

NO INCOME? NO PROBLEM!

... OR IS IT?

IMPUTED INCOME

WHAT IT IS

WHAT IT ISN'T

WHEN & HOW TO DO IT



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Support Orders Need Income Findings

- Child support formula (FC § 4055): $CS = K[HN - (H\%)(TN)]$
 - Child Support =
 - K (a constant, TBD in upcoming training)
 - times the quantity HN minus (high-earning time share percentage times TN)
- Guess what all those “Ns” stand for? Net INCOME!
 - HN = High earner’s net income
 - TN = Total net income

Support Orders Need Income Findings

- Spousal Support (FC 4320)
 - Guideline/Dissomaster for pendente lite (LASC Rule 5.10)(FC § 3600; *IRMO Winter* (1992) 7 Cal.App.4th 1926)
 - 4320(a) & (c): earning capacity (both spouses), present and future
 - 4320(n): “Any other factors the court determines are just and equitable.”
 - 4331: vocational exam available
 - Possibility of *Gavron* warning

“Income Available for Support”

FC § 4058

- (a) income from whatever source derived, except as specified in subdivision (c)
- (c) excludes from income child support (any relationship) and need-based cash government aid

“Income Available for Support”

FC § 4058

- Income includes, but is not limited to
 - (1) wages, passive income, benefits, spousal support from different relationship;
 - (2) business income net of “expenditures required for the operation of the business”;
 - (3) work perks in the court’s discretion
 - AND potpourri: e.g., recurring gifts; dubious “loans”; inference of cash flow from unexplained household expenses, bank deposits, unreliable tax return (e.g., *Pratt v. Ferguson* (2016) 3 Cal.App.5th 102; *IRMO Smith* (2015) 242 Cal.App.4th 529; *IRMO Alter* (2009) 171 Cal.App.4th 718; *IRMO Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28)
- AND/OR....

Earning Capacity

- FC § 4058(b)(1):
 - Court may, in its discretion, consider a parent's *earning capacity in lieu of income*, consistent with children's best interests, considering children's welfare and developmental needs, and considering the parent's time share
 - No requirement of bad faith
- NOTE—Statute is evolving, has recently changed, with more changes coming: stay tuned
- First let's distinguish real income from earning capacity, which is essentially fictional income

Real vs Fictional Income



“I imputed income based on the party’s expenses.”

Do you see a problem with this statement?

Real vs Fictional Income

- Real income is whatever you determine a person **ACTUALLY HAS**
 - Paystubs
 - Tax returns
 - P(L)s
 - Loan applications
 - I&Es (reliable or otherwise)
 - Circumstantial evidence/negative inference
- Imputation—aka Earning Capacity—is income a person **DOES NOT** actually have, but **SHOULD** have, based on.... (everything we're going to discuss here)

Imputation *AND* Circumstantial Evidence of Actual Income

- Both are fundamentally fact-based inquiries
- Evidence might support both:
 - (1) a finding that a party truly *has* ongoing regular income (e.g., based on regular payment of high expenses) **AND**
 - (2) a finding of an *earning capacity* consistent with regularly maintaining such expenses

Imputation *AND* Circumstantial Evidence of Actual Income

- Often arises when person has earnings history without satisfactory explanation for change, or maintains expenses without some explanation other than income
- Examples:
 - Entrepreneur who regularly did “consulting” for \$10K/month during marriage still maintains same standard of living and expenses
 - Person who used to AirBnB property now claims it is going unrented, but lacks convincing documentation; meanwhile, somehow continues to get by with no other visible means of support

Imputation Limitations

- Can you **use** both actual AND imputed (earning capacity) income?
 - It depends!
 - If using imputation for one category of income (e.g., wages), then ONLY imputation (“in lieu of” actual)
 - But can still use actual income from other categories (e.g., unearned income, interest, dividends) (*Stewart v. Gomez* (1996) 47 Cal.App.4th 1748)

Imputation Limitations

Need-Based Cash Aid:

- No imputation if person gets need-based cash aid (E.g., *Mendoza v. Ramos* (2010) 182 Cal.App.4th 680; *County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771)
- But CAN STILL FIND aid recipient has ACTUAL income (e.g., paychecks, social media, expenses, admissions)

Contrary to children's best interests:

- Key limitation: “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” (FC § 4058(b)(1))

When to Impute?

