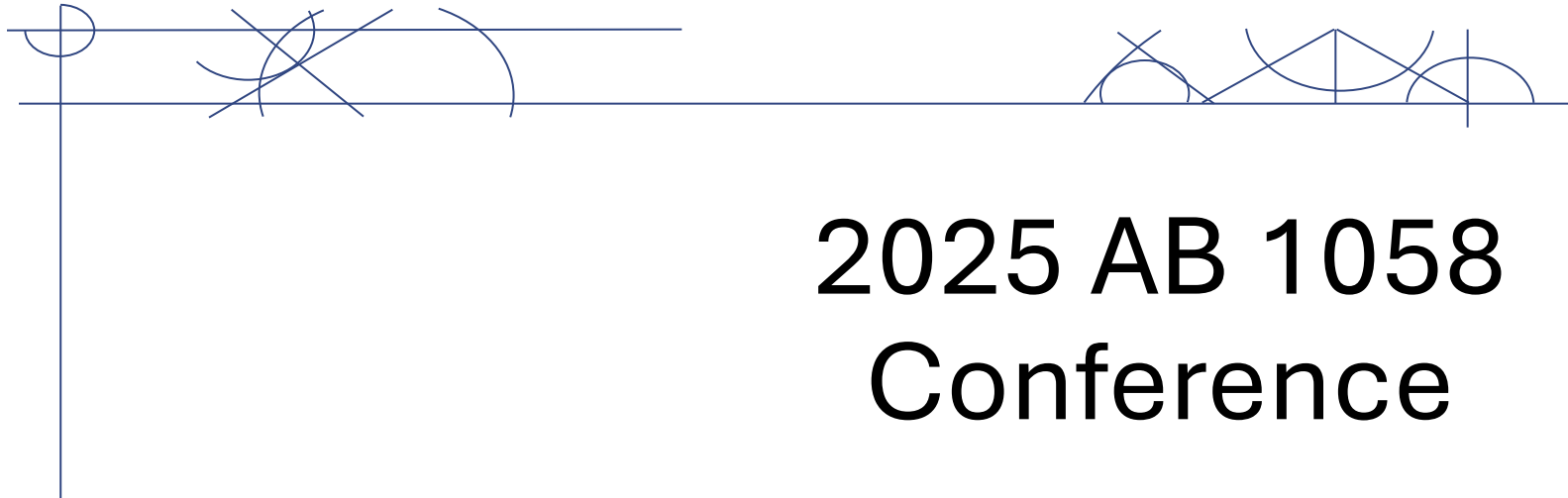


# Welcome to the 29<sup>th</sup> Annual AB 1058 Conference

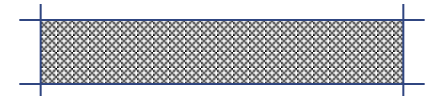


September 17, 2025

# Income Determination



2025 AB 1058  
Conference



# Goal of Guideline Support

- 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;
- Ensure compliance with Federal regulations—AB 1058 issue

# Principal Objectives

- Parents' 1<sup>st</sup> & principal obligation--support children based on standard of living of parents
- Both parents mutually responsible for support
- Consider income and time share for children
- OK if support improves the standard of living of custodial parent.
  - See **Family Code Section 4053**

# How is Child Support Calculated

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



# Income is.....

- “..income from whatever source derived” IRC language--  
Mandatory: **FC 4058(a)(1)**
  - Commissions, salary, wages, bonuses
  - Royalties, rents, dividends, interest
  - 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**



# Evidence of Income

- Paycheck
- Profit and Loss Statement/Schedule C — consider add-backs
- Tax Returns
- Award letter—Social Security, SDI, Workers Comp.
- Account Statements

# Profit and Loss (Schedule C)

**SCHEDULE C (Form 1040) Profit or Loss From Business (Sole Proprietorship)** OMB No. 1545-0074  
 Department of the Treasury Internal Revenue Service (99) **2018** Attachment Sequence No. 09  
 ▶ Go to [www.irs.gov/ScheduleC](http://www.irs.gov/ScheduleC) for instructions and the latest information.  
 ▶ Attach to Form 1040, 1040NR, or 1041; partnerships generally must file Form 1065.

