

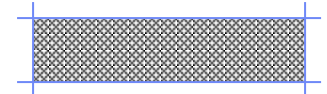


**Welcome to the 26<sup>th</sup> Annual  
AB 1058 Child Support  
Training Conference**

# Child Support and Income Determination

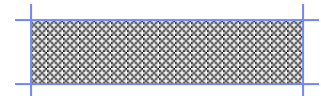
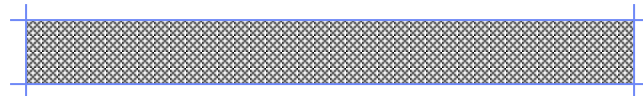
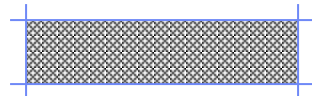


2023 AB 1058 Conference



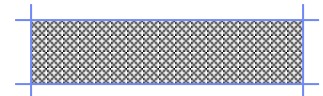
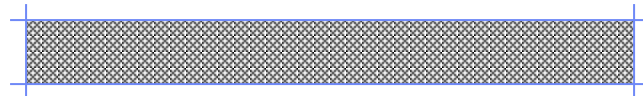
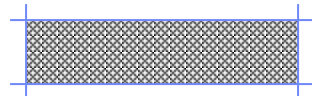
# Goal

- Ensure compliance with Federal regulations;
- To provide consistency throughout the state *where parties cannot agree !*;
- To ensure children receive support consistent with the State's high standard of living and high cost of raising children compared to other states;
- To encourage settlements of conflicts and minimize litigation.



# Polling

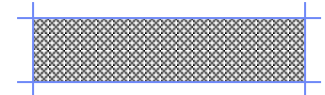
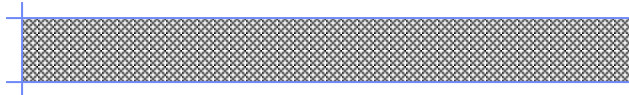
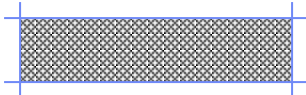
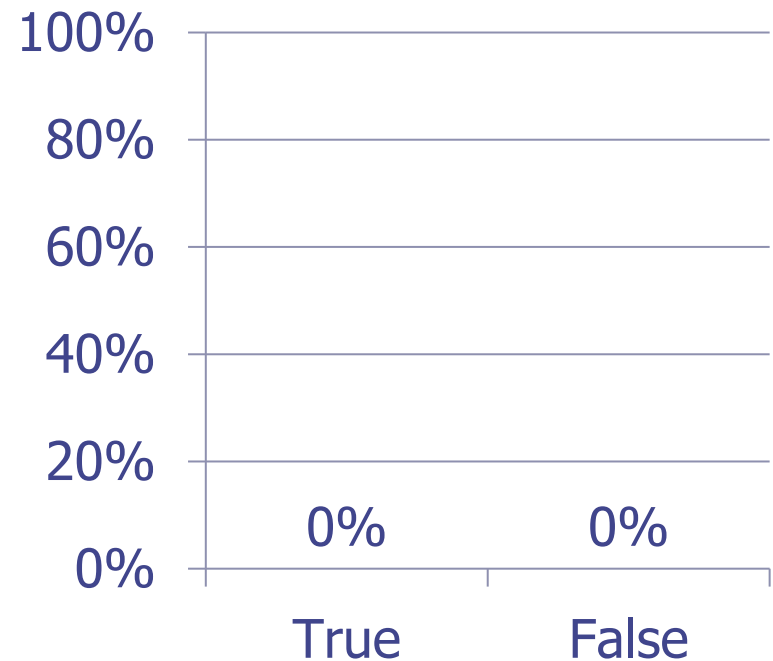
- Log onto JCCkeypad.com on your mobile device
- Enter meeting ID: 1058
- It should say “no current question.”
- Wait for the slide to advance to the question and then read and respond on your device



# Test Yourself: #1

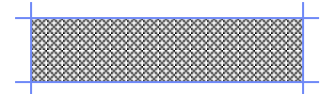
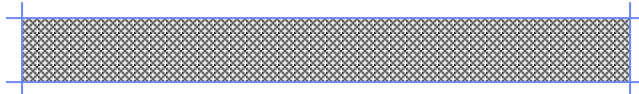
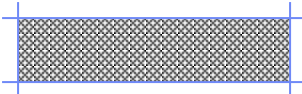
**A parent's first obligation after paying bills and other expenses is to pay child support.**

1. True
2. False



# Principal Objectives

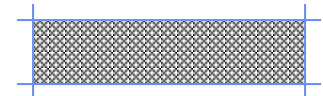
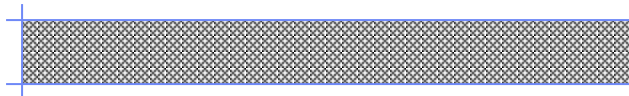
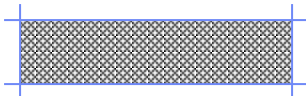
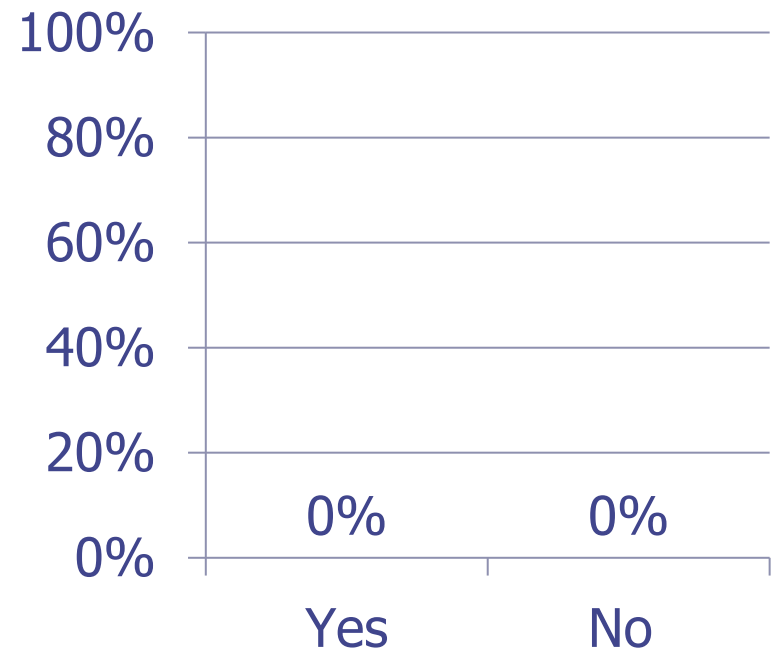
- Parents' 1<sup>st</sup> & principal obligation is to support child according to circumstances & station in life
- Both parents mutually responsible for support
- Considers each parents income and level of responsibility for children
- Children share the standard of living of both parents. Support may improve the standard of living of custodial household.
  - See **Family Code Section 4053**



# Test Yourself: #2

**Is the calculation of guideline child support mandatory in all cases where child support is requested?**

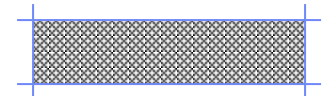
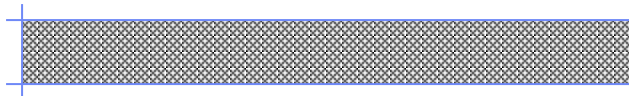
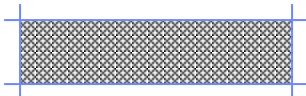
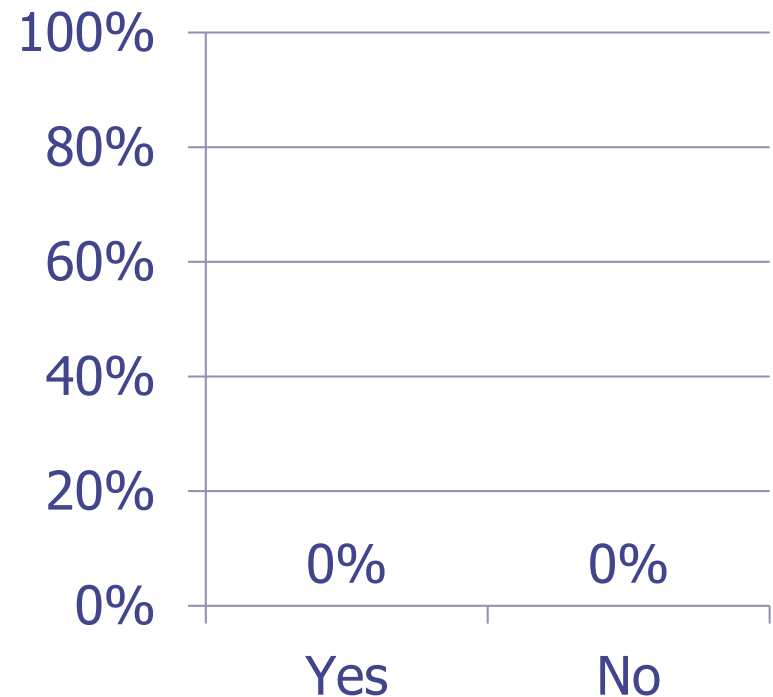
1. Yes
2. No



# Test yourself: #3

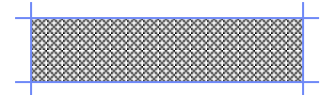
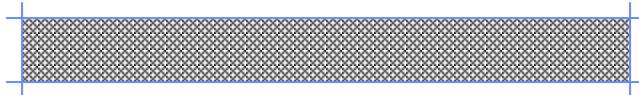
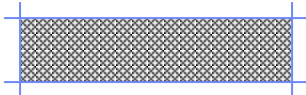
**Bench officers can exercise discretion when calculating guideline child support.**

1. Yes
2. No



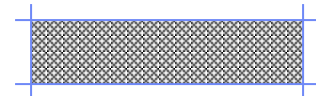
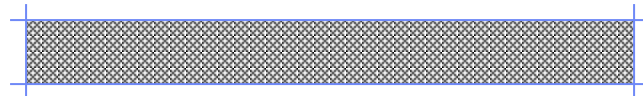
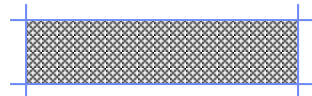
# Calculating Guideline Child Support

- It is not a guideline
  - Adherence is mandatory by the court!
- Presumptively correct
  - Rebuttable presumption
  - Exceptions will be discussed and agreements by parents are encouraged
    - Even if only on some points.



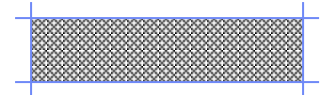
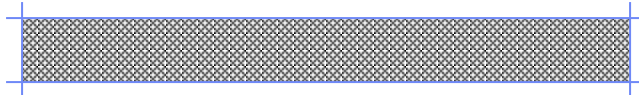
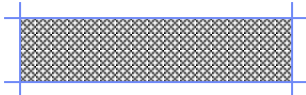
# Rebuttable Presumption

- **Family Code Section 4057(b)**
  - Stipulate to different amount (**FC 4065**)
  - Deferred sale of residence
  - Payor has extraordinarily high income & GL amount exceeds needs of child
  - Party not contributing to needs of child consistent with custodial time
  - Application unjust or inappropriate due to special circumstances



# Special Circumstances

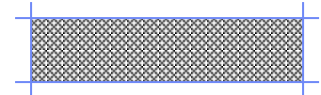
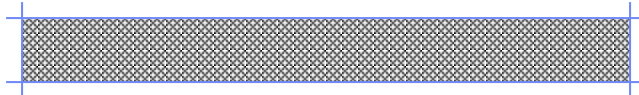
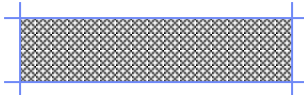
- Included but not limited to:
  - Different custodial plans for different children
  - Substantially equal custodial time & one parent has higher or lower % of income used for housing
  - Children have special medical needs
- List is not exclusive!!



