley, U.S. v (1985) 473 US 667, 105 S Ct 3375, 87 L Ed 2d 481: [§4.38](#)
- Bain v Superior Court (1974) 36 CA3d 804, 111 CR 848: [§1.109](#)
- Baker, Marriage of (1992) 3 CA4th 491, 4 CR2d 553: [§1.134](#)
- Bank of America Nat'l Trust & Sav. Ass'n v Jennett (1999) 77 CA4th 104, 91 CR2d 359: [§4.144](#)
- Bardzik, Marriage of (2008) 165 CA4th 1291, 83 CR3d 72: [§1.52](#)
- Barkins, People v (1978) 81 CA3d 30, 145 CR 926: [§4.64](#)
- Barron v Superior Court of Santa Clara County (2009) 173 CA4th 293, 92 CR3d 394: [§1.59](#)
- Barthold, Marriage of (2008) 158 CA4th 1301, 70 CR3d 691: [§2.11](#)
- Beaoza, In re (Bankr SDNY 2002) 271 BR 46, 51: [§4.10](#)
- Beck, Marriage of (1997) 57 CA4th 341, 67 CR2d 79: [§1.134](#)
- Benjamins, Marriage of (1994) 26 CA4th 423, 31 CR2d 313: [§1.111](#)
- Berger, Marriage of (2009) 170 CA4th 1070, 88 CR3d 766: [§§1.34, 1.56–1.57](#)
- Berhanu v Metzger (1992) 12 CA4th 445, 15 CR2d 191: [§4.131](#)
- Berman, Marriage of (2017) 15 CA5th 914, 223 CR3d 604: [§1.116](#)
- Beust, Marriage of (1994) 23 CA4th 24, 28 CR2d 201: [§1.141](#)
- Bhatt v Department of Health Servs. (2005) 133 CA4th 923, 35 CR3d 335: [§4.45](#)
- Blazer, Marriage of (2009) 176 CA4th 1438, 99 CR3d 42: [§1.116](#)
- Boblitt, Marriage of (2014) 223 CA4th 1004, 167 CR3d 777: [§2.15](#)
- Bodo, Marriage of (2011) 198 CA4th 373, 129 CR3d 298: [§2.10](#)

- Boswell, Marriage of (2014) 225 CA4th 1172, 171 CR3d 100: [§§4.181, 4.195](#)
- Boutte v Nears (1996) 50 CA4th 162, 57 CR2d 655: [§1.83](#)
- Bower, Marriage of (2002) 96 CA4th 893, 117 CR2d 520: [§1.143](#)
- Boykin v Alabama (1969) 395 US 238, 89 S Ct 1709, 23 L Ed 2d 274: [§4.31](#)
- Brady v Maryland (1963) 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215: [§4.38](#)
- Braud, Marriage of (1996) 45 CA4th 797, 53 CR2d 179: [§1.88](#)
- Bridges v Superior Court (1939) 14 C2d 464, 94 P2d 983: [§4.40](#)
- Brienza v Tepper (1995) 35 CA4th 1839, 42 CR2d 690: [§4.147](#)
- Brinkman, Marriage of (2003) 111 CA4th 1281, 4 CR3d 722: [§§1.102, 4.186](#)
- Brothers v Kern (2007) 154 CA4th 126, 64 CR3d 239: [§§1.54, 2.60](#)
- Bryan v Itasca County (1976) 426 US 373, 96 S Ct 2102, 48 L Ed 2d 710: [§5.37](#)
- Buford, People v (1974) 42 CA3d 975, 117 CR 333: [§4.65](#)
- Burgess, Marriage of (1996) 13 C4th 25, 51 CR2d 444: [§1.93](#)
- Burlini, Marriage of (1983) 143 CA3d 65, 191 CR 541: [§§1.4, 1.107–1.108, 1.112](#)
- Butler & Gill, Marriage of (1997) 53 CA4th 462, 61 CR2d 781: [§§1.64, 1.93](#)
- Butte, County of v Superior Court (Filipowicz) (1989) 210 CA3d 555, 258 CR 516: [§2.5](#)
- Calcaterra & Badakhsh, Marriage of (2005) 132 CA4th 28, 33 CR3d 246: [§1.48](#)
- California v Cabazon Band of Mission Indians (1987) 480 US 202, 107 S Ct 1083, 94 L Ed 2d 244, superseded by statute on other grounds as stated in 134 S Ct 2024: [§5.37](#)
- Cal-Western Reconveyance Corp. v Reed (2007) 152 CA4th 1308, 62 CR3d 244: [§4.79](#)
- Campi, Marriage of (2013) 212 CA4th 1565, 152 CR3d 179: [§4.154](#)
- Caralyn S., Guardianship of (1983) 148 CA3d 81, 195 CR 646: [§1.27](#)
- Carlsen, Marriage of (1996) 50 CA4th 212, 57 CR2d 630: [§§1.47, 1.63–1.64](#)
- Carlton, Marriage of (2001) 91 CA4th 1213, 111 CR2d 329: [§1.47](#)
- Cassil, In re (1995) 37 CA4th 1081, 44 CR2d 267: [§4.7](#)
- Cassinelli, Marriage of (2018) 20 CA5th 1267, 229 CR3d 801: [§1.144](#)
- Cecilia & David W., Marriage of (2015) 241 CA4th 1277, 194 CR3d 559: [§1.100](#)
- Cedars-Sinai Imaging Med. Group v Superior Court (Moore) (2000) 83 CA4th 1281, 100 CR2d 320: [§4.20](#)
- Chandler, Marriage of (1997) 60 CA4th 124, 70 CR2d 109: [§§1.83, 1.89](#)
- Chapman, Marriage of (1988) 205 CA3d 253, 252 CR 359: [§4.101](#)
- Charisma R. v Kristina S. (2009) 175 CA4th 361, 96 CR3d 26: [§1.20](#)
- Cheriton, Marriage of (2001) 92 CA4th 269, 111 CR2d 755: [§§1.37, 1.50, 1.56–1.57, 1.66–1.67, 1.90, 1.106, 1.113–1.116, 1.129, 1.137, 1.139](#)
- Cheyenne B., In re (201 2) 203 CA4th 1361, 138 CR3d 267: [§1.26](#)
- Christie, Marriage of (1994) 28 CA4th 849, 34 CR2d 135: [§§1.134–1.135](#)
- Cima-Sorci v Sorci (2017) 17 CA5th 875, 225 CR3d 813: [§3.18](#)
- City & County of San Francisco v Cartagena (1995) 35 CA4th 1061, 41 CR2d 797: [§§1.10, 2.5, 4.172](#)
- City & County of San Francisco v Funches (1999) 75 CA4th 243, 89 CR2d 49: [§4.181](#)
- City & County of San Francisco v Givens (2000) 85 CA4th 51, 101 CR2d 859: [§1.26](#)

- City & County of San Francisco v Miller (1996) 49 CA4th 866, 56 CR2d 887: [§1.93](#)