- Unemployed or underemployed
 - Voluntary divestiture (e.g., quit the job, stopped doing business) (E.g., *IRMO McHugh* (2014) 231 Cal.App.4th 1238)
 - CANNOT treat incarceration as voluntary unemployment (FC § 4058(b)(3))
 - Person could be making more money either from wages or self-employment, but isn't—without a good reason
 - Touchstone: Ability & Opportunity to secure employment at a given rate of pay
 - Ability & Opportunity NEED NOT BE SHOWN if departure reflects “voluntary and deliberate” effort to reduce income for support (*IRMO McHugh, supra*, at 1249-1256)

When to Impute?

- FC § 4058(b)(2):
 - Imputation itself is discretionary, but in making this decision:
 - Court “shall consider the specific circumstances of the parent, to the extent known includ[ing] but not limited to”
 - Including but not limited to what?
- Numerous factors listed in the statute (eff. 1-1-2023)

When to Impute? Statutory Factors:

- Assets
- Residence
- Employment and earnings history
- Job skills
- Educational attainment
- Literacy
- Age
- Health
- Criminal record and other employment barriers
- Record of seeking work
- Local job market
- Availability of employers willing to hire the individual
- Prevailing earnings levels in the local community
- Other relevant background factors affecting parent's ability to earn

When to Impute? Other Possibilities:

- Underperforming or non-performing assets
 - E.g., rental property sitting empty, especially if used to be rented
 - Person “unilaterally, and voluntarily, arrange[s] his business affairs in such a way as to effectively preclude his children from sharing in the benefits of his current standard of living” (*IRMO Sorge* (2012) 202 Cal.App.4th 626, 639 (quoting *IRMO Berger* (2009) 170 Cal.App.4th 1070))
 - Impute claimed losses as income (*Sorge*, supra)
 - Impute reasonable rate of return (OK even for incarcerated parent)

When to Impute?