# How is Child Support Calculated

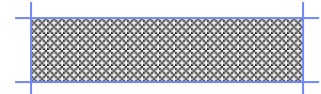
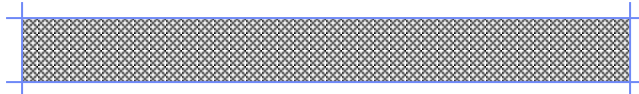
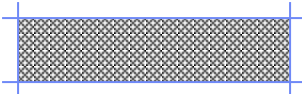


- **Family Code Section 4055**
- $CS = K[HN - (H\%)(TN)]$
- Components of Formula
  - Amount of each parent's income allocated for CS
  - High wage earners net monthly disposable income
  - Approximate % high earner has child in their care
  - Total net monthly disposable income of both parents



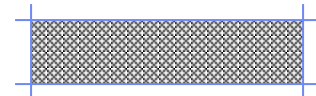
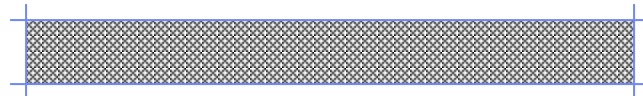
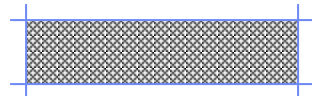
# Real World - How calculated

- Certified computer programs:
- CalSupport and CalSupport PRO, <http://www.nolotech.com/>
- DissoMaster, <http://www.cflr.com/products/dissomaster.php>
- Xspouse, <http://www.xspouse.com/>
- California Guideline Child Support Calculator (DCSS), <https://www.cse.ca.gov/ChildSupport/cse/guidelineCalculator>
- Family Law Software, <http://www.FamilyLawSoftware.com/ca>
- FamilySoft SupportCalc by Legal+Plus, <http://www.legalplus.com>



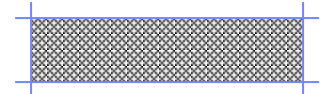
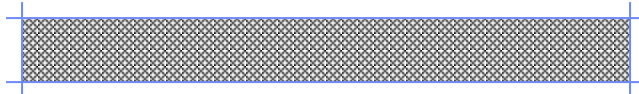
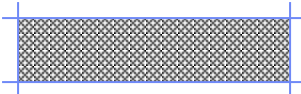
# Real World (cont.)

- If calculating child support in a case involving the Department of Child Support Services, the court must use the DCSS Child Support Guideline Calculator.



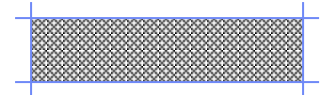
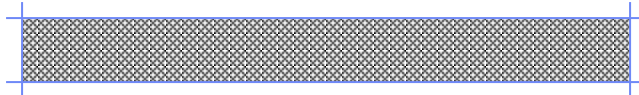
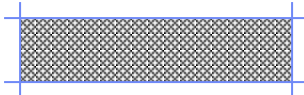
# Necessary Information

- Court order is only as accurate as the evidence received by the court!!
- While court is neutral, often requires bench officer to make inquiry of parties.
  - Frequently more hands-on by bench officer in SRL cases. Must balance with Canons.
- If you make inquiry of parties for inputs, have clerk administer oath
  - # of children
  - Parenting arrangement
  - Tax filing status - current as of year end
  - Gross Income



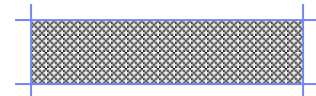
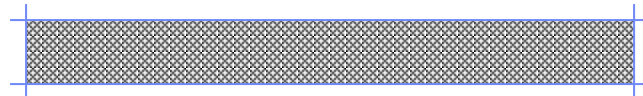
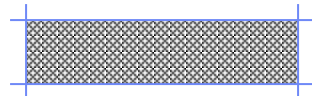
# Necessary Information (Con't)

- Deductions from Income
  - Taxes
  - Health Insurance (Pre or Post taxes)
  - Retirement Plans
  - Necessary job-related expenses, union dues
- Mortgage Interest, Property Taxes, Charitable contributions (IRS, Schedule A)
- Child Care expenses
- Statutory Hardships



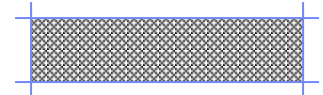
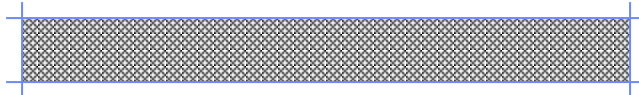
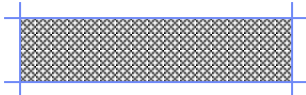
# Deductions which have tax effect

- Adjustments to income
  - IRA/ Pre-Tax 401K contributions
  - Pre-tax health insurance premiums or meet AGI threshold (uninsured costs)
  - Home Mortgage Interest
  - Property Taxes
  - Student Loan Interest
  - Charitable Contributions



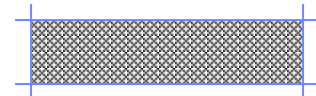
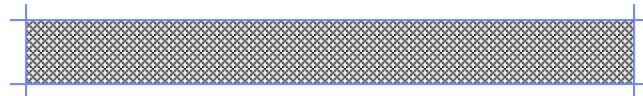
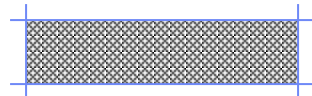
# Child Support Add-Ons

- Mandatory- **FC4062**- Generally split equally, may also be proportional to net disposable income.
  - Child Care for employment or education
  - Uninsured health care costs
- Discretionary-
  - Education/Special Needs
    - Extra-curricular activities
  - Visitation travel expenses



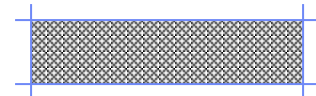
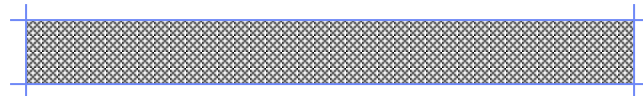
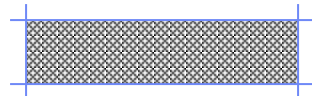
# Responsibility for care

- Timeshare does not have to be exact-
  - Look to responsibility for care- May be responsible for care even when child not with a particular parent (school).
  - Based upon what is actual arrangement, not necessarily what order says.
- **County of San Diego v. P.B. (2020) 55 Cal.App.5th 1058**
  - Courts may not impute timeshare for the purposes of guideline child support.



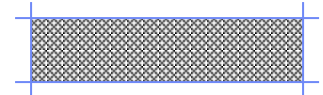
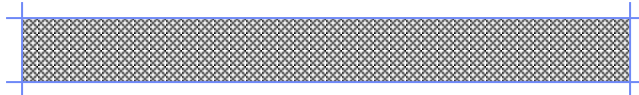
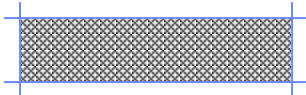
# VOID CS Agreements

- Those agreements which deprive the court of jurisdiction, e.g. binding arbitration
  - **IRMO Bereznak (2003) 110 CA4th 1062**
- Waiver of arrears on a take it or leave it basis without good faith dispute as to amounts owed
  - **IRMO Sabine & Toshio M. (2007) 153 Cal.App.4th 1203, 1213-1215**



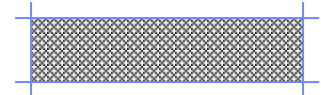
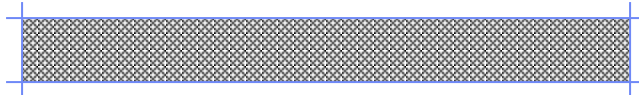
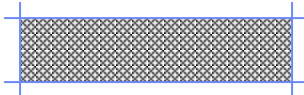
# CS orders

- Always modifiable
  - Even stipulated non-modifiable “floor”, subject to modification.
    - **IRMO Alter (2009) 171 Cal.App.4th 718**
  - Different than spousal support!



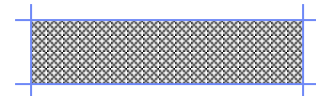
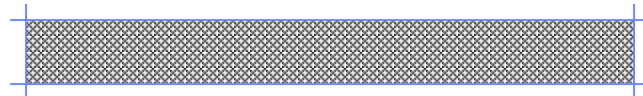
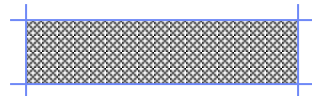
# Income is.....

- “..income from whatever source derived” IRC language--Mandatory: **FC 4058(a)(1)**
  - Commissions, salary, wages, bonuses
  - Royalties, rents, dividends, interest, gifts (maybe, if recurring **IRMO Alter (2009) 171 CA4 718**)
  - Pensions, annuities, social security benefits
    - --not children’s benefits—see deviation
  - Workers’ comp., unemployment, disability
  - Spousal support from another relationship
  - Tribal payments paid directly to member
    - **M.S v O.S (2009) 176 CA4th 548**



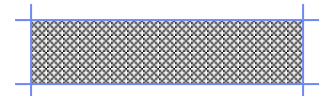
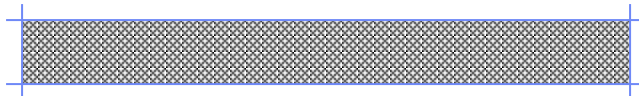
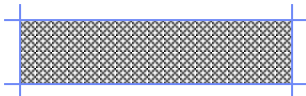
# Income is.....

- **IRMO LOH (2001) 93 CA4th 325, 332**
- Individual tax returns are presumptively correct
- But...



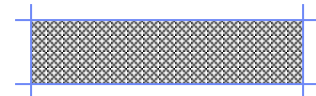
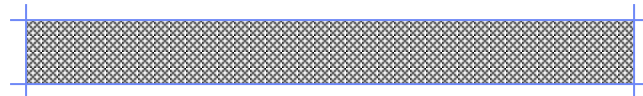
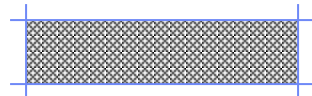
# Income is.....

- Gross income to business less operating expenses. **FC 4058(a)(2)**
  - **Asfaw v. Woldberhan (2007) 147 CA4th 1407** Depreciation of rental property is not deductible in calculating child support under 4058 and 4059.
    - Add-Backs**—“Was the expenditure necessary for the operation of the business?”