- Clark v Superior Court (1998) 62 CA4th 576, 587–592, 73 CR2d 53: [§2.6](#)
- Clarke & Akel, Marriage of (2018) 19 CA5th 914, 223 CR3d 483: [§1.150](#)
- Clevenger v Clevenger (1961) 189 CA2d 658, 11 CR 707: [§1.27](#)
- Cohen, Marriage of (2016) 3 CA5th 1014, 207 CR3d 846: [§1.148](#)
- Cohn, Marriage of (1998) 65 CA4th 923, 76 CR2d 866: [§§1.51, 1.53](#)
- Colby v Colby (1954) 127 CA2d 602, 274 P2d 417: [§4.101](#)
- Coleman, In re (1974) 12 C3d 568, 116 CR 381: [§4.41](#)
- Coleman, People v (1975) 13 C3d 867, 120 CR 384: [§§4.58, 4.63](#)
- Collins v Superior Court (1957) 150 CA2d 354, 310 P2d 103: [§4.19](#)
- Comer, Marriage of (1996) 14 C4th 504, 59 CR2d 155: [§§2.52, 3.41, 4.189, 4.195](#)
- Comino v Kelly (1994) 25 CA4th 678, 30 CR2d 728: [§1.14](#)
- Contra Costa, County of v Lemon (1988) 205 CA3d 683, 252 CR 455: [§1.41](#)
- Cooper v O'Rourke (1995) 32 CA4th 243, 38 CR2d 444: [§4.195](#)
- Copeman, Marriage of (2001) 90 CA4th 324, 108 CR2d 801: [§4.190](#)
- Cordero, Marriage of (2002) 95 CA4th 653, 115 CR2d 787: [§4.182](#)
- Corman, Marriage of (1997) 59 CA4th 1492, 69 CR2d 880: [§§1.33, 1.60, 1.93](#)
- County of \_\_\_\_\_. *See* name of county.
- Craig v Superior Court (Fountaine) (1975) 45 CA3d 675, 119 CR 692: [§4.145](#)
- Crittenden v Superior Court (1964) 225 CA2d 101, 36 CR 903: [§4.46](#)
- Cutler, Marriage of (2000) 79 CA4th 460, 94 CR2d 156: [§4.138](#)
- Dacumos, Marriage of (1999) 76 CA4th 150, 90 CR2d 159: [§1.57](#)
- Damico, Marriage of (1994) 7 C4th 673, 29 CR2d 787: [§§1.71, 3.41, 4.186, 4.188, 4.195](#)
- Dandona & Araluce, Marriage of (2001) 91 CA4th 1120, 111 CR2d 390: [§§4.148, 4.191](#)
- Daniels, Marriage of (1993) 19 CA4th 1102, 23 CR2d 865: [§2.33](#)
- DaSilva v DaSilva (2004) 119 CA4th 1030, 15 CR3d 59: [§1.71](#)
- Daugherty, Marriage of (2014) 232 CA4th 463, 181 CR3d 427: [§1.42](#)
- Davenport, Marriage of (2011) 194 CA4th 1507, 125 CR3d 292: [§2.33](#)
- David L. v Superior Court (2018) 29 CA5th 359, 240 CR3d 462: [§§3.4, 4.143](#)
- de Guigne, Marriage of (2002) 97 CA4th 1353, 119 CR2d 430: [§§1.93, 1.118](#)
- de Leon v Jenkins (2006) 143 CA4th 118, 49 CR3d 145: [§3.18](#)
- Denise & Kevin C., Marriage of (1997) 57 CA4th 1100, 67 CR2d 508: [§1.93](#)
- Destein, Marriage of (2001) 91 CA4th 1385, 111 CR2d 487: [§§1.31, 1.50, 1.57](#)
- Dietz, Marriage of (2009) 176 CA4th 387, 97 CR3d 616: [§1.141](#)
- Dilday, People v (1993) 20 CA4th Supp 1, 25 CR2d 386: [§§4.4, 4.15](#)
- D.M., In re (2013) 210 CA4th 541, 148 CR3d 349: [§1.20](#)
- D.R., In re (2011) 193 CA4th 1494, 122 CR3d 753: [§1.12](#)
- Drake, Marriage of (1997) 53 CA4th 1139, 62 CR2d 466: [§§1.71, 1.99–1.100](#)
- Drapeau, Marriage of (2001) 93 CA4th 1086, 114 CR2d 6: [§§1.129, 1.139](#)
- D.S., In re (2012) 207 CA4th 1088, 143 CR3d 918: [§1.16](#)
- Duke, Marriage of (1980) 101 CA3d 152, 161 CR 444: [§1.88](#)
- Duris & Urbany, Marriage of (2011) 193 CA4th 510, 123 CR3d 150: [§2.34](#)
- Eby v Chaskin (1996) 47 CA4th 1045, 55 CR2d 517: [§4.95](#)
- E.C. v J.V. (2012) 202 CA4th 1076, 136 CR3d 339: [§1.24](#)

- Edwards v Edwards (2008) 162 CA4th 136, 75 CR3d 458: [§§1.93, 1.100](#)
- Eggers, Marriage of (2005) 131 CA4th 695, 32 CR3d 292: [§1.52](#)
- El Dorado County DCSS v Nutt (2008) 167 CA4th 990, 84 CR3d 523: [§§1.54, 1.85](#)
- El Dorado, County of v Schneider (1987) 191 CA3d 1263, 237 CR 51: [§2.5](#)
- Elisa B. v Superior Court (Emily B.) (2005) 37 C4th 108, 33 CR3d 46: [§§1.5, 1.24](#)
- Elsenheimer v Elsenheimer (2004) 124 CA4th 1532, 22 CR3d 447: [§§1.42, 1.60](#)
- Epstein, Marriage of (1979) 24 C3d 76, 154 CR 413, superseded on other grounds as stated in 203 CA3d 1198: [§1.111](#)
- Estevez v Superior Court (1994) 22 CA4th 423, 27 CR2d 470: [§1.48](#)
- Ethan S., Guardianship of (1990) 221 CA3d 1403, 271 CR 121: [§1.27](#)
- Eustice, Marriage of (2015) 242 CA4th 1291, 195 CR3d 876: [§2.30](#)
- Evans v Superior Court (1942) 20 C2d 186, 124 P2d 820: [§4.101](#)
- Even Zohar Construction Remodeling Inc v Bellaire Townhouses LLC (2015) 61 C4th 830, 189 CR3d 824: [§4.152](#)
- Everett, Marriage of (1990) 220 CA3d 846, 269 CR 917: [§1.99](#)
- Fabricant v Superior Court (1980) 104 CA3d 905, 163 CR 894: [§4.19](#)
- Falcone & Fyke, Marriage of (2012) 203 CA4th 964, 138 CR3d 44: [§2.33](#)
- Faretta v California (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562: [§4.28](#)
- Farner, Marriage of (1989) 216 CA3d 1370, 265 CR 531: [§§4.98, 4.101](#)
- Feiock, In re (1989) 215 CA3d 141, 263 CR 437: [§4.57](#)