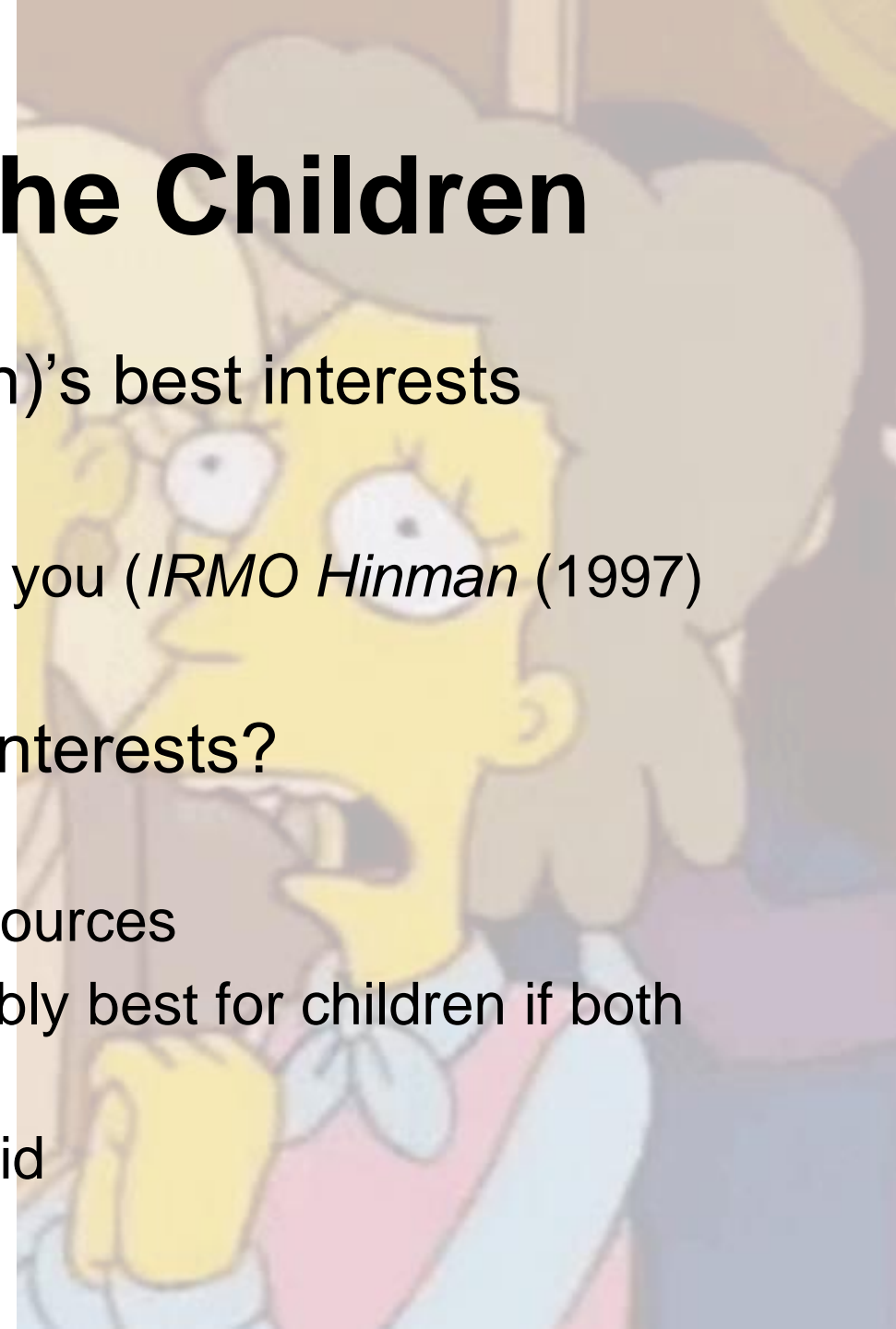
- “Custodial” versus “Non-Custodial” parent: not dispositive
 - May be appropriate to impute income to a “custodial” (majority time share) parent
 - But it depends! Imputation to “custodial” parent might not be in children’s best interests if it diminishes resources available to the children (e.g., *IRMO Cheriton* (2001) 92 Cal.App.4th 269 (dictum))
- Consider who has the burden of proof
- Make findings!
 - For example: “Lifestyle” usually not enough by itself to establish income or earning capacity
 - But lifestyle may corroborate additional evidence on these issues

How Much To Impute?

- Discretionary
- No such thing as automatic imputation of minimum wage
- Highly persuasive: recent and/or consistent prior earnings, and no reason to believe person has lost the ability to earn at that level
- Shown by: sources vary case-by-case
 - examples: documentation of prior earnings
 - want ads coupled with resume
 - comparables
- Countered by: showing of documented diligent and good-faith effort to secure actual earnings
- Must be representative (just as with actual income) (e.g., *IRMO Pletcher* (2021) 68 Cal.App.5th 906; *IRMO Riddle* (2005) 125 Cal.App.4th 1075)

Review: Best Interests of the Children

- Impute ONLY if you find it is in the child(ren)'s best interests
- Which child(ren)?
 - Normally, just the child(ren) of the case before you (*IRMO Hinman* (1997) 55 Cal.App.4th 988)
- When might it NOT be in child(ren)'s best interests?
 - Time share
 - Potential to deprive custodial household of resources
 - But BOTH parents have duty of support, possibly best for children if both are motivated to secure actual income
 - Arrears/unrealistic the order will actually be paid



Hypo 1: The Modern Stone-Age Family

(1) Should income be imputed to Fred during his period of voluntary unemployment?

(2) Should you grant or deny Wilma's request for affirmative relief?

(3) Should you impute income to Wilma?

(4) What questions might you ask from the bench?

Hypo 2: And Now For Something We Hope You'll *Really* Like

(1) Should income be imputed to Boris?

(2) To Natasha?

(3) What questions might you ask from the bench?

The End

Questions?

Thank you!