# Income is.....

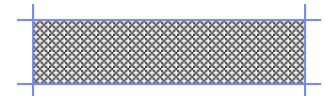
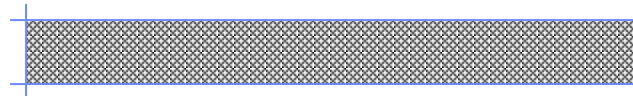
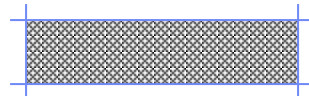
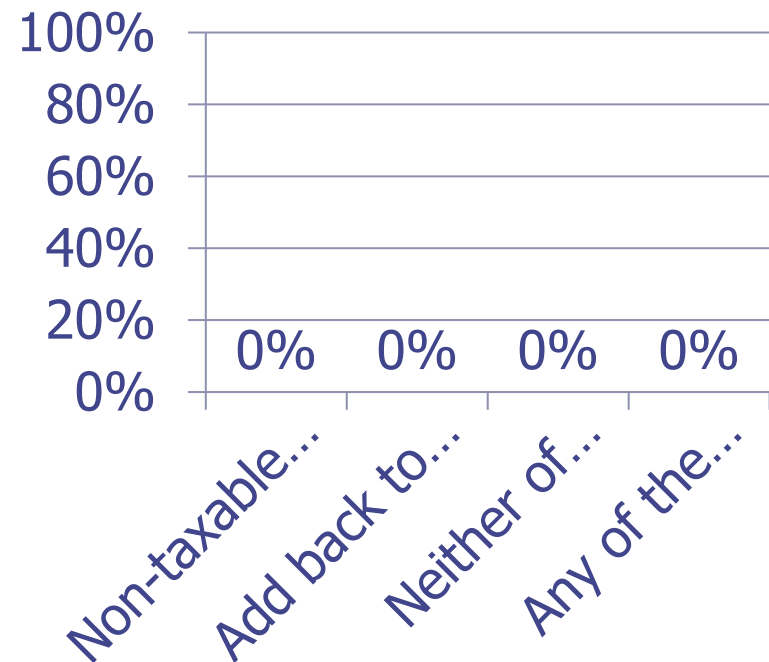
- **IRMO Hein (2020) 52 Cal.App.5<sup>th</sup> 519** - extends Asfaw add-back of depreciation to equipment and vehicles
  - Also, burden of proof is on the party who has possession of the information



# Test yourself: #4

**How do you generally treat depreciation when calculating income available for child support?**

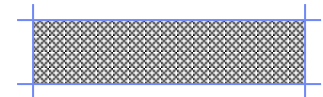
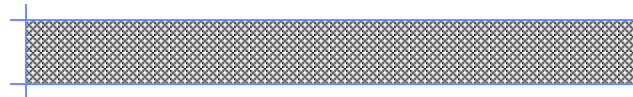
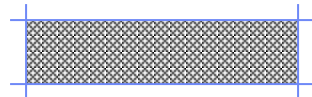
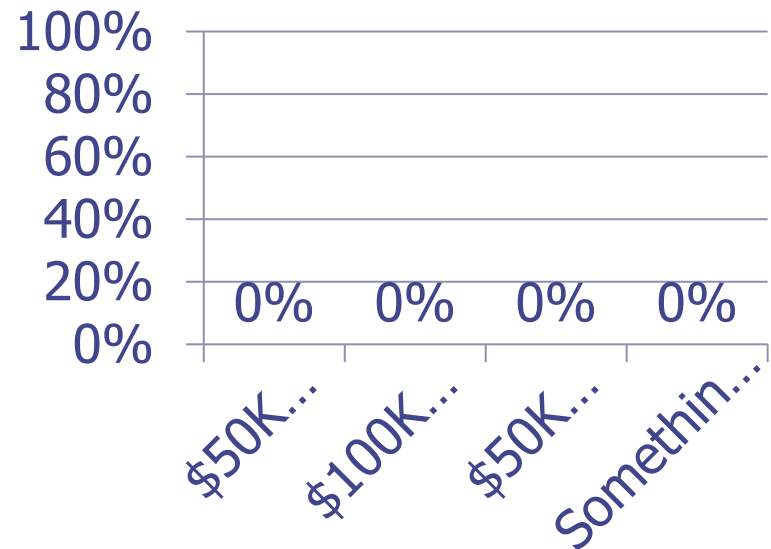
1. Non-taxable income
2. Add back to self-employment income as taxable
3. Neither of the above but consider as a factor for deviation
4. Any of the above depending on the circumstance



# Hypo: #5

**F owns apartment complex. He makes \$200k/year in gross rental income and claims business expenses of \$150k, \$50k of which is depreciation. What is F's income for CS?**

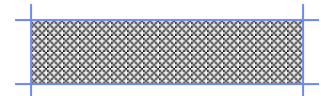
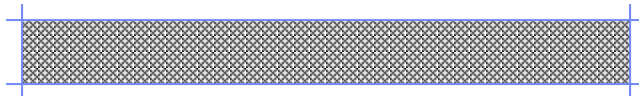
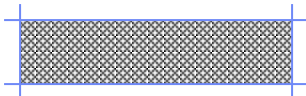
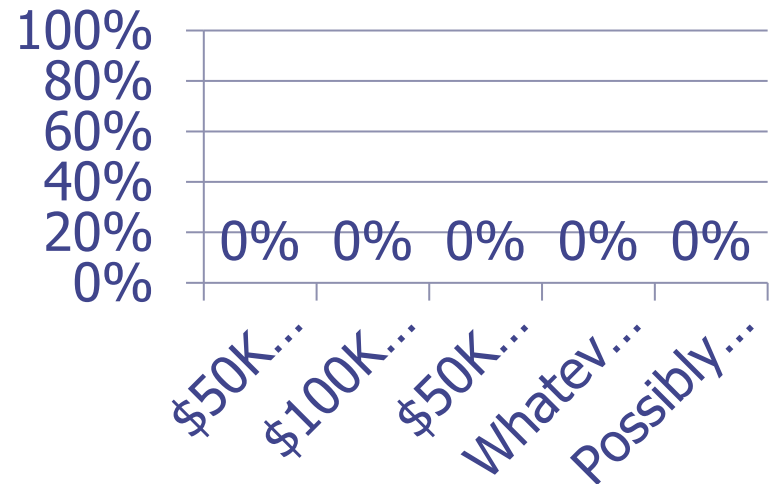
1. \$50K taxable
2. \$100K taxable
3. \$50K taxable plus \$50K nontaxable
4. Something else



# HYPOTHESIS #6

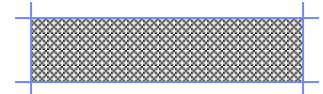
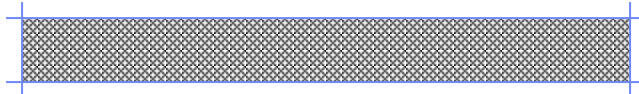
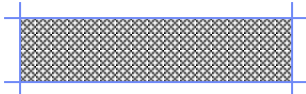
**F is self-employed and owns medical transcription business. He makes \$200k in gross income and \$150k in business expenses, \$50k of which is depreciation. What is self-employment income?**

1. \$50K taxable
2. \$100K taxable
3. \$50K taxable plus \$50K non-taxable
4. Whatever the tax return says
5. Possibly something else



# Income is.....

- Discretionary: **FC 4058(a)(3) & (b)**
  - Employment/self-employment benefits— consider benefit to employee, reduction in living expenses, other relevant factors
  - Earning capacity (less than 40-hour week not necessarily underemployed)

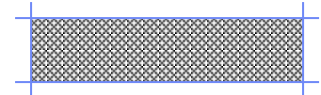
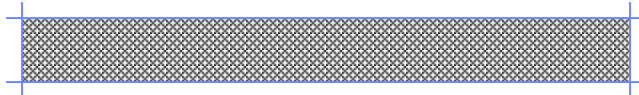
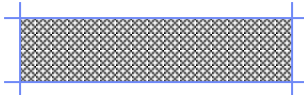


# Income is.....

- Overtime: Predictable overtime *must* be included unless:
  - Evidence that not likely to continue; or
  - Overtime subjects party to an “excessively onerous work schedule”. Parent only required to work “objectively reasonable work regimen”. See **Co. of Placer v Andrade (1997)55 CA4th 1396; IRMO Simpson (1992) 4 Cal.4<sup>th</sup> 225.**

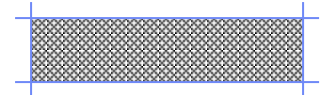
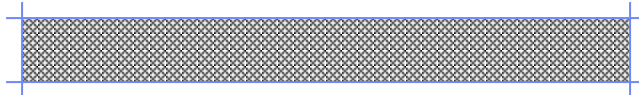
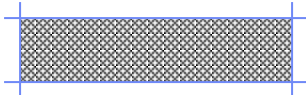
# Income is.....

- Military Allowances
  - BAH—Basic Allowance for Housing
  - BAS—Basic Allowance for Subsistence
    - Federal pre-emption does not apply
    - BAH and BAS are non-taxable income for child support
    - **IRMO Stanton (2011) 190 CA4th 547**



# Income is.....

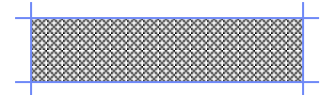
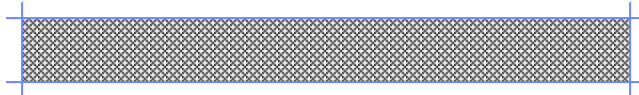
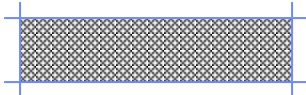
- SEVERANCE PAY
  - Smith Ostler order in effect
  - “35% of all income in excess of \$25,000/mo.
  - Payor receives severance pay of \$309K
  - 5 Components...



# Income is.....

- Yrs. of Service \$100,000
- Lump sum in lieu of commissions \$152,000
- Qualitative Compensation \$ 35,000
- Healthcare payout \$ 1,500
- Retirement benefits \$ 3,422

– TC ruling: % applies to all

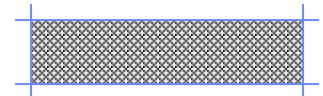
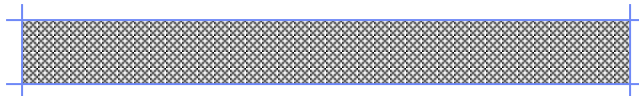
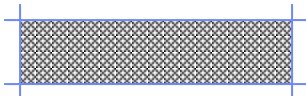


# Income is.....

- Yrs. of Service (limit 12 mo.) \$100,000
- Lump \$ in lieu 6mo commissions \$152,000
- Qualitative Compensation \$ 35,000
- Healthcare payout \$ 1,500
- Retirement benefits \$ 3,422

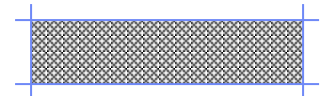
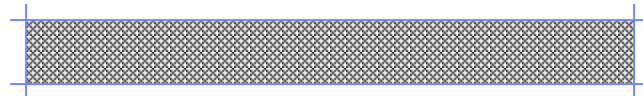
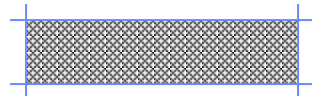
– TC ruling: % applies to all

– CA: reverses---Allocate rationally



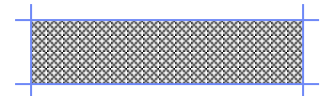
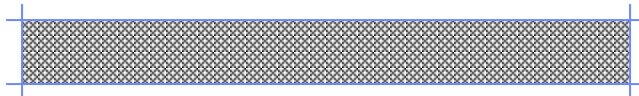
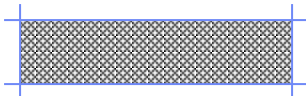
# Income is.....

- Allocation of Severance Pay
  - TC discretion
  - May follow allocation stated in plan or other reasonable allocation
  - May not allocate all to one month
  - **IRMO Tong & Sampson (2011)**  
**197 CA4th 23**



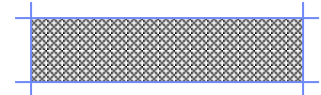
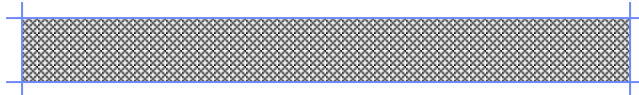
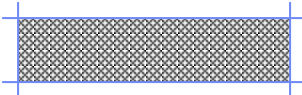
# Income is.....

- Child Tax Credit (American Rescue Plan Act)
  - Tax credit
  - Increases maximum age for a child to 17 years
  - Fully refundable which means no need to have earned income or owe taxes to receive it.
  - Half the credit amount paid in advance monthly payments (other half claimed when 2021 taxes filed)
  - Increased amount gradually phased-out for higher income earners (MFJ \$150,000, HH \$112,500 and S \$75,000)



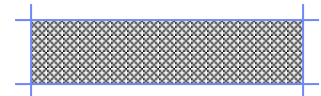
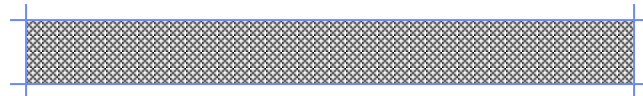
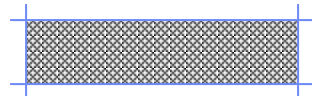
# What is NOT Income?