- Feldman, Marriage of (2007) 153 CA4th 1470, 64 CR3d 29: [§§2.14, 2.33](#)
- Fellows, Marriage of (2006) 39 C4th 179, 46 CR3d 49: [§§1.95, 4.149, 4.190](#)
- Fini, Marriage of (1994) 26 CA4th 1033, 1 CR2d 749: [§1.84](#)
- First City Props., Inc. v MacAdam (1996) 49 CA4th 507, 56 CR2d 680: [§4.95](#)
- Fong, Marriage of (2011) 193 CA4th 278, 123 CR3d 260: [§2.33](#)
- Foosadas v Superior Court (2005) 130 CA4th 649, 30 CR3d 358: [§5.9](#)
- Forcum, Marriage of (1983) 145 CA3d 599, 193 CR 596: [§1.137](#)
- Foross, In re (BAP 9th Cir 1999) 242 BR 692: [§4.112](#)
- Freeman v Superior Court (1955) 44 C2d 533, 282 P2d 857: [§§4.13, 4.22](#)
- Freitas, Marriage of (2012) 209 CA4th 1059, 147 CR3d 453: [§§1.106, 1.110, 1.146, 2.8](#)
- Fresno, County of v Sanchez (2005) 135 CA4th 15, 37 CR3d 192: [§4.173](#)
- Frye, In re (1983) 150 CA3d 407, 197 CR 755: [§§4.39, 5.9](#)
- Gabriel P. v Suedi D. (2006) 141 CA4th 850, 46 CR3d 437: [§1.22](#)
- Gavron, Marriage of (1988) 203 CA3d 705, 250 CR 148: [§§1.132, 1.137, 1.139, 1.141](#)
- George P. v Superior Court (2005) 127 CA4th 216, 24 CR3d 919: [§2.66](#)
- Gibble v Car-Lene Research, Inc. (1998) 67 CA4th 295, 78 CR2d 892: [§4.158](#)
- Gigliotti, Marriage of (1995) 33 CA4th 518, 39 CR2d 367: [§1.83](#)
- Glasser, Marriage of (1986) 181 CA3d 149, 226 CR 229: [§4.101](#)
- Gong & Kwong, Marriage of (2008) 163 CA4th 510, 77 CR3d 540: [§2.30](#)
- Goodarzirad, Marriage of (1986) 185 CA3d 1020, 230 CR 203: [§4.177](#)
- Graham, Marriage of (2003) 109 CA4th 1321, 135 CR2d 685: [§1.53](#)
- Grothe v Cortlandt Corp. (1992) 11 CA4th 1313, 15 CR2d 38: [§4.82](#)
- Gruen, Marriage of (2011) 191 CA4th 627, 120 CR3d 184: [§§1.106, 1.110, 2.8](#)
- Gruntz, People v (1994) 29 CA4th 412, 35 CR2d 55: [§4.10](#)

- Guardianship of Caralyn S. (1983) 148 CA3d 81, 195 CR 646: [§1.27](#)
- Guardianship of Ethan S. (1990) 221 CA3d 1403, 271 CR 121: [§1.27](#)
- Guardino, Marriage of (1979) 95 CA3d 77, 156 CR 883: [§4.172](#)
- Guess v Bernhardson (2015) 242 CA4th 820, 195 CR3d 349: [§4.82](#)
- Haggard v Haggard (1995) 38 CA4th 1566, 45 CR2d 638: [§1.93](#)
- Hall, Marriage of (2000) 81 CA4th 313, 96 CR2d 772: [§1.94](#)
- Hall & Frencher, Marriage of (2016) 247 CA4th 23, 201 CR3d 769: [§§1.42, 4.78](#)
- Hamer, Marriage of (2000) 81 CA4th 712, 97 CR2d 195, superseded by statute as stated in 39 C4th 179: [§§1.95, 4.138, 4.186](#)
- Hamm, In re (1982) 133 CA3d 60, 183 CR 626: [§4.70](#)
- Hasbun v County of Los Angeles (9th Cir 2003) 323 F3d 801: [§4.45](#)
- Hebbring, Marriage of (1989) 207 CA3d 1260, 255 CR 488: [§1.134](#)
- Heiner, Marriage of (2006) 136 CA4th 1514, 39 CR3d 730: [§1.60](#)
- Heistermann, Marriage of (1991) 234 CA3d 1195, 286 CR 127: [§§1.121, 1.125, 1.134, 1.141](#)
- Helgestad v Vargas (2014) 231 CA4th 719, 180 CR3d 318: [§§4.148, 4.193](#)
- Hendricks, In re (1970) 5 CA3d 793, 85 CR 220: [§4.4](#)
- Henry James Koehler, In re (2010) 181 CA4th 1153, 104 CR3d 877: [§2.30](#)
- Henry, Marriage of (2005) 126 CA4th 111, 23 CR3d 707: [§1.60](#)
- Herr, Marriage of (2009) 174 CA4th 1463, 95 CR3d 464: [§2.11](#)
- Heuer v Heuer (1949) 33 C2d 268, 201 P2d 385: [§4.145](#)
- Hicks v Feiock (1988) 485 US 624, 108 S Ct 1423, 99 L Ed 2d 721: [§§4.7–4.9, 4.15, 4.34, 4.57](#)
- Hinman, Marriage of (1997) 55 CA4th 988, 64 CR2d 383: [§§1.51, 1.56](#)
- Hofer, Marriage of (2012) 208 CA4th 454, 145 CR3d 697: [§2.32](#)
- Hoffmeister, Marriage of (Hoffmeister II) (1987) 191 CA3d 351, 236 CR 543: [§1.142](#)
- Hooser v Superior Court (Ray) (2000) 84 CA4th 997, 101 CR2d 341: [§4.93](#)
- Hopkins, Marriage of (2009) 173 CA4th 281, 92 CR3d 570: [§5.58](#)
- Horton, In re (1991) 54 C3d 82, 248 CR 305: [§5.10](#)
- Howard, People v (1997) 16 C4th 1081, 68 CR2d 870: [§4.70](#)
- Howell, Marriage of (2011) 195 CA4th 1062, 126 CR3d 539: [§1.150](#)
- H.S. v Superior Court (2010) 183 CA4th 1502, 108 CR3d 723: [§§1.12, 1.22](#)
- Hubner, Marriage of (2004) 124 CA4th 1082, 22 CR3d 549: [§4.182](#)
- Hubner, Marriage of (2001) 94 CA4th 175, 114 CR2d 646: [§§1.48, 1.91, 1.94](#)
- Hulse v Davis (1927) 200 C 316, 253 P 136: [§4.102](#)
- Hunter v Hunter (1959) 170 CA2d 576, 339 P2d 247: [§4.101](#)
- Huntington, Marriage of (1992) 10 CA4th 1513, 14 CR2d 1: [§1.134](#)
- Iberti, Marriage of (1997) 55 CA4th 1434, 64 CR2d 766: [§1.138](#)
- Ilas, Marriage of (1993) 12 CA4th 1630, 16 CR2d 345: [§1.52](#)
- Imperial Bank v Pim Elect., Inc. (1995) 33 CA4th 540, 39 CR2d 432: [§§4.90–4.92, 4.118, 4.124](#)
- In re \_\_\_\_\_. *See* name of party.
