

The Practitioner Family Law

Algebraic Formula

Child-Support Order Deviating From Guidelines Must Contain Findings

By Mitchell A. Jacobs and David L. Marcus

The recent case of *In re Marriage of Hall*, 81 Cal.App.4th 313 (2000), held that a child-support order that requires a parent to pay as additional child support a portion of income above a certain amount is technically a "deviation" from California's statutory child-support guideline formula. To be valid, such an order must contain certain statutory findings. If these findings are absent, then at least a non-stipulated order is per se invalid.

In *Hall*, the mother was a certified public accountant, and the father was a product manager. The parties had one child. The first child-support order, made in January 1996, required the father to pay the mother \$940 per month child support based on the father's monthly income of \$10,953 and the mother's monthly income of \$8,634.

Approximately two years later, the father filed an order to show cause to lower support because of increased time with the child. He reported his average monthly income at \$11,707, based on the prior 12 months.

The mother then filed her own order to show cause seeking statutory "guideline" support because her monthly income was \$6,373. She then filed a second income-and-expense declaration, increasing her monthly income to \$8,031.

There was no public hearing for the orders to show cause. Instead, the court handled the matters in chambers. A subsequent letter to the trial court revealed that during the chambers conference, there was an extended discussion concerning the father's "substantial bonus" and dividend and interest income.

The mother's attorney then submitted a proposed order requiring the father to pay \$836 per month plus 8 percent "of all earnings over and above the sum of \$10,300 per month." The father's attorney objected to the proposed order because it, in effect, was a continuing modification of the support order without regard to any increase that might occur to the mother's income. The trial court signed the mother's proposed order.

The Court of Appeal reversed the trial court. The appellate court reasoned that the California child-support statutes impose on courts the dual obligation to first determine the amount of child support pursuant to a "rigid algebraic formula," and if support is ordered that deviates from that formula, to state the basis for the deviation.

The obligation to state the basis for the deviation is set forth in Family Code Section 4056(a), as follows: "To comply with federal law, the court shall state, in writing or on the record, the following information whenever the court is ordering an amount for support that differs from the statewide uniform guideline formula amount under this article."

The statute then lists the findings that must be made: the amount of support that would have been ordered under the guideline, the reason the amount ordered differs from the guideline and the reason the ordered amount is consistent with the best interests of the children. The court must state these findings even if neither party requests them in order for a non-stipulated amount of support that deviates from the guideline to be proper.

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Since the trial court did not state the findings set forth in Section 4056(a), the first task for the Court of Appeal was to determine whether or not the order deviated from the guideline. The court analyzed the child-support formula and concluded that the formula does not allow support to be based on the fluctuating income of one party and the static income of the other party. In fact, the formula is based on both parties' incomes being fixed in time, similar to the income reported on an income-tax return.

Therefore, the court's order technically deviated from the guideline formula. Without the required findings of Section 4056(a), the order was defective on its

stated in the application for an order to show cause.

A second issue is determining a proper method to account for a parent's bonus or fluctuating income for child support in light of the *Hall* opinion. One approach, as employed in *County of Placer v. Andrade*, 55 Cal.App.4th 1393 (1997), is to assume that the parent will receive a bonus in the future, amortize the bonus over 12 months and include it in the parent's monthly income. This avoids the pitfalls uncovered in the *Hall* opinion altogether, because the amount of support does not deviate from the guideline.

If this method is not employed, another alternative is simply to order the parent to report all bonuses to the other parent when received; then the parents can return to court to determine the proper amount of guideline support. This approach has the distinct disadvantage to parties and the courts of promoting and prolonging litigation.

Another alternative is contained in the computer program commonly used to determine guideline support (called "Dis-somaster"), which now includes a feature to determine the percentage of a parent's additional income that should be paid as support and a corresponding feature that determines the extent support should be reduced based on any increase of the custodial parent's income. The program generates a lengthy chart that specifies the effect on support resulting from various increases of income. In light of *Hall*, it appears that these schedules should not be blindly used as if they simply perform calculations required by statute.