- Child support for other children
- Public assistance (AFDC, SSI, TANF, Adoptive Assistance), but see Deviation
- Gifts (maybe)... But see *IRMO Alter* (2009) 171 CA4th 718
- Inheritances, life insurance
- Appreciation in value of primary residence *IRMO Henry* (2004) 126 Cal.App.4th 111
- New spouse/nonmarital partner income - exception in extraordinary circumstances (FC 4057.5)
- *IRMO Knowles* (2009) 178 Cal.App.4th 35



# What is NOT Income? (Con't)

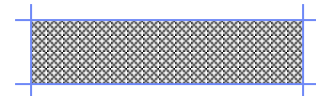
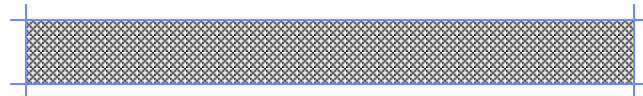
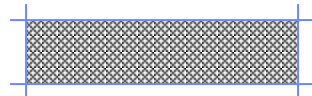
- Loans
- COVID stimulus check funds (Economic Impact Payments)
- Undifferentiated lump sum PI awards
- Annuity purchased from undifferentiated lump sum PI award, but see Deviation



# What is NOT Income? (cont.)

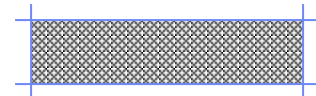
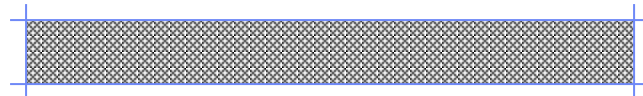
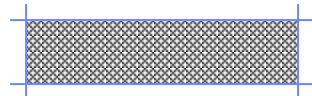
- **IRMO Daugherty (2014) 232 Cal App 4<sup>th</sup> 463**

- Derivative benefits received for children is not income to either parent
  - Child's income, not parent
  - If payee is recipient of benefits from payor's disability, credit against support order and possibly arrears
  - May be basis for deviation



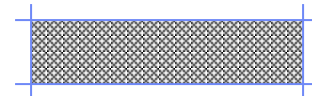
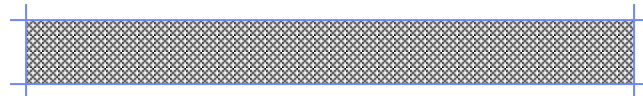
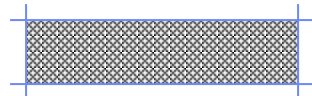
# Calculating Gross and Net Income

- Calculation of “Net Disposable Income” **FC 4058 (gross) and 4059 (deductions)**.
  - 12-month average. **IRMO Riddle (2005) 125 CA4th 1075, at 1083**, facts may dictate longer or shorter period.
  - Court can adjust support to account for seasonal or fluctuating income. **FC 4060-4064.**



# Calculating Income (cont.)

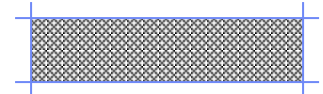
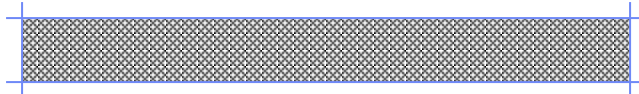
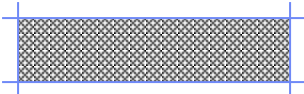
- Percentage of fluctuating income as child support?
  - Better practice to set base CS and percentage of income (bonuses, incentive pay) over base level?
    - **IRMO Mosley (2008) 165 Cal.App.4th 1375**
  - Contra authority if bonuses/commissions are consistent.
    - See **Co of Placer v. Andrade**, supra.



# But Don't Forget.....

## – Must consider appropriate deductions per **FC 4059**

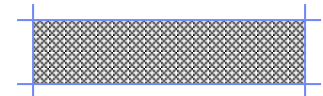
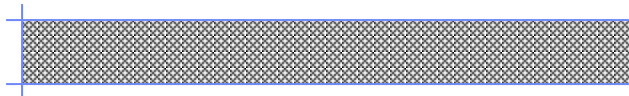
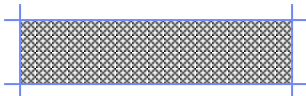
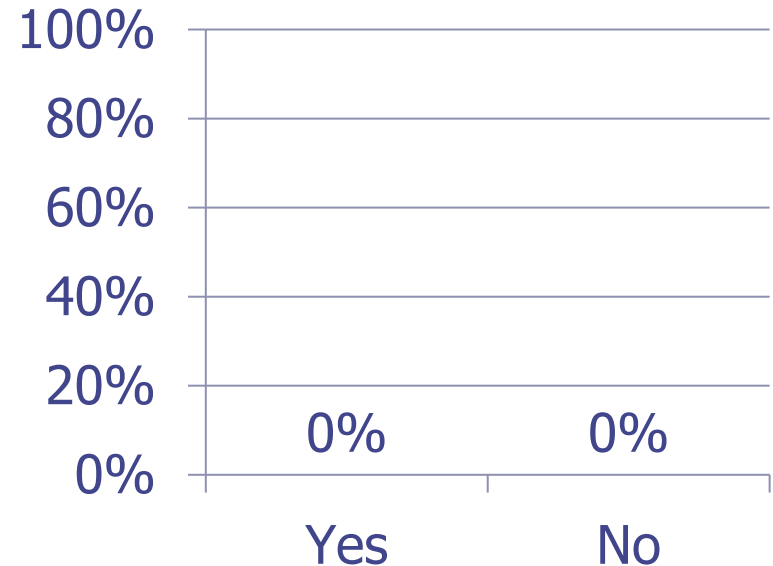
- Taxes
- Health Insurance (Pre or Post tax)
- Mandatory Retirement Plans (Pre or Post tax)
  - Vol. to extent ATI
- Necessary job-related expenses
- Union dues
- CS or SS
- Hardship



# Test yourself: #7

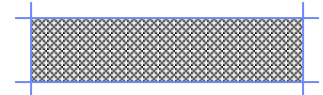
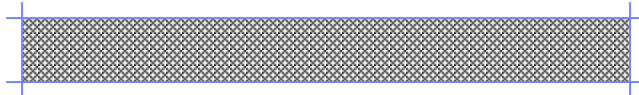
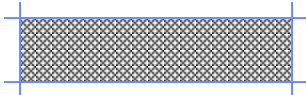
**Hardships: Must the court grant a hardship deduction to a parent who has a biological or adopted child from a different relationship in the home?**

1. Yes
2. No



# Allowable Deductions (con't)

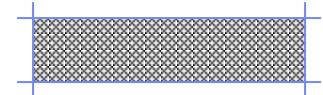
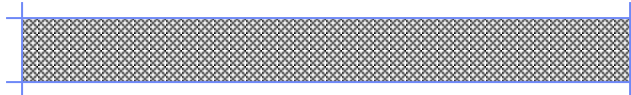
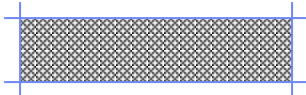
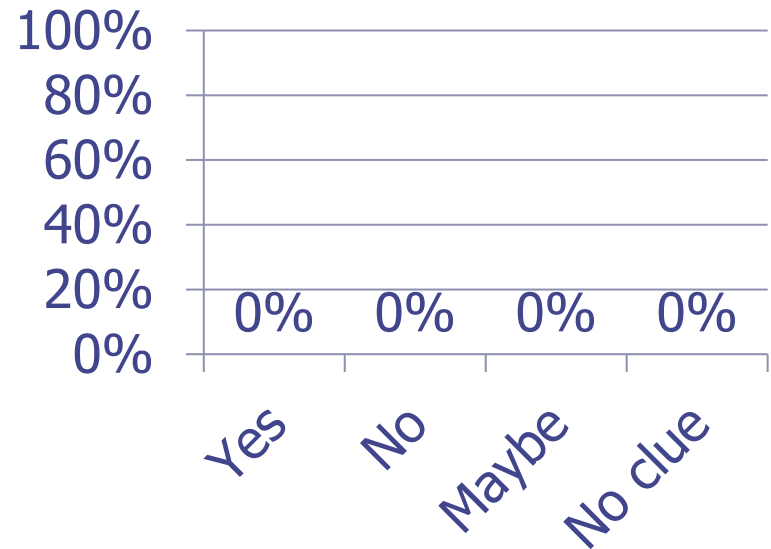
- Hardships
  - Extraordinary health expenses and uninsured catastrophic losses
  - Minimum basic living expenses for children residing with a parent for whom the parent has an obligation to support
    - Does not apply to step-children as there is no 'legal' duty of support owed.



# Hypo #8

**W has mandatory retirement. H works for HP and voluntarily contributes to 401k. Is H's contribution an allowable deduction in calculating guideline child support?**

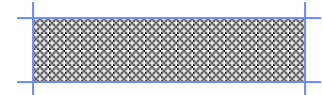
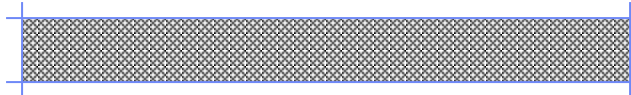
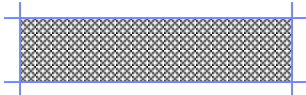
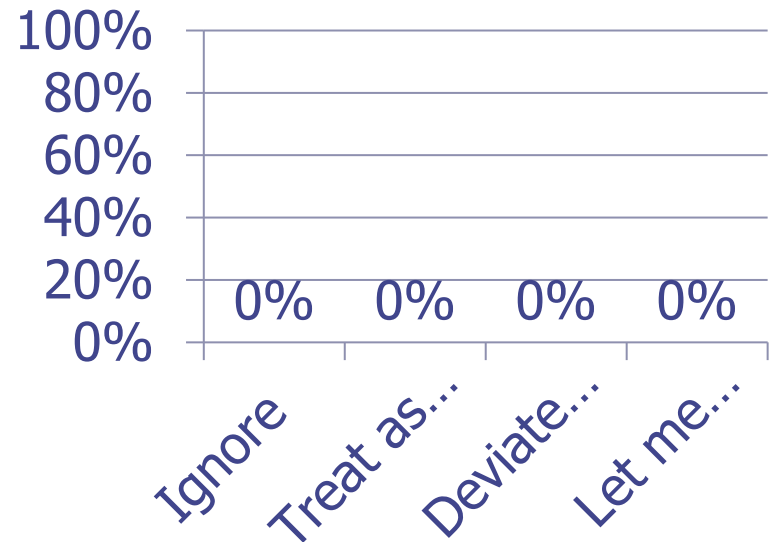
1. Yes
2. No
3. Maybe
4. No clue



# HYPOTHESIS # 9

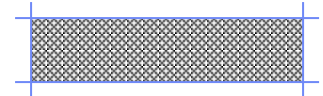
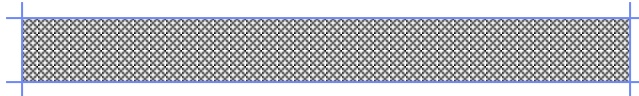
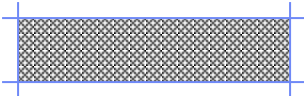
**Due to poor economy, F is laid off. Secures new job but now commutes 100 miles each way to work. How do you treat increased commute costs in the guideline calculator?**

1. Ignore
2. Treat as necessary job-related expense
3. Deviate per CFC 4057
4. Let me think about it



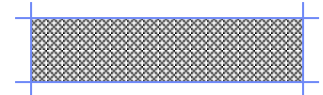
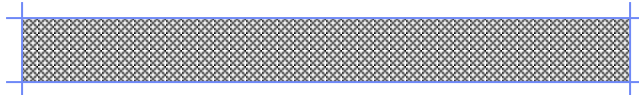
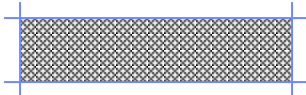
# Beyond the Paycheck

- **Section 4058** language is expansive but must limit application to money *actually* received or available; not appreciation of residence. **IRMO Henry (2005) 126 CA4th 111, 23 CR3rd 707.**
- **IRMO Destein (2001) 91 CA4th 1385, 111 CR2nd 487,** appreciation of real estate okay if investment asset, not residence.