- International Union, United Mine Workers of Am. v Bagwell (1994) 512 US 821, 114 S Ct 2552, 129 L Ed 2d 642: [§§4.7, 4.9](#)
- Inyo, County of v Jeff (1991) 227 CA3d 487, 277 CR 841: [§5.37](#)
- Ivey, In re (2000) 85 CA4th 793, 102 CR2d 447: [§§4.13, 4.15](#)
- Jackson v Jackson (1975) 51 CA3d 363, 124 CR 101: [§§2.56, 4.101, 4.148, 4.193](#)

- Jacobson, Marriage of (2004) 121 CA4th 1187, 18 CR3d 162: [§1.107](#)
- J.O., In re (2009) 178 CA4th 139, 100 CR3d 276: [§1.26](#)
- Johnson v Johnson (1968) 259 CA2d 139, 66 CR 172: [§4.145](#)
- Johnson v Superior Court (1998) 66 CA4th 68, 77 CR2d 624: [§§1.31, 1.48, 1.89](#)
- Johnson, Marriage of (1979) 88 CA3d 848, 152 CR 121: [§1.27](#)
- Johnson-Wilkes & Wilkes, Marriage of (1996) 48 CA4th 1569, 56 CR2d 323: [§4.75](#)
- Jones v Superior Court (2004) 115 CA4th 48, 8 CR3d 687: [§4.68](#)
- Jones v World Life Research Inst. (1976) 60 CA3d 836, 131 CR 674: [§4.101](#)
- J.R. v D.P. (2012) 212 CA4th 374, 150 CR3d 882: [§1.22](#)
- Kacik, Marriage of (2009) 179 CA4th 410, 101 CR3d 745: [§1.141](#)
- Kahn v Berman (1988) 198 CA3d 1499, 244 CR 575: [§4.107](#)
- Katz v Katz (NJ Sup Ct Div 1998) 707 A2d 1353: [§3.4](#)
- Katzberg, Marriage of (2001) 88 CA4th 974, 106 CR2d 157: [§§1.70, 1.96, 4.194](#)
- Kelkar, Marriage of (2014) 229 CA4th 833, 176 CR3d 905: [§1.127](#)
- Kenneth G. v Suzanne H. (1998) 62 CA4th 853, 72 CR2d 525: [§3.41](#)
- Kern County DCSS v Camacho (2012) 209 CA4th 1028, 147 CR3d 354: [§§5.9–5.10](#)
- Kern, County of v Castle (1999) 75 CA4th 1442, 89 CR2d 874: [§§1.38, 1.40–1.41, 1.60](#)
- Kerr, Marriage of (1999) 77 CA4th 87, 91 CR2d 374: [§§1.67, 1.114, 1.116](#)
- Kevin Q. v Lauren W. (2009) 175 CA4th 1119, 95 CR3d 477: [§§1.12, 1.26](#)
- Khera & Sameer, Marriage of (2012) 206 CA4th 1467, 143 CR3d 81: [§§1.52, 1.116, 1.125, 1.141](#)
- Klug, Marriage of (2005) 130 CA4th 1389, 31 CR3d 327: [§4.181](#)
- Knabe v Brister (2007) 154 CA4th 1316, 65 CR3d 493: [§3.7](#)
- Knowles, Marriage of (2009) 178 CA4th 35, 100 CR3d 199: [§1.47](#)
- Kochan, Marriage of (2011) 193 CA4th 420, 122 CR3d 61: [§§1.116, 1.144](#)
- Koester, TC Summ Op 2017-88: [§1.123](#)
- Kreiss, Marriage of (1990) 224 CA3d 1033, 274 CR 226: [§4.142](#)
- Kreitman, In re (1995) 40 CA4th 750, 47 CR2d 595: [§§4.40, 4.51](#)
- Kulko v Superior Court (1978) 436 US 84, 98 S Ct 1690, 56 L Ed 2d 132: [§4.143](#)
- Kumar, Marriage of (2017) 13 CA5th 1072, 220 CR3d 863: [§1.151](#)
- LaBass & Munsee, Marriage of (1997) 56 CA4th 1331, 66 CR2d 393: [§§1.51–1.53, 1.56, 1.86, 4.177](#)
- Lake, County of v Antoni (1993) 18 CA4th 1102, 22 CR2d 804: [§1.93](#)
- Lambe & Meehan, Marriage of (1995) 37 CA4th 388, 44 CR2d 641: [§§1.87, 4.177](#)
- Lamoure, Marriage of (2011) 198 CA4th 807, 132 CR3d 1: [§§4.118–4.119, 5.58](#)
- Lasich, Marriage of (2002) 99 CA4th 702, 121 CR2d 356: [§1.70](#)
- Laudeman, Marriage of (2001) 92 CA4th 1009, 112 CR2d 378: [§§1.66, 1.87, 1.94, 1.102](#)
- Le Francois v Goel (2005) 35 C4th 1094, 29 CR3d 249: [§2.11](#)
- Leadford v Leadford (1992) 6 CA4th 571, 8 CR2d 9: [§4.141](#)
- Leff, Marriage of (1972) 25 CA3d 630, 102 CR 195: [§4.140](#)
- Leonard, Marriage of (2004) 119 CA4th 546, 14 CR3d 482: [§§1.106, 1.146](#)
- Leonis v Superior Court (1952) 38 C2d 527, 241 P2d 253: [§4.20](#)