Name of proprietor: **RICK GRIME** Social security number (SSN): **000-00-0000**

**A** Principal business or profession, including product or service (see instructions): **LANDSCAPING** **B** Enter code from instructions: **571630**

**C** Business name, if no separate business name, leave blank: **GREEN ACRES LANDSCAPING** **D** Employer ID number (EIN) (see instr.): **0000000000**

**E** Business address (including suite or room no.): **BUCKSNORT STREET**  
 City, town or post office, state, and ZIP code: **SAN ANTONIO, TX 78208**

**F** Accounting method: (1)  Cash (2)  Accrual (3)  Other (specify) ▶

**G** Did you "materially participate" in the operation of this business during 2018? If "No," see instructions for limit on losses.  Yes  No

**H** If you started or acquired this business during 2018, check here

**I** Did you make any payments in 2018 that would require you to file Form(s) 1099? (see instructions)  Yes  No

**J** If "Yes," did you or will you file required Forms 1099?  Yes  No

Part I Income	
1	Gross receipts or sales. See instructions for line 1 and check the box if this income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked. <input type="checkbox"/> <b>1</b> <b>99,200</b>
2	Returns and allowances <b>2</b>
3	Subtract line 2 from line 1 <b>3</b> <b>99,200</b>
4	Cost of goods sold (from line 42) <b>4</b>
5	<b>Gross profit.</b> Subtract line 4 from line 3 <b>5</b> <b>99,200</b>
6	Other income, including federal and state gasoline or fuel tax credit or refund (see instructions) <b>6</b>
7	<b>Gross income.</b> Add lines 5 and 6 <b>7</b> <b>99,200</b>

Part II Expenses. Enter expenses for business use of your home only on line 30.	
8	Advertising <b>8</b> <b>1,160</b>
9	Car and truck expenses (see instructions) <b>9</b> <b>5,641</b>
10	Commissions and fees <b>10</b>
11	Contract labor (see instructions) <b>11</b> <b>1,000</b>
12	Depletion <b>12</b>
13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions) <b>13</b> <b>4,000</b>
18	Office expense (see instructions) <b>18</b> <b>1,500</b>
19	Pension and profit-sharing plans <b>19</b>
20	Rent or lease (see instructions): <b>20</b>
20a	a Vehicles, machinery, and equipment <b>20a</b> <b>7,400</b>
20b	b Other business property <b>20b</b>
21	Repairs and maintenance <b>21</b> <b>1,975</b>
22	Supplies (not included in Part III) <b>22</b> <b>12,800</b>
23	Taxes and licenses <b>23</b> <b>400</b>
24	Travel and meals: <b>24</b>

13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions) <b>13</b> <b>4,000</b>	22	Supplies (not included in Part III) <b>22</b> <b>12,800</b>
14	Employee benefit programs (other than on line 19) <b>14</b>	23	Taxes and licenses <b>23</b> <b>400</b>
15	Insurance (other than health) <b>15</b> <b>1,200</b>	24	Travel and meals: <b>24</b>
16	Interest (see instructions): <b>16</b>	24a	a Travel <b>24a</b> <b>1,435</b>
16a	a Mortgage (paid to banks, etc.) <b>16a</b> <b>300</b>	24b	b Deductible meals (see instructions) <b>24b</b> <b>270</b>
16b	b Other <b>16b</b>	25	Utilities <b>25</b> <b>2,200</b>
17	Legal and professional services <b>17</b> <b>1,040</b>	26	Wages (less employment credits) <b>26</b> <b>53,850</b>
25	Utilities <b>25</b> <b>2,200</b>	27a	Other expenses (from line 48) <b>27a</b> <b>850</b>
26	Wages (less employment credits) <b>26</b> <b>53,850</b>	27b	b Reserved for future use <b>27b</b>
27a	Other expenses (from line 48) <b>27a</b> <b>850</b>	28	<b>Total expenses</b> before expenses for business use of home. Add lines 8 through 27a <b>28</b> <b>97,021</b>
27b	b Reserved for future use <b>27b</b>	29	Tentative profit or (loss). Subtract line 28 from line 7 <b>29</b> <b>2,179</b>
28	<b>Total expenses</b> before expenses for business use of home. Add lines 8 through 27a <b>28</b> <b>97,021</b>	30	Expenses for business use of your home. Do not report these expenses elsewhere. Attach Form 8829 unless using the simplified method (see instructions). <b>30</b>
29	Tentative profit or (loss). Subtract line 28 from line 7 <b>29</b> <b>2,179</b>	31	<b>Net profit or (loss).</b> Subtract line 30 from line 29. <b>31</b> <b>2,179</b>
30	Expenses for business use of your home. Do not report these expenses elsewhere. Attach Form 8829 unless using the simplified method (see instructions). <b>30</b>	32a	<input checked="" type="checkbox"/> All investment is at risk.
31	<b>Net profit or (loss).</b> Subtract line 30 from line 29. <b>31</b> <b>2,179</b>	32b	<input type="checkbox"/> Some investment is not at risk.
32	If you have a loss, check the box that describes your investment in this activity (see instructions). <b>32</b>		
	• If you checked 32a, enter the loss on both <b>Schedule 1 (Form 1040), line 12 (or Form 1040NR, line 13)</b> and on <b>Schedule SE, line 2.</b> (If you checked the box on line 1, see the line 31 instructions). Estates and trusts, enter on <b>Form 1041, line 3.</b>		
	• If a loss, you <b>must</b> go to line 32.		
	• If you checked 32b, you <b>must</b> attach <b>Form 6198.</b> Your loss may be limited.		

For Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 11334P Schedule C (Form 1040) 2018

**SCHEDULE C  
(Form 1040)**

Department of the Treasury  
Internal Revenue Service (99)

**Profit or Loss From Business**  
(Sole Proprietorship)

▶ Go to [www.irs.gov/ScheduleC](http://www.irs.gov/ScheduleC) for instructions and the latest information.  
▶ Attach to Form 1040, 1040NR, or 1041; partnerships generally must file Form 1065.

OMB No. 1545-0074

**2018**  
Attachment  
Sequence No. **09**

Name of proprietor <b>RICK GRIME</b>		Social security number (SSN) <b>000-00-0000</b>	
A Principal business or profession, including product or service (see instructions) <b>LANDSCAPING</b>		B Enter code from instructions ▶ <b>5 7 1 6 3 0</b>	
C Business name. If no separate business name, leave blank. <b>GREEN ACRES LANDSCAPING</b>		D Employer ID number (EIN) (see instr.) <b>0 0 0 0 0 0 0 0 0 0</b>	
E Business address (including suite or room no.) ▶ <b>BUCKSNORT STREET</b> City, town or post office, state, and ZIP code <b>SAN ANTONIO, TX 78208</b>			
F Accounting method: (1) <input checked="" type="checkbox"/> Cash (2) <input type="checkbox"/> Accrual (3) <input type="checkbox"/> Other (specify) ▶			
G Did you "materially participate" in the operation of this business during 2018? If "No," see instructions for limit on losses . . . <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
H If you started or acquired this business during 2018, check here . . . <input checked="" type="checkbox"/>			
I Did you make any payments in 2018 that would require you to file Form(s) 1099? (see instructions) . . . <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
J If "Yes," did you or will you file required Forms 1099? . . . <input type="checkbox"/> Yes <input type="checkbox"/> No			

**Part I Income**

1	Gross receipts or sales. See instructions for line 1 and check the box if this income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked . . . ▶ <input type="checkbox"/>	1	<b>99,200</b>
2	Returns and allowances . . . . .	2	
3	Subtract line 2 from line 1 . . . . .	3	<b>99,200</b>
4	Cost of goods sold (from line 42) . . . . .	4	
5	<b>Gross profit.</b> Subtract line 4 from line 3 . . . . .	5	<b>99,200</b>
6	Other income, including federal and state gasoline or fuel tax credit or refund (see instructions) . . . . .	6	
7	<b>Gross income.</b> Add lines 5 and 6 . . . . . ▶	7	<b>99,200</b>

**Part II Expenses.** Enter expenses for business use of your home **only** on line 30.

8	Advertising . . . . .	8	<b>1,160</b>	18	Office expense (see instructions)	18	<b>1,500</b>
9	Car and truck expenses (see instructions). . . . .	9	<b>5,641</b>	19	Pension and profit-sharing plans . . . . .	19	
10	Commissions and fees . . . . .	10		20	Rent or lease (see instructions):		
11	Contract labor (see instructions)	11	<b>1,000</b>	a	Vehicles, machinery, and equipment	20a	<b>7,400</b>
12	Depletion . . . . .	12		b	Other business property . . . . .	20b	
13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions). . . . .	13	<b>4,000</b>	21	Repairs and maintenance . . . . .	21	<b>1,975</b>
				22	Supplies (not included in Part III) . . . . .	22	<b>12,800</b>
				23	Taxes and licenses . . . . .	23	<b>400</b>
				24	Travel and meals:		

