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Bay Area Law Associates

Frequently Asked Questions:
Child Support

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Supporting your Children is not only Moral, it is the Law

"[T]he the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances." (Fam. Code § 3900; see also Fam. Code §§ 4053(a) and (b).)

This can sometimes come as a shock to women who are used to being the primary caregiver for children. And, yes, "women" is used advisedly here. While we like to talk about how far we've come, the gains women have made in the workforce and in life in general, the fact remains that as of 2012 men made up only 3.4 percent of stay-at-home parents. So when we talk about child support, we are generally talking about men as the one paying support and women as the one receiving.

Even with child (and spousal) support, there is a good chance that the supported parent will need to work at least part time. That is today's new reality, and judges are pretty attuned to this reality. As one judge recently told the parties in one of my cases, "You are probably going to have to seek some sort of employment to keep yourself going, given our lovely longevity." She was saying this to a 65-year-old woman… So much more so to a 25-year-old woman.

Unless the children are very young or have special needs which require special care, both parents can expect that they will be required by the Court to contribute financially to the support of their children to one extent or another.

"Guideline Support"

To comply with federal child support guidelines, California has established that, with limited exceptions, child support during a divorce (or parentage) proceeding and after judgment will be calculated using a mandated formula or guideline set forth in the Family Code. (Fam. Code § 4050 and following)

Non-guideline support is possible, so long as the judge agrees that the amount is in the best interest of the child. Generally this occurs when the non-guideline support is greater than the amount of guideline support, or is included in an amount of "undifferentiated family support" (see below) which is greater than an amount of guideline child support and spousal support. (Fam. Code § 4056.)

Calculating "Guideline" Support

As part of the legislative intent to protect children, mathematical guidelines have been established which establish, within the family code, a formula for calculating support based upon a very few factors. (Fam. Code §4055.)

The formula for calculating child support is:

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

The components of the formula are as follows:

CS = child support amount.
K = amount of both parents' income to be allocated for child support
HN = high earner's net monthly disposable income.
H% = approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent. In cases in which parents have different time-sharing arrangements for different children, H% equals the average of the approximate percentages of time the high earner parent spends with each child.
TN = total net monthly disposable income of both parties.

Simple, yes? (Riiiight…)

To math majors, maybe. To the rest of us, no. And even the math majors will raise their hands to ask about how the various factors are determined, such as establishing the "amount of both parents' income to be allocated for child support."

An old law school saying is, "If we knew how to do math, we wouldn't be in law school." While, like all sayings, this is only sometimes rooted in reality, it is true that complex math and accounting is generally not within the skill set of most lawyers.

Fortunately, the legislature has also approved of a couple of computer programs which lawyers are required to use to prepare reports to present to courts. Today that means using the Dissomaster software program.

Having an agreed-upon computer program does not mean determining child support is simple. While there are only a few variables to enter into the program (gross income for both parties, a limited number of deductions like health insurance, property taxes and mandatory union dues, and percentage of time spent with each parent [timeshare] among others), these numbers are often the focus of intensive argument between the parties.

Two factors are generally argued over – timeshare and income.

"Timeshare" is a term you will hear a lot – it is simply the percentage of time the child (or children) spend with each parent. While the concept is simple, calculating it can get tricky. For more on timeshare, see the companion FAQ "Child Custody and Visitation."

The simplest situation is where timeshare has been agreed to, both parties are employed and have a paycheck, and they do not own a home. Their income can be documented through their pay stubs, their deductions are minimal, and if they have already established a custody and visitation plan

they have most of the data to plug into the program and generate a support number.

Usually things are not that neat. Often, one parent is not employed, or only works part-time. The judge can then decide that income can be "imputed" to that person for purposes of child support calculations.

The basis for imputed income is that each parent has a duty to support their children. (Fam. Code §3900.) Each parent also has a duty, absent special circumstances, to make efforts to become self-sufficient after divorce. (Fam. Code §4320(l).) There is no requirement that the judge impute income to a non-working or part-time working parent; the judge will examine the circumstances and they have broad discretion to decide. For example, if there are very young or special needs children, the judge may well decide that it is in the children's best interest to have a parent with them rather than at work.

The amount of imputed income can vary greatly. The judge can decide that the parent should be working at least half-time or full-time at minimum wage, or look at past work history and set the imputed earnings at a prior income level. For example, if a parent gave up a $100,000 a year job recently in anticipation of the divorce, hoping to be supported, the judge could impute that full $100,000 to their income as if they were still earning it.

