

Family Code Section 4058, subdivision (b), Since Enactment

Bill Section:

19931994 AB1500 Sec. 138. (Adds) - Chaptered (Stats.1993 Ch.219)

SEC. 138. Article 2 (commencing with Section 4050) is added to Chapter 2 of Part 2 of Division 9 of the Family Code, to read:

4058.

...

(b) The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children.

Bill Section:

20172018 AB2780 Section 1. (Amends) - Chaptered (Stats.2018 Ch.178)

SECTION 1. Section 4058 of the Family Code is amended to read:

4058.

...

(b) The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children.

Bill Section:

20212022 AB207 Sec. 4. (Amends) - Chaptered (Stats.2022 Ch.573)

SEC. 4. Section 4058 of the Family Code is amended to read:

4058.

...

(b) (1) The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children.

(2) When determining the earning capacity of the parent pursuant to this subdivision, the court shall consider the specific circumstances of the parent, to the extent known. Those circumstances include, but are not limited to, the parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings levels in the local community, and other relevant background factors affecting the parent's ability to earn.

(3) Notwithstanding any other law, the incarceration or involuntary institutionalization of a parent shall not be treated as voluntary unemployment in establishing or modifying support orders regardless of the nature of the offense. "Incarcerated or involuntarily institutionalized" has the same meaning as subdivision (e) of Section 4007.5.

Bill Section:

20232024 SB343 Sec. 6. (Amends) - Chaptered (Stats.2023 Ch.213)

SEC. 6. Section 4058 of the Family Code is amended to read:
4058.

...

(b) (1) The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children.

(2) When determining the earning capacity of the parent pursuant to this subdivision, the court shall consider the specific circumstances of the parent, to the extent known. Those circumstances include, but are not limited to, the parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings levels in the local community, and other relevant background factors affecting the parent's ability to earn.

(3) Notwithstanding any other law, the incarceration or involuntary institutionalization of a parent shall not be treated as voluntary unemployment in establishing or modifying support orders regardless of the nature of the offense. "Incarcerated or involuntarily institutionalized" has the same meaning as subdivision (e) of Section 4007.5.

...

(d) This section shall become inoperative on September 1, 2024, and, as of January 1, 2025, is repealed.

Bill Section:

20232024 SB343 Sec. 7. (Adds) - Chaptered (Stats.2023 Ch.213)

SEC. 7. Section 4058 is added to the Family Code, to read:
4058.

(b) (1) (A) In a case when a parent's annual gross income is unknown, the court shall consider the earning capacity of the parent.

(B) In a case when a parent's annual gross income is known, the court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children.

(2) When determining the earning capacity of the parent pursuant to this subdivision, the court shall consider the specific circumstances of the parent, to the extent known. Those circumstances include, but are not limited to, evidence of the parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings levels in the local community, and other relevant background factors affecting the parent's ability to earn.

(3) Notwithstanding any other law, the incarceration or involuntary institutionalization of a parent shall not be treated as voluntary unemployment in establishing or modifying support orders regardless of the nature of the offense. "Incarcerated or involuntarily institutionalized" has the same meaning as subdivision (e) of Section 4007.5.

...

(d) This section shall be operative September 1, 2024.