# Beyond the Paycheck con't

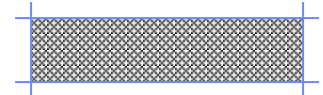
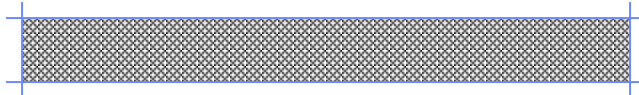
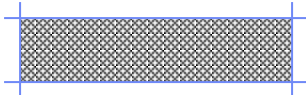
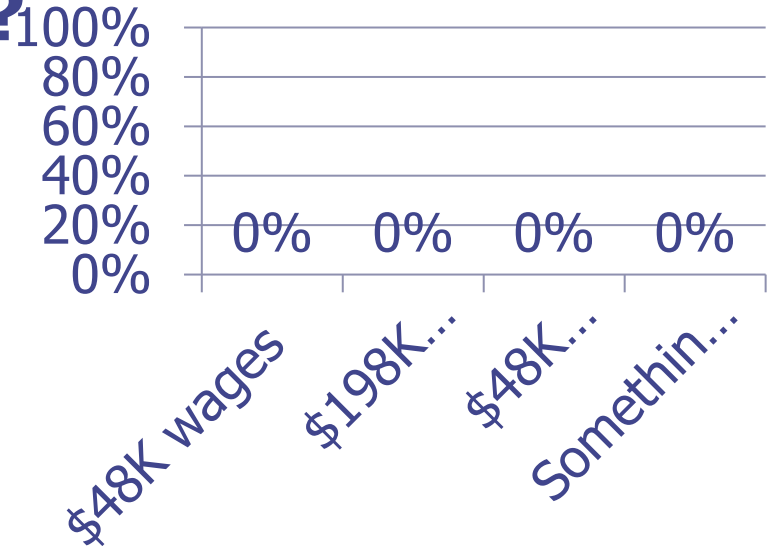
- Partnerships & S-Corps
  - K-1 vital
  - Need to understand various boxes.
  - Look not only to income but also to distributions- positive or negative



# HYPOTHESIS #10

F also makes \$48k W-2 wages from S-corp. that gives F a K-1 w/ \$150k ordinary business income. M stays at home w/ 6-month-old twins. In calculating guideline CS, what is F's income?

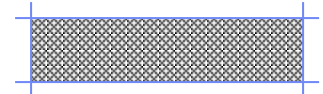
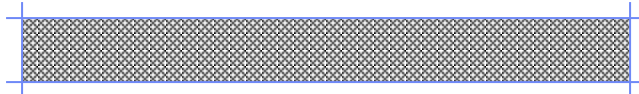
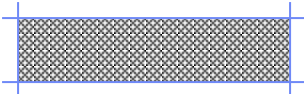
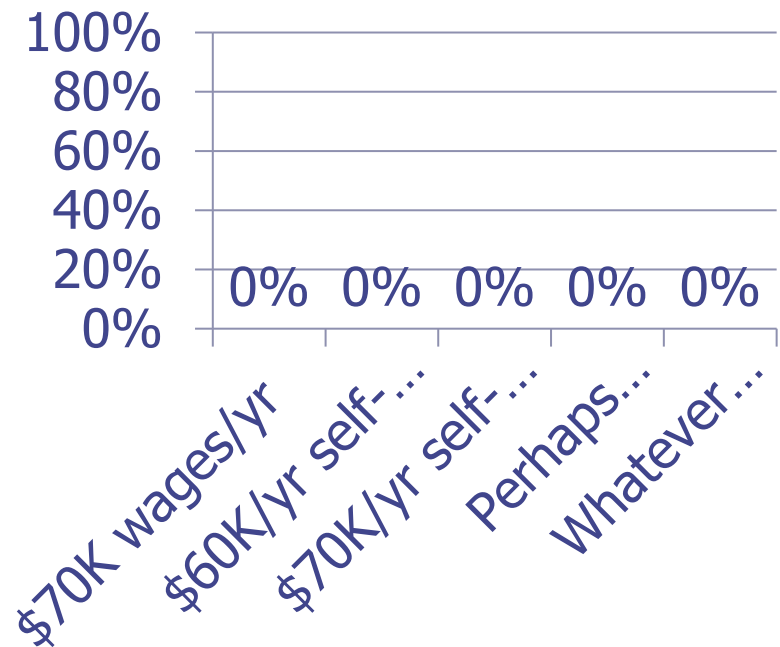
1. \$48K wages
2. \$198K wages
3. \$48K wages plus \$150K other taxable
4. Something entirely different



# Test Yourself: #11

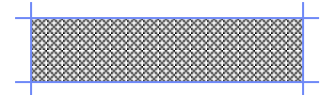
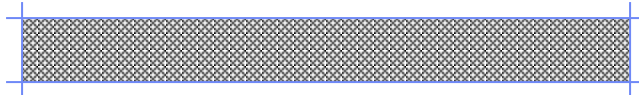
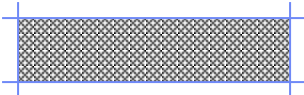
**F is a general partner and draws \$60k/yr. His K-1 shows distribution of \$70k/yr. For calculating guideline CS, what is F's income?**

1. \$70K wages/yr
2. \$60K/yr self-employment income
3. \$70K/yr self-employment plus \$10K other taxable
4. Perhaps something entirely different
5. Whatever the LCSA recommends



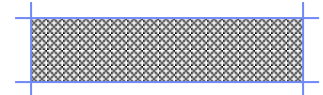
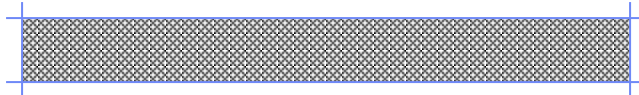
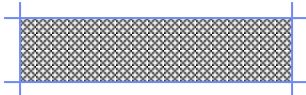
# Stock Options

- Income when option exercised or sale of stock at a gain. **IRMO Cheriton (2001) 92 CA4th 269, at 286, 111 CR2 755, at 767.** But see *In re Marriage of MacIlwaine*
- Can option be income prior to being exercised? **Murray v. Murray (1999) 128 Ohio App.3d 662, at 668-670, 716 NE2d 288, 293-295.**



# Stock

- **IRMO Pearlstein (2006) 137 CA4th 1361, 40 CR3rd 910** distinguishes stock *and cash* traded in sale of business—not income until stock sold or cash spent as opposed to reinvested - OK to impute reasonable rate of return
  - Stock options=compensation
  - Stock/cash sale of business=capital
  - Same result in IRC1031 exchange?

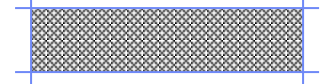
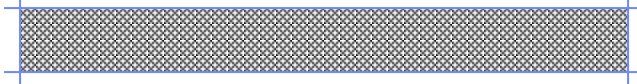


# Inheritance

- **County of Kern v. Castle** (1999) 75 CA4th 1442, at 1453, 89 CR2 874
- Corpus not income.
- Imputation of interest income to the corpus of the inheritance;
- Actual rental income, plus reduction in living expenses, per FC 4058(a)(3)
  - Compare **County of Orange v. Smith** (2005) 132 CA4th 1434, at 1447-1448, 34 CR3rd 383, at 392-393, but see **Anna M. v. Jeffrey E.**, 7 Cal. App. 5th 439.

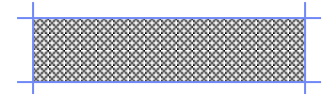
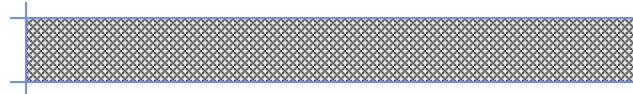
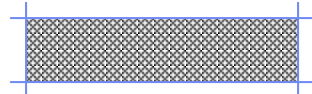
# Life Insurance

- Lump sum payment of life insurance benefits not income—may apply reasonable rate of return. **IRMO**  
**Scheppers (2001) 86 CA4th 646,**



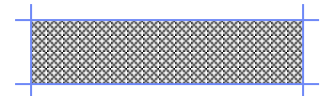
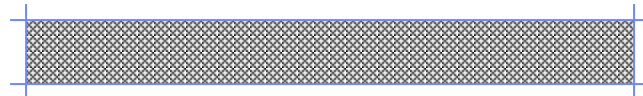
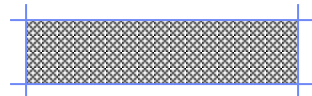
# Gambling Winnings

- Return on capital investment, include as income. **IRMO Scheppers, supra**, at **651 and 533.**



# Lottery Winnings

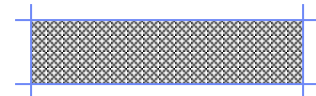
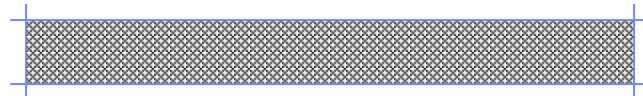
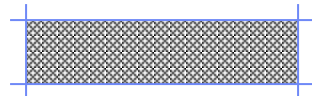
- **County of Contra Costa v. Lemon (1988) 205 CA3rd 683, at 688, 252 CR2nd 455, at 459** - AFDC case. Court held lottery winnings to be income and available for both AFDC reimbursement and ongoing child support.
  - See **IRMO Scheppers, supra, at 651 and 533.**



# Benefits from Employment

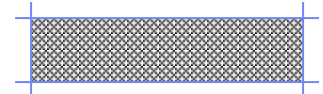
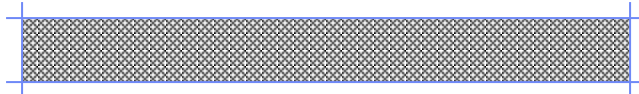
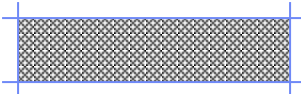
- **Discretionary Add-ons**

- **Automobile.** IRMO Schulze (1997) 60 CA4th 519, at 528, 70 CR2nd 488, at 494.
- **Housing.** IRMO Schulze, supra, at 529 and 495.
- **Meals.** Stewart v. Gomez (1996) 47 CA4th 1748, at 1756, 55CR2nd 531, at 536.



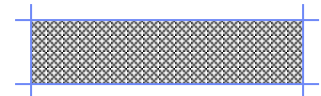
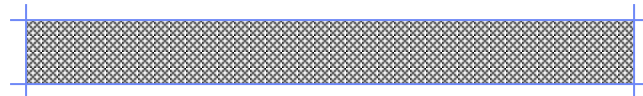
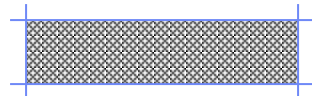
# Annuity from Undifferentiated lump sum PI award

- **IRMO Rothrock (2008) 159 Cal.App.4th 223**, held annuity purchased from undifferentiated lump sum PI award not income.
  - BOP on person challenging
- **IRMO Heiner (2006) 136 Cal.App.4th 1514** held undifferentiated lump sum PI award not income.