- Levi H., In re (2011) 197 CA4th 1279, 128 CR3d 814: [§1.26](#)

- Levy v Bloom (2001) 92 CA4th 625, 112 CR2d 144: [§2.34](#)
- Lim & Carrasco, Marriage of (2013) 214 CA4th 768, 154 CR3d 179: [§§1.52, 1.56](#)
- L.M. v M.G. (2012) 208 CA4th 133, 145 CR3d 97: [§1.24](#)
- Logue, TC Memo 2017-234: [§1.123](#)
- Loh, Marriage of (2001) 93 CA4th 325, 112 CR2d 893: [§§1.40, 1.48](#)
- Lohman v Lohman (1946) 29 C2d 144, 173 P2d 657: [§4.102](#)
- Los Angeles, County of v James (2007) 152 CA4th 253, 60 CR3d 880: [§4.169](#)
- Los Angeles, County of v Navarro (2004) 120 CA4th 246, 14 CR3d 905: [§4.173](#)
- Los Angeles, County of v Smith (1999) 74 CA4th 500, 88 CR2d 159: [§2.53](#)
- Los Angeles, County of v Soto (1984) 35 C3d 483, 198 CR 779: [§4.171](#)
- Los Angeles, County of v Youngblood (2015) 243 CA4th 230, 196 CR3d 345: [§3.18](#)
- Lundahl v Telford (2004) 116 CA4th 305, 9 CR3d 902: [§3.1](#)
- Lusby, Marriage of (1998) 64 CA4th 459, 75 CR2d 263: [§§4.181, 4.194](#)
- Lynn, Marriage of (2002) 101 CA4th 120, 123 CR2d 611: [§1.141](#)
- Macilwaine, Marriage of (2018) 26 CA5th 514, 237 CR3d 156: [§§1.37, 1.91, 1.94](#)
- MacManus, Marriage of (2010) 182 CA4th 330, 105 CR3d 785: [§§1.107, 1.122](#)
- Maki, People v (1985) 39 C3d 707, 217 CR 676: [§4.67](#)
- Malwitz & Parr, Marriage of (Colo 2004) 99 P3d 56: [§3.4](#)
- Mancini, In re (1963) 215 CA2d 54, 29 CR 796: [§4.47](#)
- Margarita D. (1999) 72 CA4th 1288, 85 CR2d 713: [§4.172](#)
- Marriage Cases (2008) 43 C4th 757, 76 CR3d 683: [§1.24](#)
- Marriage of \_\_\_\_\_. *See* name of parties.
- Maxfield, Marriage of (1983) 142 CA3d 755, 191 CR 267: [§4.144](#)
- M.C., In re (2011) 195 CA4th 197, 123 CR3d 856: [§1.25](#)
- McCallum v McCallum (1987) 190 CA3d 308, 235 CR 396: [§§4.139, 4.144](#)
- McCann, Marriage of (1996) 41 CA4th 978, 48 CR2d 864: [§1.141](#)
- McClain, Marriage of (2017) 7 CA5th 262, 212 CR3d 537: [§1.132](#)
- McGinley v Herman (1996) 50 CA4th 936, 57 CR2d 921: [§1.48](#)
- McHugh, Marriage of (2014) 231 CA4th 1238, 180 CR3d 448: [§1.52](#)
- McKaskle v Wiggins (1984) 465 US 168, 104 S Ct 944, 79 L Ed 2d 944: [§4.28](#)
- Medina, People v (2001) 89 CA4th 318, 106 CR2d 895: [§4.70](#)
- Meegan, Marriage of (1992) 11 CA4th 156, 13 CR2d 799: [§§1.113, 1.144](#)
- Mejia v Reed (2003) 31 C4th 657, 3 CR3d 390: [§§1.57, 1.93](#)
- Melendez-Diaz v Massachusetts (2009) 129 S Ct 2527, 174 L Ed 2d 314: [§1.9](#)
- Mena, Marriage of (1989) 212 CA3d 12, 260 CR 314: [§5.18](#)
- Mendoza v Ramos (2010) 182 CA4th 680, 105 CR3d 853: [§§1.50, 1.53](#)
- Mendoza & Cuellar, Marriage of (2017) 14 CA5th 939, 222 CR3d 420: [§1.146](#)
- Meyer v Meyer (1952) 115 CA2d 48, 251 P2d 335: [§4.101](#)
- Minkin, Marriage of (2017) 11 CA5th 939, 218 CR3d 407: [§1.116](#)
- Moffat v Moffat (1980) 27 C3d 645, 165 CR 877: [§§1.71, 4.145](#)
- Monterey County v Banuelos (2000) 82 CA4th 1299, 98 CR2d 710: [§4.6](#)
- Monterey County v Cornejo (1991) 53 C3d 1271, 283 CR 405: [§1.104](#)
- Moody, TC Memo 2012-268: [§1.104](#)
- Moofly Productions, LLC v Favila (2018) 24 CA5th 993, 234 CR3d 769: [§2.34](#)
- Moore v Bedard (2013) 213 CA4th 1206, 152 CR3d 809: [§2.58](#)
- Moore v Superior Court (1970) 8 CA3d 804, 87 CR 620: [§1.109](#)

- Morelli v Superior Court (Berry) (1968) 262 CA2d 262, 68 CR 572: [§4.22](#)
- Moreno v Mihelis (1962) 207 CA2d 449, 24 CR 582: [§4.102](#)