OLD Family Code Section 17400, subd. (d)(2) (in effect through 12/31/2025)	NEW Family Code Section 17400, subd. (d)(2) (becomes effective 1/1/2026)
Summons & complaint: • Must provide notice of the amount of guideline child support amount sought • Based on obligor income “as known to” the LCSA (i.e., actual income) • If actual income unknown to LCSA, then presumed income (full time statewide minimum wage) • Must include proposed judgment • Must provide notice that proposed judgment will become effective if obligor fails to file Answer within 30 days of service • Support effective date = 1st of month after summons & complaint filed	Summons & complaint: (d)(2)(A): Must provide notice of guideline child support amount sought • “Based upon one of the following methods”: → (i) Actual income if sufficient information thereof, unless LCSA has sufficient information to proceed under (ii) → (ii) if LCSA has sufficient information that earning capacity > actual income, and sufficient information to establish earning capacity under 4058(b), then MAY PLEAD earning capacity → (iii) if actual income unknown to LCSA, and sufficient information is available to establish earning capacity under 4058(b), then MUST PLEAD earning capacity • Complaint MUST ALLEGE “the steps first taken by the [LCSA] to establish” actual income, including without limitation: → (I) contact attempts (at least 3) → (II) seeking information about payor’s expenses and work history from party seeking support → (III) searching available databases (d)(2)(B): Complaint must state basis for support amount (actual or earning capacity). Complaint alleging earning capacity must inform support obligor of “the factors considered by the [LCSA] and used to determine” the earning capacity that is pled. (d)(2)(C): Complaint must provide notice that proposed judgment MAY become effective if no answer filed within 30 days of service; support effective date = 1st of month after summons & complaint filed. (d)(2)(D): If proposed jmt is based on earning capacity, LCSA must file motion for judgment (OK to serve by mail); if hearing continued, court MAY make temporary order.

OLD Family Code Section 17430 (in effect through 12/31/2025)	NEW Family Code Section 17430 (becomes effective 1/1/2026)
Default Judgments: (a) Upon default, “a judgment shall be entered without hearing, without the presentation of any other evidence or further notice to the defendant” (b) “[T]he proposed judgment . . . shall be conformed by the court as the final judgment”	Default and Earning Capacity Judgments: (a) (now includes subds. (1) & (2)): Default judgment procedure unchanged, but only if the proposed judgment is based on actual income. (b)(1) If proposed judgment is based on earning capacity, then LCSA must file motion for judgment (ok to serve by mail). (2) At motion for judgment hearing, court SHALL PERMIT appearance & participation of defendant and other parent, and presentation of evidence, even if no answer filed. (3) If no answer and no defendant appearance, then court enters default judgment AFTER considering 4058(b) factors and stating findings on record. Court may inquire of LCSA re: 4058(b) factors or “any other relevant matter.” Court may order support LOWER than amount prayed, but not higher. If defendant answers or appears, then court may order amount lower, same, or higher than amount prayed.

OLD Family Code Section 17432 (in effect through 12/31/2025)	NEW Family Code Section 17432 (becomes effective 1/1/2026)
Presumed-Income Set-Asides: (a) Set-aside for financial provisions of LCSA-obtained judgments (b) Applies to presumed income jmts (c) Set-aside OK if payor’s income “substantially different” than originally used in guideline calculation → means guideline result changes by 10% or more (d) Set-aside motion must include I&E or simplified financial statement (e) Burden on party seeking set-aside (f) Motion must be filed within one year of first collection received by LCSA (g) [LSCA review and motion for set-aside] (h) Court must consider: time passed, circumstances of default, relative hardship on child(ren), “caretaker parent,” and defendant, and other equitable factors (i) If set-aside granted, then court makes new support order based on current guideline, with same commencement date as before	Presumed Income and Earning Capacity Set-Asides: (a) Same as OLD Section 17432. (b) Applies to presumed income AND earning capacity judgments obtained under Family Code section 17430. (c) Same, but either income or earning capacity substantially different than originally used. (d) [language moved to (e)] NEW (d): Court may set aside and reinstate support for all or partial relevant time periods, depending on income or earning capacity information available. Set-aside for less than full retroactive period “shall not preclude a subsequent review . . . pursuant to subdivision (g).” (e) Same as former (d) - Motion must include I&E/simplified fin stmt. (f) Same as former (e) - Burden is on moving party. (g) Motion must be filed within two years of first involuntary collection (earnings assignment order or notice to withhold income) received by LCSA. Once such collection is received, LCSA must “notify the support obligor and . . . obligee in writing” that the collection was received and the two-year period has commenced. (h) [LCSA review and motion for set-aside (not barred by intervening modification).] (i) Same as former (h) - required considerations. (j) same as former (i) - terms, if set-aside granted.