# Imputing Income

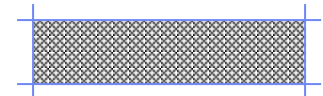
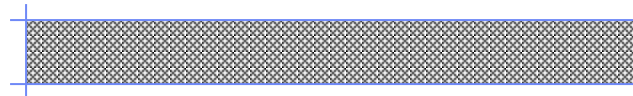
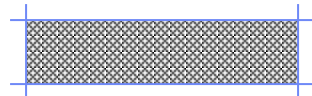
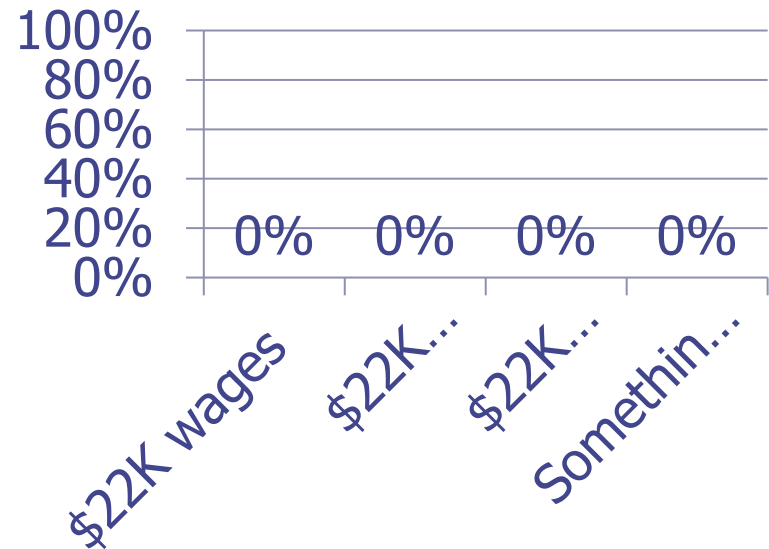
- Gifts
- Earning Capacity
  - Unemployed/underemployed
- Assets
- Expense Theory
- New Mate Income
  - **FC 4057.5**



# Test Yourself #12

F receives gift of \$18k every year from parents to pay rent. F (NCP) wages are \$22k/yr. M (CP) wages are \$48k/yr. F's timeshare is 0%. What is F's income?

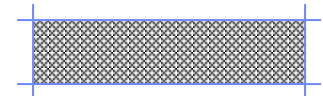
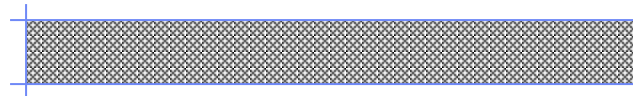
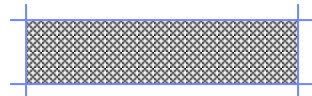
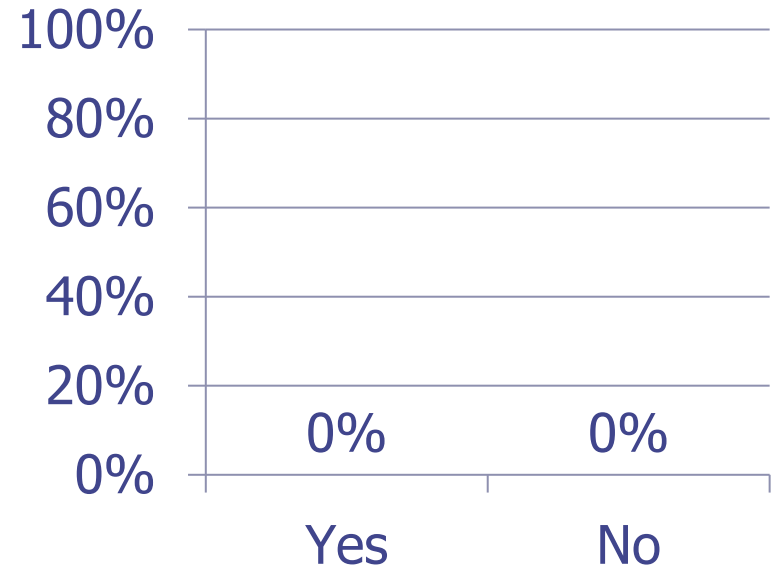
1. \$22K wages
2. \$22K wages plus \$18K non-taxable income
3. \$22K wages plus \$18K taxable income
4. Something else



# Test yourself #13

Would your answer to the previous question be different if the parents provided F free housing with an annual value of \$18k instead of cash?

1. Yes
2. No

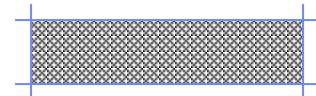
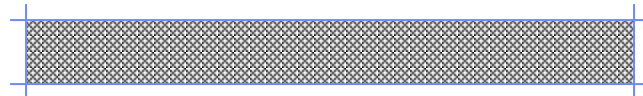
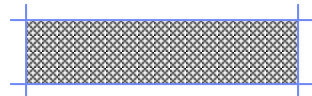


# Gifts

- One-time gifts are not includable as income unless failure to do so would provide inequitable result. **IRMO Schulze, supra at 530 and 495.**

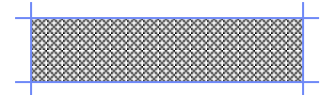
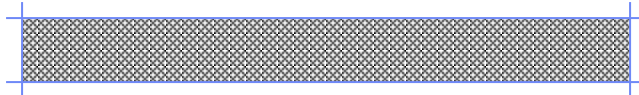
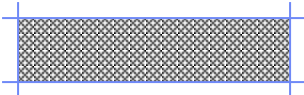


- Court has broad discretion to **deviate** *up or down* if in the best interests of the children. **IRMO deGuigne (2002) 97 CA4th 1353, at 1361, 119 CR2nd 430, at 436.**



# Gifts (cont.)

- Recurring gifts may be treated as income for child support. **IRMO Alter (2009) 171 CA4th 718**
- **IRMO Shaughnessy (2006) 139 CA4th 1225**, held discretion to consider third party gifts in spousal support
  - [FC4057(b)(5) mentioned in dicta].

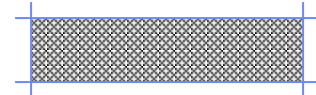
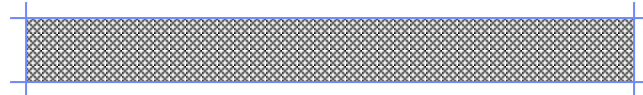
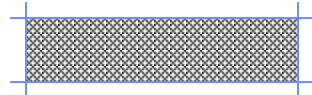


# Earning Capacity

- **FC4058(b)** Discretion to consider in lieu of income if consistent with best interests
  - May consider EC along with parent's receipt of disability benefits. **Stewart v. Gomez (1996) 47 CA4th 1748**
  - Burden on party seeking to impute to show ability (age, experience, health), and opportunity to work (job availability). **IRMO Regnery (1989) 214 CA3rd 1367, 263 CR 243.**

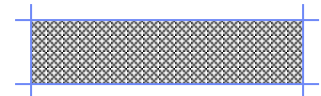
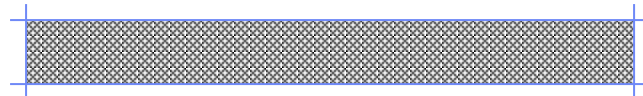
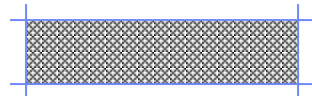
# Earning Capacity (cont)

- Burden on responding party if employment terminated voluntarily.  
**IRMO Ilas (1993) 12 CA3rd 1630;**  
**IRMO Padilla (1995) 38 CA4th 1212;**  
**IRMO McHugh (2014) 231 CA4th 1238.**



# Earning Capacity (cont)

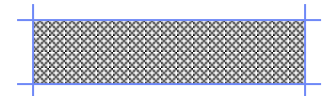
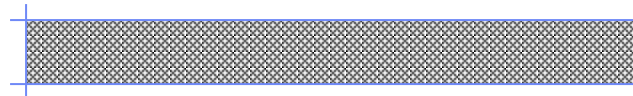
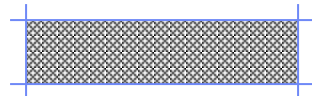
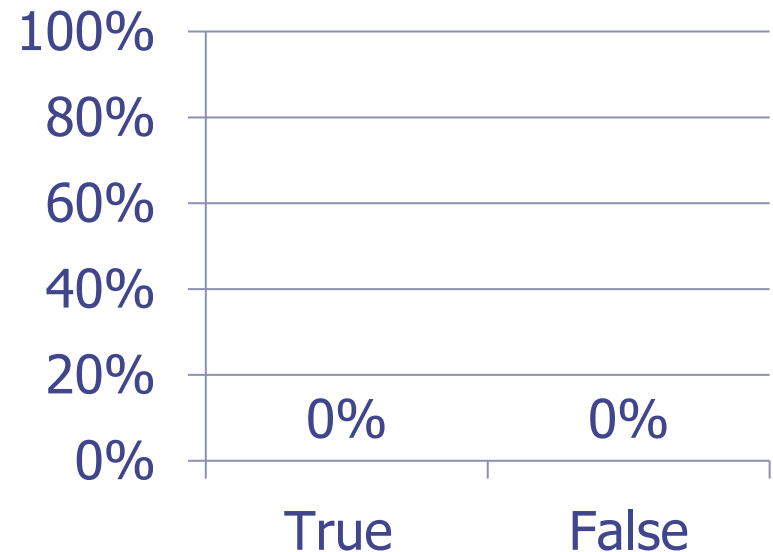
- Cannot 'automatically' impute to former level if termination involuntary, even if misconduct! **IRMO Eggers (2005)**  
**131 CA4th 695, 32 CR3rd 292.**



# Test Yourself #14

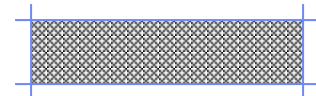
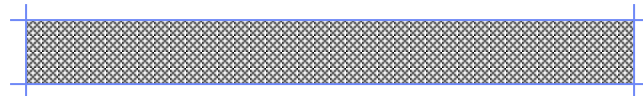
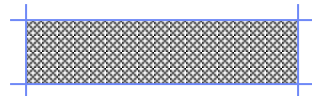
Where a parent retires early and before normal retirement age with minors, the court must impute income as matter of law to pre-retirement level.

1. True
2. False



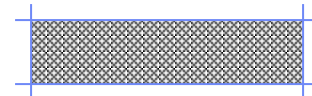
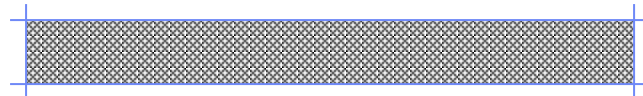
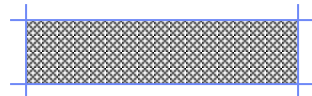
# Earning Capacity (cont)

- Retirement scenario
  - **IRMO Bardzik (2008) 165 CA4th 292**
    - Reiterates BOP on parent who seeks to modify CS order to show parent has ability and opportunity.
    - Retirement distinguished from voluntary termination (**IRMO Ilas & Padilla**, supra;)
    - However, perhaps consider viability on **Stewart v. Gomez**, *infra*, if in best interests to impute and evidence to do so



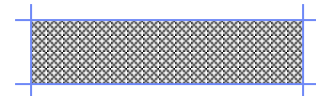
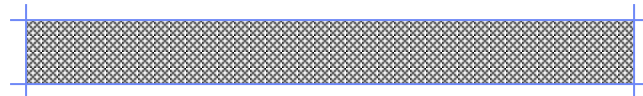
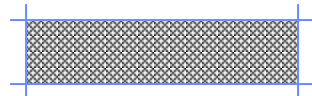
# Earning Capacity (cont.)

- Court may impute to one who is unable to find employer willing to hire them so long as there is a substantial likelihood income can be produced utilizing marketable skills. **IRMO Cohn (1998) 65 CA4th 923, at 930, 76 CR2nd 866 at 871.**
  - Tangible evidence needed; cannot be “drawn from thin air.” **IRMO Cohn (lawyer case); Oregon v. Vargas 70 CA4th 1123.** Want ads enough. **LaBass and Munsee (1997) 56 CA4th 1331.**



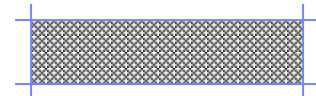
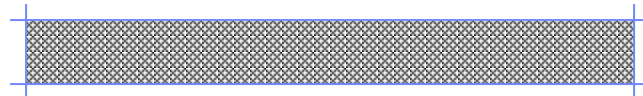
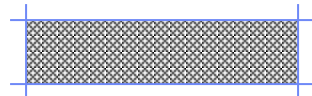
# Earning Capacity(cont.)