- Morrison, Marriage of (1978) 20 C3d 437, 143 CR 139: [§1.134](#)
- Morrissey v Brewer (1972) 408 US 471, 92 S Ct 2593, 33 L Ed 2d 484: [§§4.65, 4.71](#)
- Morton, Marriage of (2018) 27 CA5th 1025, 238 CR3d 407: [§§1.33, 2.32](#)
- Mosley, Marriage of (2008) 165 CA4th 1375, 82 CR3d 497: [§§1.35, 1.51, 1.56](#)
- Mosley, People v (1988) 198 CA3d 1167, 244 CR 264: [§4.60](#)
- Moss v Superior Court (Ortiz) (1998) 17 C4th 396, 71 CR2d 215: [§§4.2, 4.4, 4.15, 4.18–4.19, 4.55, 4.57](#)
- Moss, In re (1985) 175 CA3d 913, 221 CR 645: [§4.61](#)
- Mossman v Superior Court (Mossman) (1972) 22 CA3d 706, 99 CR 638: [§4.4](#)
- M.S. v O.S. (2009) 176 CA4th 548, 97 CR3d 812: [§1.35](#)
- Municipal Court, People v (Runyan) (1978) 20 C3d 523, 143 CR 609: [§4.38](#)
- Murray, Marriage of (2002) 101 CA4th 581, 124 CR2d 342: [§§1.4, 1.107, 1.110](#)
- Musaelian v Adams (2009) 45 C4th 512, 87 CR3d 475: [§2.30](#)
- Nebel v Sulak (1999) 73 CA4th 1363, 87 CR2d 385: [§4.90](#)
- Neil S. v Mary L. (2011) 199 CA4th 240, 131 CR3d 51: [§1.22](#)
- Nicholas H., In re (2002) 28 C4th 56, 120 CR2d 146: [§1.26](#)
- Nosbisch, Marriage of (1992) 5 CA4th 629, 6 CR2d 817: [§§3.4, 4.140, 4.143](#)
- O'Brian v AMBS Diagnostics, LLC (2016) 246 CA4th 942, 201 CR3d 305: [§4.119](#)
- Ohio v Barron (1997) 52 CA4th 62, 60 CR2d 342: [§1.96](#)
- Okum, Marriage of (1987) 195 CA3d 176, 240 CR 458: [§4.101](#)
- Oliver v Superior Court (1961) 197 CA2d 237, 17 CR 474: [§4.46](#)
- Olivia A., In re (1986) 181 CA3d 237, 226 CR 382: [§5.18](#)
- Orange County DCSS v Superior Court (Ricketson) (2005) 129 CA4th 798, 28 CR3d 877: [§§2.31, 2.34](#)
- Orange, County of v Carl D. (1999) 76 CA4th 429, 90 CR2d 440: [§§2.52, 4.101, 4.189](#)
- Orange, County of v Leslie B. (1993) 14 CA4th 976, 17 CR2d 797: [§1.14](#)
- Orange, County of v Smith (2002) 96 CA4th 955, 117 CR2d 336: [§§4.39, 4.190](#)
- Orange, County of v Smith (2005) 132 CA4th 1434, 34 CR3d 383: [§1.33](#)
- Orange, County of v Superior Court (Rothert) (2007) 155 CA4th 1253, 66 CR3d 689: [§4.164](#)
- Oregon v Vargas (1999) 70 CA4th 1123, 83 CR2d 229: [§§2.60, 4.192](#)
- Ostler & Smith, Marriage of (1990) 223 CA3d 33, 272 CR 560: [§§1.35, 1.116](#)
- Ostrander, Marriage of (1997) 53 CA4th 63, 61 CR2d 348: [§1.134](#)
- Outboard Marine Corp. v Superior Court (1975) 52 CA3d 30, 124 CR 852: [§4.186](#)
- P.A., In re (2011) 198 CA4th 974, 130 CR3d 556: [§1.22](#)
- Paboojian, Marriage of (1987) 189 CA3d 1434, 235 CR 65: [§4.101](#)
- Pacific Tel. & Tel. Co. v Superior Court (1968) 265 CA2d 370, 72 CR 177: [§4.40](#)
- Parage v Couedel (1997) 60 CA4th 1037, 70 CR2d 671: [§4.158](#)
- Parker v Harbert (2012) 212 CA4th 1172, 151 CR3d 642: [§2.33](#)
- Parker v Parker (1928) 203 C 787, 266 P 283, superseded on other grounds in 51 C3d 1160: [§4.181](#)
- Paul, Marriage of (1985) 173 CA3d 913, 219 CR 318: [§1.137](#)
- Paulin, Marriage of (1996) 46 CA4th 1378, 54 CR2d 314: [§§1.56, 1.63](#)

- Pearlstein, Marriage of (2006) 137 CA4th 1361, 40 CR3d 910: [§1.60](#)
- Pearson, Marriage of (2018) 21 CA5th 218, 229 CR3d 916: [§2.34](#)
- Peet, Marriage of (1978) 84 CA3d 974, 149 CR 108: [§§4.101, 4.148](#)
- Pendleton & Fireman, Marriage of (2000) 24 C4th 39, 99 CR2d 278: [§§1.125, 1.150](#)
- People v \_\_\_\_\_. *See* name of defendant.