HELPFUL CASES re: Income

MUST USE REPRESENTATIVE INCOME

IRMO Pletcher (2021) 68 Cal.App.5th 906, 914

IRMO Riddle (2005) 125 Cal.App.4th 1075, 1082

INCOME FOR PERMANENT SS DISTINGUISHED FROM INCOME FOR CS

IRMO Blazer (2009) 176 Cal.App.4th 1438, 1445 (“There are no statutes that address the computation of income for the purpose of determining spousal support.”)

COURT HAS DISCRETION IN DETERMINING INCOME

IRMO Williamson (2014) 226 Cal.App.4th 1303 1315 (discretion to include or exclude value of rent-free living)

Stewart v. Gomez (1996) 47 Cal.App.4th 1748, 1753-1756 (discretion to use actual income in some categories, imputed income in others)

EXAMPLES OF THINGS FOUND NOT TO BE INCOME

No requirement to work excessive hours/extraordinary overtime

IRMO Simpson (1992) 4 Cal.4th 225, 234-235

New partner earnings

IRMO Knowles (2009) 178 Cal.App.4th 35, 40-42 (disapproved on other grounds, *K.J. v. LAUSD* (2020) 8 Cal.5th 875, 888)

Attorney fees paid directly to attorney on individual’s behalf

M.S. v. O.S. (2009) 176 Cal.App.4th 548, 560 (but remanded for further findings)

Home equity

- *IRMO Williams* (2007) 150 Cal.App.4th 1221, 1241-1242
- *IRMO Henry* (2005) 126 Cal.App.4th 111, 119

Rental value of mortgage-free residence other than as an employment benefit

IRMO Schlafly (2007) 149 Cal.App.4th 747, 758-759 (but can justify deviation)

Proceeds from sale of business, ordinarily; Unrealized stock appreciation

IRMO Pearlstein (2006) 137 Cal.App.4th 1361, 1375-1376

Undifferentiated PI recovery

IRMO Heiner (2006) 136 Cal.App.4th 1514, 1524

Unvested/Inchoate/Non-Exerciseable Stock Options

IRMO Cheriton (2001) 92 Cal.App.4th 269, 288 (superseded by statute on other grounds, *IRMO Morton* (2018) 27 Cal.App.4th 1025, 1049)

Life insurance proceeds

IRMO Scheppers (2001) 86 Cal.App.4th 646, 649

Non-recurring, irregular gifts

- *Anna M. v. Jeffrey E.* (2017) 7 Cal.App.5th 439, 445, 452-455
- *IRMO Williamson* (2015) 226 Cal.App.4th 1303, 1314

Inheritance corpus

County of Kern v. Castle (1999) 75 Cal.App.4th 1442, 1453

Student loans

IRMO Rocha (1998) 68 Cal.App.4th 514, 517-518

EXAMPLES OF INCOME

VA benefits, depending on their purpose

Rose v. Rose (1987) 481 US 619, 636 (VA benefits not always meant solely for support of veteran)

Employment Fringe Benefits and Perquisites

- Tax refunds, HSA contributions, and 401(k) contributions
IRMO Morton (2018) 27 Cal.App.5th 1025, 1042, 1047
IRMO Olson (1993) 14 Cal.App.4th 1, 12-13
- Housing, auto, meal allowance, employer-paid disability
Stewart v. Gomez (1996) 47 Cal.App.4th 1748, 1752, 1754-1756
IRMO Schulze (1997) 60 Cal.App.4th 519, 528-530

Vested/Exercised/Exerciseable stock options

- *IRMO Macilwaine* (2018) 26 Cal.App.5th 514, 532
- *IRMO Cheriton* (2001) 92 Cal.App.4th 269, 286 (superseded by statute on other grounds, *IRMO Morton* (2018) 27 Cal.App.4th 1025, 1049)

“General welfare” payments not shown to be need-based

Pateras v. Armenta (2025) 109 Cal.App.5th 142, 150-151 2025 Cal.App.LEXIS 108, **4-6, *14 (B336065)

Trust income

Pratt v. Ferguson (2016) 3 Cal.App.5th 102, 110 (trust income available to pay CS, even if trust has “spendthrift” clause)

Recurring, regular gifts

- *IRMO Smith* (2015) 242 Cal.App.4th 529, 534
- *IRMO Alter* (2009) 171 Cal.App.4th 718, 733-737