If one or both parents earn bonuses or have significant overtime at their jobs this can also complicate things. While "gross income" expressly by statute includes bonuses (Fam. Code §4058) and cases have supported including both bonuses and regular overtime as gross income for support calculation purposes (*County of Placer v. Andrade* (1997) 55 Cal.App.4th 1393; *M.S. v. O.S.* (2009) 176 Cal.App.4th 548), the creators of support software have muddied the waters by introducing a "bonus calculation" which some judges at the trial court level are accepting.

"Family Support"

When both child support and spousal support are being paid, the parties may choose to lump them together as "family support." Family support can have advantages to both parties depending upon how it is set up. Child support is not taxable as income to the receiving party ("payee") but it is not deductible to the paying party ("payor"). Spousal support is taxable to the payee and is deductible as an expense to the payor.

Family support is deductible to the payor and must be declared as income by the payee. The IRS does not like this, but recent decisions have gone against the IRS in the tax courts (see *Delong v. IRS Comm'r*, T.C. Memo. 2013-70 (3/11/13).

One unspoken reason judges like family support for post-judgment support is it allows them to avoid the trouble to dealing with the fourteen-factor analysis of Family Code section 4320; this is a complex and factually-intensive analysis which is time consuming and judges, attorneys and parties generally want to avoid. By lumping together child and spousal support as an undifferentiated number – where neither amount is labeled as such – the judge does not have to justify why the total is what it is so long as the amount is something greater than what the guideline would be for child support alone and the parties are in agreement.

Most persons receiving family support do so because they are getting more money than they would up front than if they received separate child support and spousal support; they trade the cash in hand for a potential loss when they pay taxes. Depending upon their income and tax situation that could mean a payment of significant taxes or no penalty at all. It is always wise to have a tax professional run an analysis to make certain that the trade-off is worth it. It would not be wise to trade getting an extra $200 a month and have to pay an extra $3000 come next April 15.

For the party paying the support, the calculation is whether paying a little more for family support is worth the tax benefit.

Paying Child Support is Serious Business

As part of the Legislature's and Court's focus on protecting children, the law has numerous protections for enforcing collection of child support. There are far fewer mechanisms for enforcing collection of spousal support.

If you have been ordered to pay child support, take it serious. You will find that, should your ex pursue it (or if they turn it over to the Department of Child Support Service for collection), your bank accounts could be tapped, you could lose your driver's license, and you could even end up in jail as well as face large fines.

Think twice before you claim inability to pay. Your child support obligation is, by law, your first bill to be paid every month (after taxes). You cannot say, "I don't have enough left over after I pay my rent and my car payment and my credit cards." You are supposed to pay your support first, to take care of your kids first, and worry about your creditors second.

Failing to pay child support on time is a violation of a court order. It is contempt of court. Contempt of court is, in family law, a quasi-criminal proceeding (some argue criminal, but I hedge my bets here) because it includes among its penalties possible jail time. While this rarely happens in family law cases, it does happen. Penalties are based on each instance of contempt, which here would mean each month you don't pay the full amount of support. The penalties for each missed payment are a possible 5 days in jail or 120 hours of community service. In addition, the judge has the option of putting you in jail until you pay the back amount due. Often this is self-defeating – how can you make the money to pay back support if you are in jail? – but the option is in the statutes.

Again, the odds of jail time are slim, although if you have really angered the judge you might get a community service and a suspended sentence to hang over your head pending payment of the back support and fees.

Exchanges Are Not Times to Discuss Support or Pay Support

One of the most important things you can do as a parent in a divorce is protect your kids from the uglier aspects of the situation. It is tough, as you are going through great emotional turmoil and seeing your ex (or soon-to-be-ex) will generally bring up emotions you normally can keep under better control. When you are exchanging the children for visits you will probably see each other, however

briefly.

This is not a time to discuss anything money-related or even hand over an envelope, no matter the age of your kids. You may be under strict orders not to discuss anything about the divorce in front of the kids (most visitation agreements include this), but common sense dictates this even if a court order does not. You may think you are being subtle but even very young children can pick up verbal and non-verbal cues and it can affect their mood if not cause them to ask questions you should not be answering.

There are plenty of other opportunities to communicate and exchange support checks. This is a definite no-go at exchanges. Unless you are on very good terms with your former partner, discussions at exchanges should be limited to talk about the kids, their health, upcoming events or appointments that the person taking over custody needs to know, etc.