- What if earning capacity greater than actual earnings, i.e. underemployed?
  - Ability to pay standard—if earning capacity greater than actual earnings court may base order on ability so long as in the children's best interests—sound discretion of the court.  
**Moss v. Superior Court (Ortiz) (1998) 17 C4th 396, at 4245; IRMO Simpson (1992) 4 C4th 225, at 233; IRMO Smith (2001) 90 CA4th 74, at 81.**



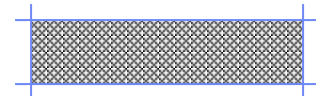
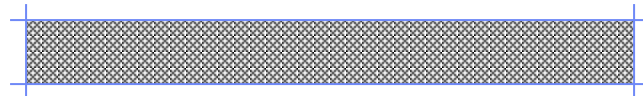
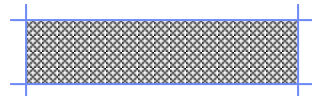
# Earning Capacity(cont.)

- **IRMO Sorge (2012) 202 CA4th 626**
  - 4058(b) allows imputing income on the basis of business assets without consideration of losses - start-ups by dad after \$800K income from prior employment.



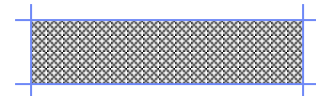
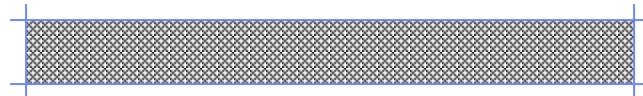
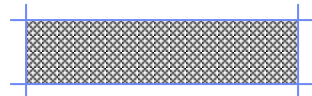
# Earning Capacity(cont.)

- Remarriage and quit job/reduced hours
  - **IRMO Paulin (1996) 46 Cal.App.4th 1378**
  - **Lim & Carrasco (2013)** - Parent reducing work to 80% FT Ok if in best interests of the children.
  - **IRMO Ficke (2013)** - must find imputation of income to be in children's best interests.



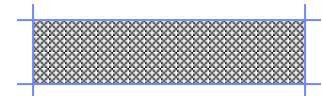
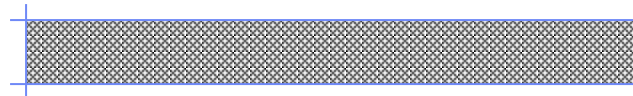
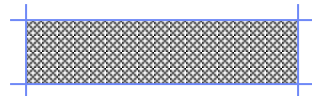
# Imputing Income

- Can impute reasonable rate of return on non- income-producing assets.
  - **IRMO Dacumos (1999)**, 76 CA4th 150, at 154-155, 90 CR2nd 159, at 161;
  - **IRMO Destein (2001)** 91 CA4th 1385, at 1393-1396, 111CR2nd 487, at 492-496;
  - **IRMO deGuigne**, supra, at 1363 and 437-438.



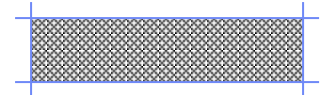
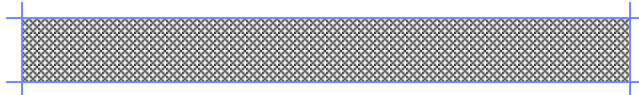
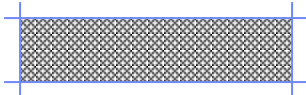
# Imputing Income

- Rate of return? Substantial evidence test on review;
  - Risk free (6%) - **Destein**,
  - legal rate (10%)—**Scheppers**,
  - 4.3 or 4.5 government bond rate—**IRMO**  
**Ackerman (2006) 146 CA4th 191** all acceptable.
  - Common sense “Theoretical rate” 4.5% **IRMO**  
**Berger (2009) 170 CA4th 1070**



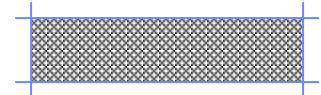
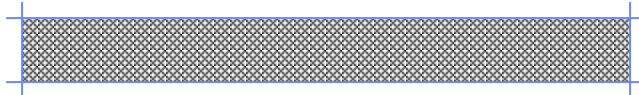
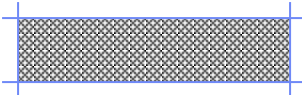
# Imputing Income (cont.)

- **Brothers v. Kern (2007) 154 CA4<sup>th</sup> 126** confirms trial court imputing reasonable rate of return on liquidated proceeds already paid to third party.
  - Court also **deviated** from guidelines— payor incarcerated- considered children's needs for above guideline award.



# Imputing Income (con't)

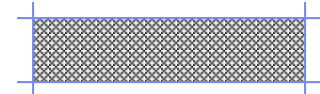
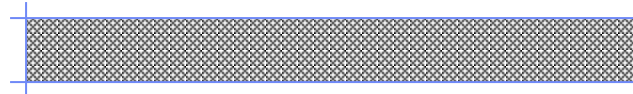
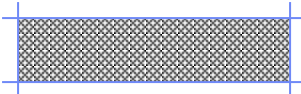
- Expenses Theory
  - Calculate guideline
  - Make credibility finding if I&E or other evidence of unbelievable income vis a vis expenses
    - Rule out other sources for payments as shown by evidence
  - Re-calculate with expenses as non-tax income - no tax consid. as expenses are paid after tax.
  - See **IRMO Loh; IRMO Calcattera (2005) 132 CA4th 28**



# Imputing Income(cont.)

- Exceptions to imputing income:

- CalWorks participant **Mendoza v Ramos (2010) 182 CA4th 680**
- **IRMO Williams (2007) 150 CA4<sup>th</sup> 1221** confirms that court cannot impute reasonable rate of return on home equity in primary residence.
- **IRMO Schlafly (2007) 149 Cal.App.4th 747**, confirms cannot impute income on mortgage free housing (FRV?) of primary residence
- But consider **Kern v Castle, supra.** Also discussed “add-ons” FC 4062
- Principal portion of biz mtg pmt may be deductible if crt determines that pmts reasonably and legitimately reduce net income. **IRMO Deluca (2019) 45 Cal.App.5<sup>th</sup> 184.**

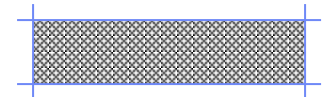
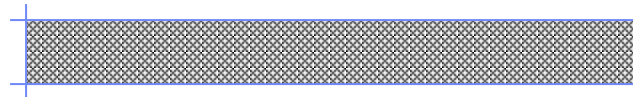
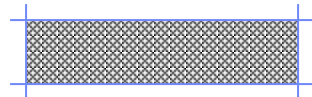
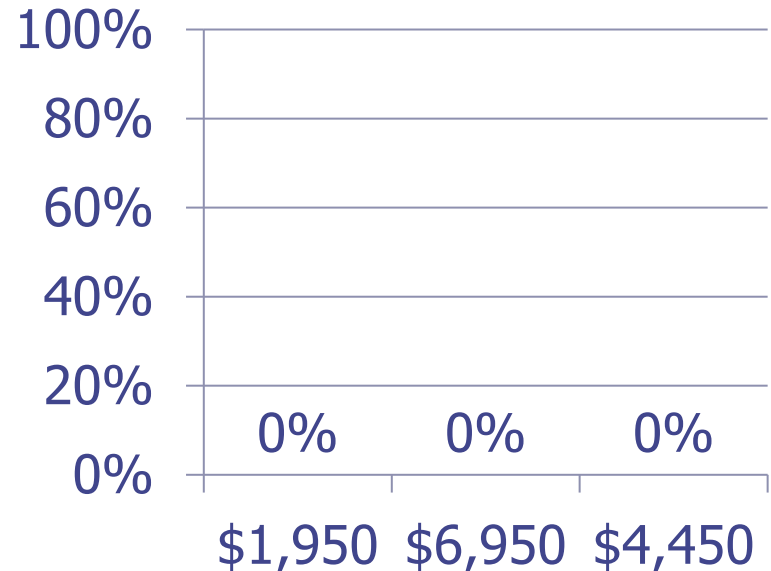


# Test Yourself #15

F and new spouse have passive investment income of \$5k. F was recently laid off and is collecting UI benefits of \$1,950/mo.

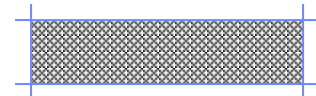
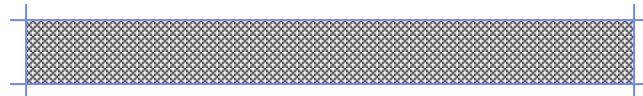
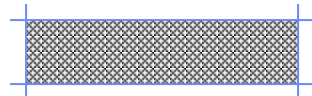
What is F's income for CS?

1. \$1,950
2. \$6,950
3. \$4,450



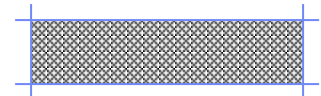
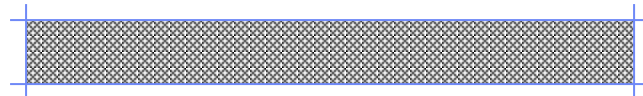
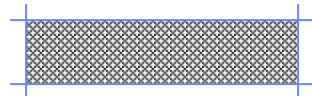
# Imputing Income (cont.)

- Remarriage - May impute income to custodial parent who terminates employment to care for new children of remarriage (**IRMO Hinman (1997) 55 CA4th 988, 64CR2nd 383**) or remarriage to wealthy spouse (**IRMO Wood (1995) 37 CA4th 1059, 44 CR2nd 236**)
  - **CAUTION** re **FC 4057.5**
    - Need finding of that exclusion of NMI would result in extreme or severe hardship to child
  - **IRMO Knowles (2009) 178 CA4th 35**



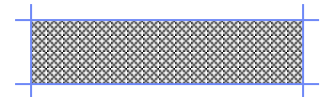
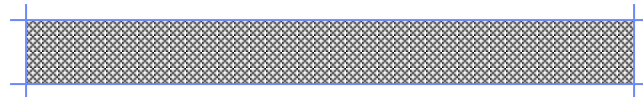
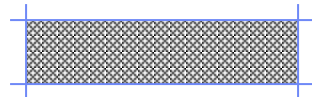
# Evidence

- **Swan v. Hatchett**
- Can't disregard evidence of income for self-employed for child support but consider it for attorney's fees



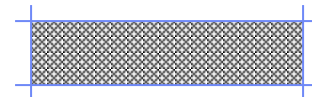
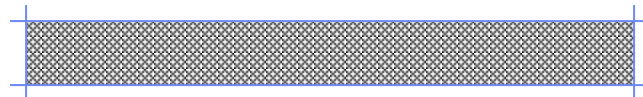
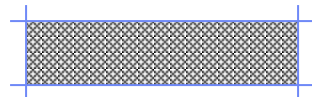
# Summary— Determining Income

- Income = gross income from all sources, including commissions, bonuses, overtime
- May include benefits
- Does not include aid, child support, etc.
- Average when fluctuating or seasonal
- Imputing income may be available



# Deviating from Guideline

- “The court is not supposed to punch numbers into a computer and award the parties the computer’s result without considering the circumstances in a particular case which would make that order unjust or inequitable”
  - **Marriage of Fini (1994) 26 CA4th 1033**
- .....It’s true, we are not mere robots or potted plants!



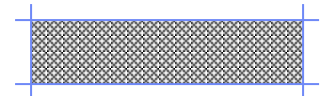
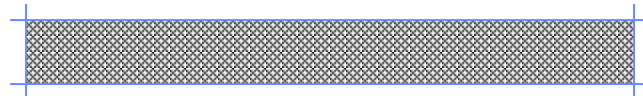
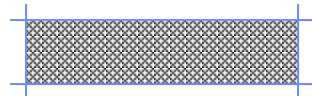
# Deviating from Guideline (cont.)