- Perez, Marriage of (1995) 35 CA4th 77, 41 CR2d 377: [§4.182](#)
- Petropoulos, Marriage of (2001) 91 CA4th 161, 110 CR2d 111: [§1.146](#)
- Phegley, In re (BAP 8th Cir 2011) 443 BR 154: [§4.112](#)
- Pinholster, People v (1992) 1 C4th 865, 4 CR2d 765: [§4.38](#)
- Placer, County of v Andrade (1997) 55 CA4th 1393, 64 CR2d 739: [§§1.35–1.36](#)
- Plescia, Marriage of (1997) 59 CA4th 252, 69 CR2d 120: [§1.27](#)
- Plumas County DCSS v Rodriquez (2007) 161 CA4th 1021, 76 CR3d 1: [§1.96](#)
- Plummer v Superior Court (1942) 20 C2d 158, 124 P2d 5: [§4.4](#)
- Prietsch & Calhoun, Marriage of (1987) 190 CA3d 645, 235 CR 587: [§1.139](#)
- Purnel, Marriage of (1997) 52 CA4th 527, 60 CR2d 667: [§4.117](#)
- Quay, Marriage of (1993) 18 CA4th 961, 22 CR2d 537: [§2.33](#)
- Ramer, Marriage of (1986) 187 CA3d 263, 231 CR 647, superseded by statute on other ground as stated in Marriage of Romero (2002) 99 CA4th 1436: [§4.5](#)
- Regnery, Marriage of (1989) 214 CA3d 1367, 263 CR 243: [§§1.3, 1.51, 1.53](#)
- Reifler v Superior Court (1974) 39 CA3d 479, 114 CR 356: [§4.36](#)
- Reisman v Shahverdian (1984) 153 CA3d 1074, 102 CR 194: [§5.10](#)
- Renoir v Redstar Corp. (2004) 123 CA4th 1145, 20 CR3d 603: [§4.161](#)
- Reynolds, Marriage of (1998) 63 CA4th 1373, 74 CR2d 636: [§§1.116, 1.132, 1.144](#)
- Rice & Eaton, Marriage of (2012) 204 CA4th 1073, 139 CR3d 518: [§4.17](#)
- Richardson, Marriage of (2009) 179 CA4th 1240, 102 CR3d 391: [§3.4](#)
- Richmond, Marriage of (1980) 105 CA3d 352, 164 CR 381: [§1.139](#)
- Riddle, Marriage of (2005) 125 CA4th 1075, 23 CR3d 273: [§1.49](#)
- Rising, Marriage of (1999) 76 CA4th 472, 90 CR2d 380: [§1.137](#)
- Robert J. v Leslie M. (1997) 51 CA4th 1642, 59 CR2d 90: [§2.5](#)
- Robinson, Marriage of (1998) 65 CA4th 93, 76 CR2d 134: [§1.42](#)
- Rocha, Marriage of (1998) 68 CA4th 514, 80 CR2d 376: [§1.60](#)
- Rodrigues v Superior Court (2005) 127 CA4th 1027, 26 CR3d 194: [§4.153](#)
- Rodriguez, Marriage of (2018) 23 CA5th 625, 233 CR3d 187: [§§1.34, 1.93](#)
- Rodriguez, People v (1990) 51 C3d 437, 272 CR 613: [§4.69](#)
- Rojas v Mitchell (1996) 50 CA4th 1445, 58 CR2d 354: [§1.94](#)
- Romero, Marriage of (2002) 99 CA4th 1436, 122 CR2d 220: [§1.145](#)
- Rosan, Marriage of (1972) 24 CA3d 885, 101 CR 295: [§1.120](#)
- Rosen, Marriage of (2002) 105 CA4th 808, 130 CR2d 1: [§1.48](#)
- Rothrock, Marriage of (2008) 159 CA4th 223, 70 CR3d 881: [§1.60](#)
- Ruiz, People v (1975) 53 CA3d 715, 125 CR 886: [§4.71](#)
- Ryan, Marriage of (1994) 22 CA4th 841, 27 CR2d 580: [§4.138](#)
- Sabine & Toshio M., Marriage of (2007) 153 CA4th 1203, 63 CR3d 757: [§4.186](#)
- Sachs, Marriage of (2002) 95 CA4th 1144, 116 CR2d 273: [§4.93](#)
- Sagonowsky v Kekoa (2016) 6 CA5th 1142, 212 CR3d 94: [§2.33](#)

- Salas v Cortez (1979) 24 C3d 22, 154 CR 529: [§2.6](#)
- Salveter v Salveter (1936) 11 CA2d 335, 53 P2d 381: [§4.103](#)
- San Diego, County of v Arzaga (2007) 152 CA4th 1336, 62 CR3d 329: [§1.27](#)
- San Diego, County of v Gorham (2010) 186 CA4th 1218, 113 CR3d 147: [§§4.156, 4.161, 4.172](#)
- San Diego, County of v Hotz (1985) 168 CA3d 605, 214 CR 658: [§4.145](#)
- San Diego, County of v Lamb (1998) 63 CA4th 845, 73 CR2d 912: [§5.21](#)
- San Diego, County of v Mason (2012) 209 CA4th 376, 147 CR3d 135: [§2.7](#)
- San Francisco, City & County of v Cartagena (1995) 35 CA4th 1061, 41 CR2d 797: [§§1.10, 2.5, 4.172](#)
- San Francisco, City & County of v Funches (1999) 75 CA4th 243, 89 CR2d 49: [§4.181](#)
- San Francisco, City & County of v Givens (2000) 85 CA4th 51, 101 CR2d 859: [§1.26](#)
- San Francisco, City & County of v Miller (1996) 49 CA4th 866, 56 CR2d 887: [§1.93](#)
- San Mateo County DCSS v Clark (2008) 168 CA4th 834, 85 CR3d 763: [§4.168](#)
- San Mateo, County of v Dell J. (1988) 46 C3d 1236, 252 CR 478: [§1.96](#)
- Sande v Sande (1969) 276 CA2d 324, 80 CR 826: [§1.110](#)
- Sanders v Robinson (9th Cir 1988) 864 F2d 630: [§5.37](#)
- Sandy, Marriage of (1980) 113 CA3d 724, 169 CR 747: [§§4.181, 4.194](#)
- Santa Clara, County of v Perry (1998) 18 C4th 435, 75 CR2d 738: [§1.95](#)
- Santa Clara, County of v Superior Court (Rodriguez) (1992) 2 CA4th 1686, 5 CR2d 7: [§§4.7, 4.26–4.27](#)
- Santa Clara, County of v Wilson (2003) 111 CA4th 1324, 4 CR3d 653: [§4.180](#)
- Schaffer, Marriage of (1999) 69 CA4th 801, 81 CR2d 797: [§1.141](#)
- Schelb v Stein (2010) 190 CA4th 1440, 119 CR3d 267: [§4.138](#)
- Scheppers, Marriage of (2001) 86 CA4th 646, 103 CR2d 529: [§§1.41, 1.60](#)
- Scheuerman v Hauk (2004) 116 CA4th 1140, 11 CR3d 125: [§4.138](#)