Be Flexible, but Keep Records

Everyone has a bad month when they cannot make a support payment exactly on time. Some consideration will inevitably be needed. Make sure you acknowledge any accommodation you give in writing, and inquire as to when you can expect payment. When you receive payment, acknowledge getting it again in writing.

If it becomes a pattern, you may need to let the other party know that this has become a problem. You always have to weigh the cost-benefit ratio, knowing that it will cost money to bring them back to court to enforce a support agreement. You also run the risk, if the payor's financial circumstances have changed significantly for the worse, of having them file for a modification and having support lowered, so some forbearance may be in your best interest.

If the payor is simply being difficult and has the ability to pay, and there is a pattern of late or incomplete payments for more than a few months, contact your attorney and get their advice as to whether they think it worthwhile to go back to court to seek an enforcement order. It will undoubtedly cost several thousand dollars to do so, but hopefully the court will order your ex to pay this eventually (although there is never any guarantee of this).

The Department of Child Support Services

You can also use the Department of Child Support Services (DCSS) for collection of child support. This is a free service available through every county. You can locate their services online or in the phone book. You open what is known as a Title IV-D case, giving them a copy of the court order for your support and information about the payment history on the order and any arrearages.

DCSS has broad powers to enforce collection of your case, acting as lawyers on your behalf to enforce the support order on your behalf. In Marin County you will go before a different judge on all child support issues, even though you may be before another judge on other matters relating to custody and visitation or divorce issues if you are in a divorce.

DCSS will keep track of payments on your support and interest that accrues on past due

amounts. Payments will be made directly to them, which they will keep track of and then send you a check. It can delay your payments by a couple of days (check from payer to them, check from them to you) but in the long run it may be better because payers may be more inclined to pay a government agency knowing they are being watched by the State of California.

You can also check online to see the status of your payments, how much is owing on arrearages, if a check has been received by DCSS or has been sent to you, and how much interest has accrued.

DCSS has the ability to levy the payer's bank accounts, suspend their driver's license for non-payment of support, or seek an income withholding order.

They can be a powerful ally, and the price is right – free. But like any government bureaucracy they are underfunded and overworked, and you will not get the personal attention you expect from your personal attorney. You may have to wait longer for action than you are used to, and responses may not come quickly to requests for information. All government agencies have seen drastic staffing cuts over the last few years, so service has regrettably suffered as fewer people have to handle more cases.

Modification of Support

Either parent can request a modification of support by filing a Request for Order (FL-300) citing a material change in circumstances. This "material change" must be a significant shift, generally in either the income of one parent or the time the child spends with the parents, from when child support was previously set.

For example, say timeshare was set at the time support was calculated at 50/50, but as time went on one parent ended up having the child 75% of the time on a regular basis and can document this. Depending upon the amount of child support involved, this may justify a request for modification for support. If support is low (a few hundred dollars a month) it might not be worth the cost of the motion, because the parent may never recover the cost of filing and arguing the motion (assuming the judge does not award costs and fees if they win, which can never be assumed). However, if the dollar amount of support will be increased enough to where the cost of the motion is increased significantly, that increase over several months may recover the cost of filing and arguing the motion even if the costs and fees are not awarded.

Another reason for seeking a modification is a significant change in financial circumstances, which might be the loss of a job, or reduction in hours to part-time work, or a promotion of the other parent with a significant raise. Again, the calculation must be made to see if the cost of filing the motion is worth it, assuming you win, and how long at the new level of support you will take to recover your expenses.

You also have to understand that just because you believe you deserve an increase in support, the judge may not agree. The judge may decide you could find work to make up for lost hours, or a new job. The judge may also believe the other parent when they say that they will go back to the 50/50 timeshare, rendering your motion meaningless.

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There is always risk in bringing any issue before a judge. They see things differently from you, and look at things not only from both perspectives but from the side of the law and years (decades) of experience and hundreds (thousands) of cases. Even lawyers who have practiced before these judges for years never know exactly how a specific judge will rule.

If the judge rules in your favor, they will have the option of making the order retroactive to the date you filed. Thus even if it takes a month or longer (there have been cases that took years for modifications to wend their way through the courts) the judge can say the support amount as $NNN from the date you filed through the present, and say the paying parent owes the difference (or is owed the difference, if the amount is reduced).

This points out another danger of filing for a modification, albeit a small one in many cases. Just because you think things have changed so you should get more money, it is possible the judge sees things differently and believes support should be changed in the other direction. I have seen parents who filed to have support increased who had it decreased, and parents who filed to have their payments decreased have in increased. That was an "Oops!" moment they won't forget.