Third, a common practice is for a stipulated order to contain only an amount of support and what are known as the "Agnos waivers," set forth in Family Code Section 4065(a). If the parties stipulate to support below the guideline amount, that section requires the parties to make certain declarations, such as that they are fully informed of their rights and that the amount of support is in the best interests of the children. Often, the findings upon which the support is based are not included in the stipulation, and the guideline amount of support is not included.

Again, in what is arguably dicta, the court cast some doubt on the validity of stipulated child-support orders that do not state the guideline amount of support. The court cited a portion of Section 4065(a) that states that "the court shall not approve a stipulated agreement for child support below the guideline formula" unless the parties make the required declaration. The opinion states that this implies that before the trial court can approve the stipulated amount, it is implied that the court must first know what the guideline formula actually is.

The problem with putting this rule into practice is that often the parties cannot agree upon the guideline amount. Perhaps one solution is to include each parent's contentions as to the guideline amount.

To make matters more complicated concerning stipulated orders, there does not appear to be any exception to the findings requirement of Section 4056(a) for stipulated orders. This could mean that even stipulated support orders that contain an order for payment of a percentage of additional income as additional support should contain the Section 4056(a) findings. If they do not, it could be argued that the parties are estopped from raising this defect.

It is likely that future opinions, and perhaps the Legislature, will design rules for handling bonus and fluctuating income for child-support purposes. As the court in *Hall* stated: "What next? Quadratic equations?"

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face. Additionally, the court's order did not contain a printout from the computer program used to determine support or any findings to show how the court determined the amount of support.

In a statement that is arguably dicta, the court suggested a way in which a percentage of a parent's income could properly be paid as additional support. The court cited Family Code Section 4057(b) for this authority, which the court stated allows support to be ordered that differs from the guideline amount where application of the guideline formula is "unjust or inappropriate in the particular case." If support deviates from guideline on this basis, the requirements of Section 4056(a) must be met.

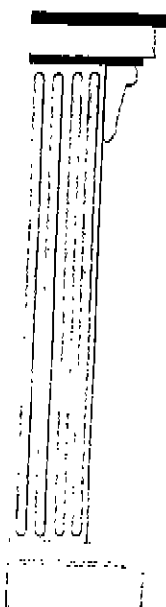
Finally, the court stressed the importance of explaining to the parents the basis for the child-support order and how the order was determined. The court stated that having counsel and the court determine the amount of support in chambers keeps the public and parents ignorant of how support is determined and is not in the parents' or the public's best interest.

Interestingly, the case most often cited for ordering a percentage of additional income to be paid as additional support is *Marriage of Smith and Ostler*, 223 Cal.App.3d 33 (1990). That case was a pre-guideline case and was not cited by *Hall*. In light of *Hall*, the continued reference to *Smith and Ostler* as supportive of these types of child-support orders should be highly doubtful.

Hall presents several implications for these types of child-support orders, both stipulated and non-stipulated. First, in a footnote, the court stated that the court's order was technically reversed because the mother requested "guideline" support in her order to show cause and the court ordered "nonguideline" support.

This is a trap for the unwary because the Judicial Counsel form, "Application for Order and Supporting Declaration," is set up by default for a party to seek "guideline" support. In the portion of the form in which a party specifies the child support being requested, the form states: "Monthly amount (if not by guideline)." A common way to complete this form is either to leave this item blank or to insert the word "guideline."

This common practice should change in light of *Hall*. In time, some judicially acceptable "boilerplate" request may be found, such as "guideline with appropriate deviations." Until then, if a party seeks additional support in the form of a percentage of the other party's income, prudence suggests that this request be

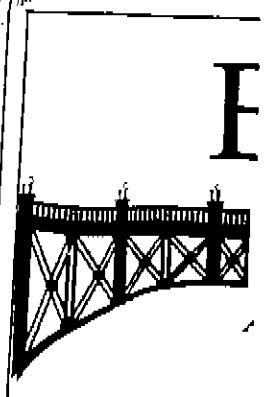


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