- Schlafly, Marriage of (2007) 149 CA4th 747, 57 CR3d 274: [§1.40](#)
- Schmir, Marriage of (2005) 134 CA4th 43, 35 CR3d 716: [§1.132](#)
- Schopfer, Marriage of (2010) 186 CA4th 524, 112 CR3d 512: [§§1.96, 1.99](#)
- Schu, Marriage of (2016) 6 CA5th 470, 211 CR3d 413: [§1.122](#)
- Schulze, Marriage of (1997) 60 CA4th 519, 70 CR2d 488: [§§1.40, 1.60, 1.112](#)
- Schwartzman v Wilshinsky (1996) 50 CA4th 619, 57 CR2d 790: [§§4.118, 4.126, 4.130, 4.136](#)
- Sellers, Marriage of (2003) 110 CA4th 1007, 2 CR3d 293: [§§1.81, 1.131](#)
- Serna, Marriage of (2000) 85 CA4th 482, 102 CR2d 188: [§§1.53, 1.55, 1.99, 1.145](#)
- Shaughnessy, Marriage of (2006) 139 CA4th 1225, 43 CR3d 642: [§1.128](#)
- Shelley, In re (1961) 197 CA2d 199, 16 CR 916: [§4.26](#)
- Shenk, 140 TC No. 10: [§1.104](#)
- Sherrer v Sherrer (1948) 334 US 343, 68 S Ct 1087, 92 L Ed 2d 1429: [§4.145](#)
- Shibley v Superior Court (1927) 202 C 738, 262 P 332: [§4.20](#)
- Shimkus, Marriage of (2016) 244 CA4th 1262, 198 CR3d 799: [§2.32](#)
- Sigismund, In re (1961) 193 CA2d 219, 14 CR 221: [§§4.13, 4.46](#)
- Silvagni v Superior Court (1958) 157 CA2d 287, 321 P2d 15: [§2.38](#)
- Simpson, Marriage of (1992) 4 C4th 225, 14 CR2d 411: [§§1.36, 1.53, 1.55–1.56, 1.116](#)
- Slevats v Feustal (1963) 213 CA2d 113, 28 CR 517: [§4.102](#)

- S.M., In re (2012) 209 CA4th 21, 146 CR3d 659: [§1.42](#)
- Smith v Smith (1981) 127 CA3d 203, 179 CR 492: [§4.145](#)
- Smith, Marriage of (2015) 242 CA4th 529, 195 CR3d 162: [§2.32](#)
- Smith, Marriage of (2001) 90 CA4th 74, 108 CR2d 537: [§§1.51, 1.54, 1.56, 1.66, 4.192](#)
- Smith, Marriage of (1990) 225 CA3d 469, 274 CR 911: [§§1.113, 1.129–1.130, 1.133, 1.142](#)
- Smith, People v (2000) 81 CA4th 630, 96 CR2d 856: [§4.4](#)
- Smith, People v (1971) 22 CA3d 25, 99 CR 171: [§4.34](#)
- Sorell v Superior Court (Kieser) (1967) 248 CA2d 157, 56 CR 222: [§4.4](#)
- Sorge, Marriage of (2012) 202 CA4th 626, 134 CR3d 751: [§§1.56, 2.32, 2.34](#)
- Souza v Superior Court (Bristow) (1987) 193 CA3d 1304, 238 CR 892: [§4.145](#)
- Spector, Marriage of (2018) 24 CA5th 201, 233 CR3d 855: [§§1.110, 1.146, 2.11](#)
- Stanislaus County DCSS v Jensen (2003) 112 CA4th 453, 5 CR3d 178: [§4.195](#)
- Stanislaus, County of v Gibbs (1997) 59 CA4th 1417, 69 CR2d 819: [§1.93](#)
- Stanton, Marriage of (2010) 190 CA4th 547, 118 CR3d 249: [§§1.33, 2.71](#)
- State of Oregon v Vargas (1999) 70 CA4th 1123, 83 CR2d 229: [§1.54](#)
- Stegge v Wilkerson (1961) 189 CA2d 1, 10 CR 867: [§4.101](#)
- Stein v Hassen (1973) 34 CA3d 294, 109 CR 321: [§5.10](#)
- Stephenson, Marriage of (1995) 39 CA4th 71, 46 CR2d 8: [§§1.116, 1.144](#)
- Steven W. v Matthew S. (1995) 33 CA4th 1108, 39 CR 2d 535: [§1.14](#)
- Stevenot, Marriage of (1984) 154 CA3d 1051, 202 CR 116: [§4.145](#)
- Stewart v Gomez (1996) 47 CA4th 1748, 55 CR2d 531: [§§1.33, 1.40, 1.50, 1.61](#)
- Stich, Marriage of (1985) 169 CA3d 64, 214 CR 919: [§4.143](#)
- Stone v Davis (2007) 148 CA4th 596, 55 CR3d 833: [§3.7](#)
- Stover v Bruntz (2017) 12 CA5th 19, 218 CR3d 551: [§1.106](#)
- Stupp & Schilders, Marriage of (2017) 11 CA5th 907, 217 CR3d 825: [§1.141](#)
- Swain, Marriage of (2018) 21 CA5th 830, 230 CR3d 614: [§2.8](#)
- S.Y. v S.B. (2011) 201 CA4th 1023, 134 CR3d 1: [§1.24](#)
- T.C. & D.C., Marriage of (2018) 30 CA5th 419, 241 CR3d 450: [§1.142](#)
- Tavares, Marriage of (2007) 151 CA4th 620, 60 CR3d 39: [§§1.106, 4.180](#)
- Taylor v Superior Court (1942) 20 C2d 244, 125 P2d 1: [§4.23](#)
- Tenhet v Boswell (1976) 18 C3d 150, 133 CR 10: [§4.82](#)
- Terri & Glenn Richard Drake, Marriage of (2015) 241 CA4th 934, 194 CR3d 252: [§1.100](#)
- Terry, Marriage of (2000) 80 CA4th 921, 95 CR2d 760: [§§1.118, 1.141](#)
- Tharp, Marriage of (2010) 188 CA4th 1295, 116 CR3d 375: [§§2.32–2.33](#)
- Thompson, Marriage of (1996) 41 CA4th 1049, 48 CR2d 882: [§§4.101, 4.188–4.189](#)
- Trainotti, Marriage of (1989) 212 CA3d 1072, 261 CR 36: [§§3.41, 4.101, 4.148, 4.193](#)
- Tulare, County of v Campbell (1996) 50 CA4th 847, 57 CR2d 902: [§1.47](#)
- Turner v Rogers (2011) 131 S Ct 2507, 180 L Ed 2d 452: [§4.26](#)
- Turner, People v (1850) 1 C 152: [§4.51](#)
- Tydlaska, Marriage of (2003) 114 CA4th 572, 7 CR3d 594: [§1.141](#)
- U.S. v Bagley (1985) 473 US 667, 105 S Ct 3375, 87 L Ed 2d 481: [§4.38](#)
- Umphrey, Marriage of (1990) 218 CA3d 647, 267 CR 218: [§4.188](#)
- United Taxpayers Co. v City & County of San Francisco (1927) 202 C 264, 259 P 1101: [§4.103](#)

- Usher, Marriage of (2016) 6 CA5th 347, 210 CR3d 875: [§1.57](#)
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