- **FC 4056**

- If deviating, must state findings and guideline CS and state reasons for deviation on record.

- **FC 4057(a)**

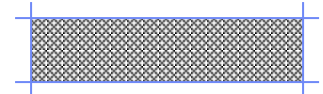
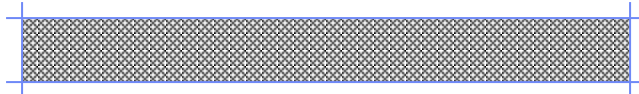
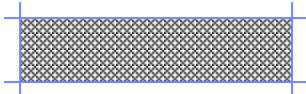
- The amount of child support established by the formula presumed to be the correct amount of child support.



# Deviating from Guideline (cont.)

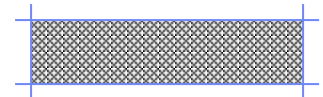
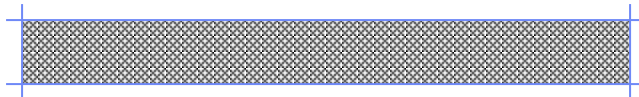
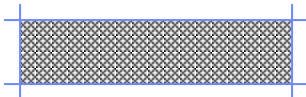
- **FC 4057(b)**

The presumption of 4057(a) - may be rebutted by showing that formula unjust or inappropriate, consistent with FC 4053, based on one or more identified factors, list is not exclusive.



# Deviating from Guideline (cont.)

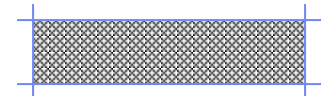
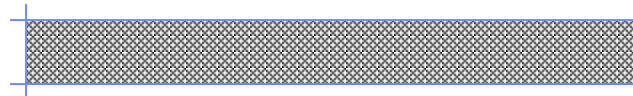
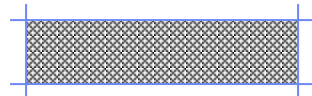
- **Family Code Section 4052.5**
  - Invites deviation—no need to modify Guideline Calculator



# Deviating from Guideline (cont.)

- Calculation of guideline

- No statutory exception to requirement that court determine guideline before addressing deviation. **IRMO Hubner supra, at 184 and 652.**



# Deviating from Guideline (cont.)

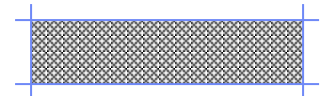
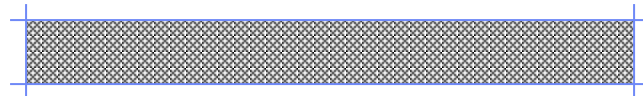
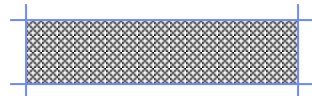
## **Stipulation of the parties. FC4057(b)(1)**

Guideline calculation &

FC 4065 inquiry/advisement required.

## **Deferred Sale of Residence FC4057(b)(2)**

Discretionary. IRMO Braud (1996) 45CA4th 797, at 819, 53 CR 2d 179, at 192



# Deviating from Guideline (cont.)

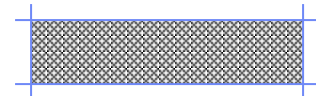
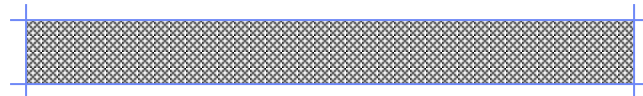
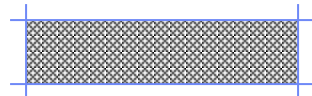
- High Income & G/L exceeds C's needs. Burden on high earner to establish that formula is "unjust or inappropriate" and would exceed needs. FC 4053(b)(3). **IRMO Cheriton, supra,, at 297 and 776.**
- Substantial evidence test—opposite result may be supportable. **IRMO Wittgrove (2004)\_120 CA4th 1317, at 1326 and 1328, 16 CR3rd 489, at 495 and 497.**

# Deviating from Guideline (cont.)

- May avoid need to calculate guideline if parties stipulate that paying parent is extraordinarily high earner and on what is an appropriate amount of child support. **Estevez v. Superior Court (Salley) (1994) 22 CA4th 423, at 431, 27 CR2nd 470, at 475-476.** Court makes “assumptions least favorable to the obligor.”

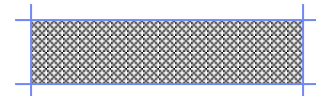
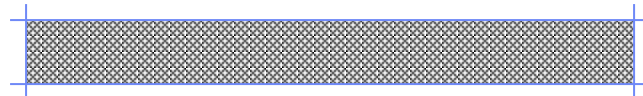
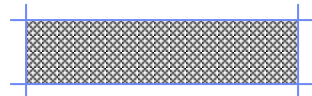
# Deviating from Guideline (cont.)

- Establishing needs of children
  - Varies with standard of living of parent, per **FC 4053(f)**.
    - **IRMO Hubner (2001) 94 CA4th 175, at 187, 114 CR2nd 646, at 655;**
    - **IRMO Wittgrove, supra, at 1329 and 498;**
    - **IRMO Chandler (1997) 60 CA4th 124, at 129, 70 CR2nd 109, at 113.**



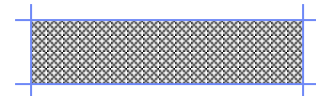
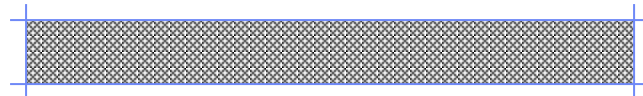
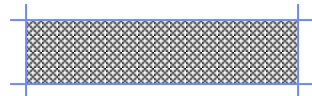
# Deviating from Guideline (cont.)

- Future financial security may be considered. **IRMO Kerr (1999) 77 CA4th 87, at 97, 91 CR2nd 374, at 381.**
- Consideration of alternative resources may not be appropriate. **IRMO Cheriton,** *supra* at 293-294 and 773 (trust not to be considered unless actually satisfying needs of children).



# Deviating from Guideline (cont.)

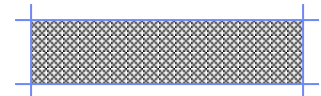
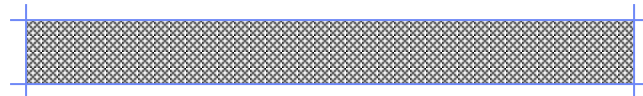
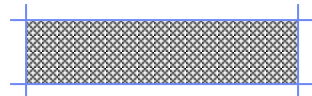
- Court needs information based in fact concerning obligor's actual gross income.
  - **Johnson v. Superior Court (Tate)** (1998) 66 CA4th 68, at 75, 77 CR2nd 624, at 628;
  - **IRMO Hubner** supra at 186-187 and 654-655.



# Deviating from Guideline (cont.)

**Contribution not commensurate with parenting time. FC4057(b)(4)**

Clothing, extra curricular, etc.



# Deviating from Guideline (cont.)

**Guideline child support would be  
“unjust or inappropriate.” FC4057(b)(5)**

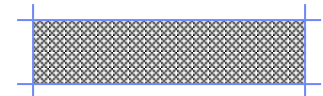
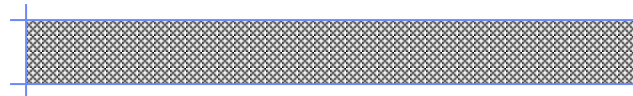
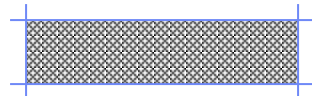
Including *but not limited to*....

(A) Different time-share with different children,

(B) Substantially equal time but housing expense greater for one parent, and

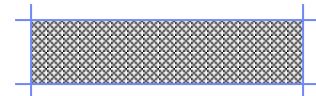
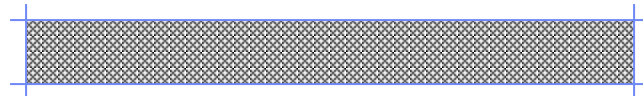
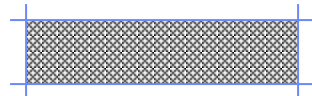
(C) Special medical or other needs for the children.

Above language are not words of limitation



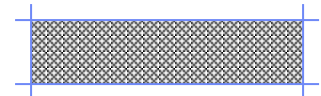
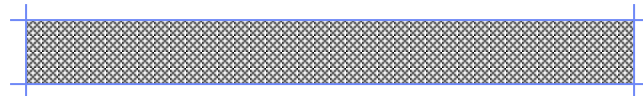
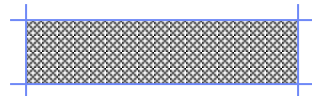
# Deviating from Guideline (cont.)

- Other Examples:
  - Broad discretion given court, as list of circumstances are inclusive, not exclusive.
    - **County of Lake v. Antoni (1993) 18 CA4th 1102, at 1106, 22 CR2nd 804, at 806;**
    - **IRMO Wood (1995) 37 CA4th 1059, at 1069, 44 CR2nd 236, at 242;**
    - **IRMO deGuigne supra, at 1361 and 436.**



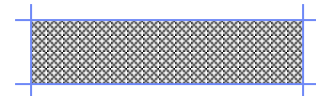
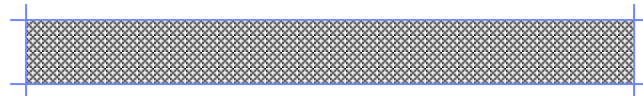
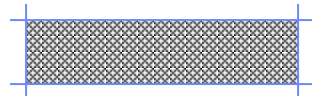
# Deviating from Guideline (cont.)

- **Edwards v Edwards (2008) 162 Cal.App.4th 136**. Where jurisdiction exists to award post age of majority CS, application of GL formula is unjust or inappropriate where neither parent retains primary physical responsibility for adult child for any period of time.



# Deviating from Guideline (cont.)

- Assets. IRMO Dacumos supra 154-155 and 161; IRMO Destein supra at 1393-1396 and 492-496; IRMO deGuigne supra at 1363 and 437-438.
- Lavish lifestyle. IRMO deGuigne supra at 1360-1366 and 435-440.
- Nontaxable benefits. IRMO Loh supra at 335-336 and 900.
- Salary Deferral combined with lavish lifestyle. IRMO Berger (2009) 170 Cal.App.4th 1070

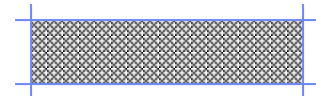
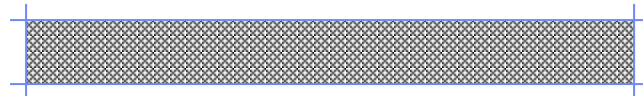
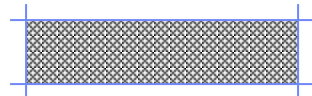


# Deviating from Guideline (cont.)

Extraordinarily low income. **City and County of San Francisco v. Miller (1996) 49 CA4th 866, at 869, 56 CR2nd 887, at 888.**

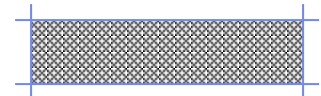
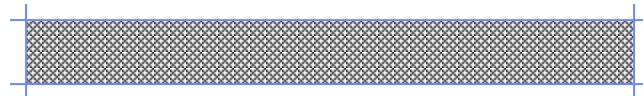
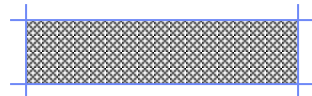
Federal Poverty Guideline

Concept used to reduce arrears in public assistance case. **City and County of San Francisco v. Funches (1999) 75 CA4th 243, at 247, 89 R2nd 49, at 52.**



# Summary—Deviating from Guideline

- Stipulation
- Deferred Sale of Residence
- Not Contributing commensurate with TS
- Extraordinarily High Income
- Guideline support unjust or inappropriate “catchall” clause
  - **Findings on the record required for all**





The End.

Thank you for joining us

For questions, feel free to email me at:

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