<b>13</b>	Depreciation and section 179 expense deduction (not included in Part III) (see instructions) . . . . .	<b>13</b>	<b>4,000</b>	<b>22</b>	Supplies (not included in Part III) . . . . .	<b>22</b>	<b>12,800</b>
<b>14</b>	Employee benefit programs (other than on line 19) . . . . .	<b>14</b>		<b>23</b>	Taxes and licenses . . . . .	<b>23</b>	<b>400</b>
<b>15</b>	Insurance (other than health)	<b>15</b>	<b>1,200</b>	<b>24</b>	Travel and meals:		
<b>16</b>	Interest (see instructions):			<b>a</b>	Travel . . . . .	<b>24a</b>	<b>1,435</b>
<b>a</b>	Mortgage (paid to banks, etc.)	<b>16a</b>	<b>300</b>	<b>b</b>	Deductible meals (see instructions) . . . . .	<b>24b</b>	<b>270</b>
<b>b</b>	Other . . . . .	<b>16b</b>		<b>25</b>	Utilities . . . . .	<b>25</b>	<b>2,200</b>
<b>17</b>	Legal and professional services	<b>17</b>	<b>1,040</b>	<b>26</b>	Wages (less employment credits) . . . . .	<b>26</b>	<b>53,850</b>
				<b>27a</b>	Other expenses (from line 48) . . . . .	<b>27a</b>	<b>850</b>
				<b>b</b>	<b>Reserved for future use</b> . . . . .	<b>27b</b>	
<b>28</b>	<b>Total expenses</b> before expenses for business use of home. Add lines 8 through 27a . . . . . ▶	<b>28</b>		<b>28</b>		<b>28</b>	<b>97,021</b>
<b>29</b>	Tentative profit or (loss). Subtract line 28 from line 7 . . . . .	<b>29</b>		<b>29</b>		<b>29</b>	<b>2,179</b>
<b>30</b>	Expenses for business use of your home. Do not report these expenses elsewhere. Attach Form 8829 unless using the simplified method (see instructions). <b>Simplified method filers only:</b> enter the total square footage of: (a) your home: _____ and (b) the part of your home used for business: _____. Use the Simplified Method Worksheet in the instructions to figure the amount to enter on line 30 . . . . .	<b>30</b>		<b>30</b>		<b>30</b>	
<b>31</b>	<b>Net profit or (loss).</b> Subtract line 30 from line 29. • If a profit, enter on both <b>Schedule 1 (Form 1040), line 12</b> (or <b>Form 1040NR, line 13</b> ) and on <b>Schedule SE, line 2</b> . (If you checked the box on line 1, see instructions). Estates and trusts, enter on <b>Form 1041, line 3</b> . • If a loss, you <b>must</b> go to line 32.	<b>31</b>		<b>31</b>		<b>31</b>	<b>2,179</b>
<b>32</b>	If you have a loss, check the box that describes your investment in this activity (see instructions). • If you checked 32a, enter the loss on both <b>Schedule 1 (Form 1040), line 12</b> (or <b>Form 1040NR, line 13</b> ) and on <b>Schedule SE, line 2</b> . (If you checked the box on line 1, see the line 31 instructions). Estates and trusts, enter on <b>Form 1041, line 3</b> . • If you checked 32b, you <b>must</b> attach <b>Form 6198</b> . Your loss may be limited.						
				<b>32a</b>	<input checked="" type="checkbox"/> All investment is at risk.		
				<b>32b</b>	<input type="checkbox"/> Some investment is not at risk.		

# Evidence of Income

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

# Self-Employment Income

- Gross income to self-employment 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?”

# Self-Employment Income

**IRMO Hein (2020) 52 Cal.App.5<sup>th</sup> 519 – Loh presumption not for self-employment-extends Asfaw add-back of depreciation to equipment and vehicles**

- Burden of proof is on the party who has possession of the information

# 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)

# Tribal Income

- Pateras v. Armenta
  - Wages at Tribal businesses are taxable
  - Income from Tribal general welfare programs are taxable

# 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 support
    - **IRMO Stanton (2011) 190 CA4th 547**

# MILITARY PAY

- Pay vs. Allowances
- Use BAH or Value of Provided Housing?
- Home State
- Special Pays and Tax Rules
- Military Pay Tables:
  - <https://www.dfas.mil/militarymembers/payentitlements/Pay-Tables.html>
- BAH, COLAs and OHA rates:
  - <https://www.travel.dod.mil/allowances/basic-allowance-for-housing/bah-rate-lookup/>

# Income is.....

- SEVERANCE PAY
  - Purpose—reward for service; allow for time to become reemployed

# Income is.....

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

# What is NOT Income?

- Child support received 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)
- New Mate income - ***IRMO Knowles*** (2009) 178 Cal.App.4th 35

# What is NOT Income? (Con't)

- Loans
- 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**
- Social Security 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. **FC 4054**
  - 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.)

- Fluctuating income
  - Set base support and percentage of income (bonuses, incentive pay) over base level. **Ostler/Smith (1990)**  
**223 CA3d 272**
    - IRMO Mosley (2008) 165 Cal.App.4th 1375
  - Annualize if bonuses/commissions are consistent.
    - Co of Placer v. Andrade, supra.

# But Don't Forget.....

- Must consider appropriate deductions **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
  - Hardships

# 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.

# 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

# 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**

# 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. **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.**

# Earning Capacity (cont)

- Retirement scenario
  - **IRMO Bardzik (2008) 165 CA4th 292**
    - Reiterates BOP on parent who seeks to modify 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 versus expenses
    - Rule out other sources for payments as shown by evidence
  - Re-calculate with expenses as non-tax income - no tax consideration 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**.

# 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 new mate income would result in extreme or severe hardship to child
- **IRMO Knowles (2009) 178 CA4th 35**

## 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

# BONUS SECTION

Harman's Guide to  
Deviating from Guidelines

# 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 in 3-parent cases—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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