Actual earnings on assets

IRMO Sorge (2012) 202 Cal.App.4th 626, 643

Portion of differentiated PI recovery representing lost earnings/earning capacity

- *IRMO Rothrock* (2008) 159 Cal.App.4th 223, 232
- *IRMO Heiner* (2006) 136 Cal.App.4th 1514, 1524

Proceeds of business sale to extent used for recipient’s expenses

IRMO Pearlstein (2006) 137 Cal.App.4th 1361, 1376

Earnings on inheritance corpus

County of Kern v. Castle (1999) 75 Cal.App.4th 1442, 1453

Overtime actually earned

County of Placer v. Andrade (1997) 55 Cal.App.4th 1393, 1396-1397 (unless unlikely to recur)

Lottery winnings

County of Contra Costa v. Lemon (1988) 205 Cal.App.3d 683, 688 (but see *County of Kern v. Castle* (1999) 75 Cal.App.4th 1442, 1449-1450)

Rent from subleasing bedroom

County of Orange v. Smith (2005) 132 Cal.App.4th 1434, 1446-1448

Bonuses, if actually earned and likely to recur

- *IRMO Mosely* (2008) 165 Cal.App.4th 1375, 1385-1386
- *IRMO Ostler & Smith* (1990) 223 Cal.App.3d 33, 52

PROPER AND IMPROPER BUSINESS EXPENSE EXCLUSIONS

Add back depreciation

- *IRMO Hein* (2020) 52 Cal.App.5th 519, 523, 533-534 (business equipment)
- *IRMO Rodriguez* (2018) 23 Cal.App.5th 625, 635 (motor vehicles)
- *Asfaw v. Woldberhan* (2007) 147 Cal.App.4th 1407, 1425-1426 (real property)

Expenses to restructure/diversify business – no add-back

IRMO Blazer (2009) 176 Cal.App.4th 1438, 1447-1448

IMPUTATION

Voluntary divestiture of employment: can go both ways

- *IRMO McHugh* (2014) 231 Cal.App.4th 1238, 1251-1252, 1254 (voluntary divestiture of employment justifies imputation of wages)
- *IRMO Lim & Carrasco* (2013) 214 Cal.App.4th 768, 777-778 (voluntary decrease in work hours not per se a reason to impute)
- *IRMO Hinman* (1997) 55 Cal.App.4th 988, 999-1000 (appropriate to impute to parent who chose to be stay-at-home parent to children of new relationship)
- *IRMO Paulin* (1996) 46 Cal.App.4th 1378, 1384 (voluntary departure from prior employment warranted imputation of former wages)

Reasonable return on underperforming assets

- *IRMO Sorge* (2012) 202 Cal.App.4th 626, 644
- *IRMO de Guigne* (2002) 97 Cal.App.4th 1353, 1363, 1365-1366
- *IRMO Destein* (2001) 91 Cal.App.4th 1385, 1393, 1396-1398

No imputation to aid recipient

Mendoza v. Ramos (2010) 182 Cal.App.4th 680, 686

Imputation to Incarcerated Obligor Depends on Proof

- *IRMO Smith* (2001) 90 Cal.App.4th 74, 82

Salary deferral under control of the earner: imputation of salary proper

IRMO Berger (2009) 170 Cal.App.4th 1070, 1073-1074, 1083

Termination for cause: no automatic imputation

IRMO Eggers (2005) 131 Cal.App.4th 695, 697, 701 (must still find ability and opportunity to earn)

UNRELIABLE EVIDENCE OF INCOME

Tax Returns

- *Swan v. Hatchett* (2023) 92 Cal.App.5th 1206, 1215 (tax return of self-reporting proprietor not presumed correct)
- *IRMO Hein* (2020) 52 Cal.App.5th 519, 541, 544-545 (tax return of self-reporting proprietor not presumed correct)
- *M.S. v. O.S.* (2009) 176 Cal.App.4th 548, 557-558 (tax law not dispositive of how funds are to be treated for purposes of child support)
- *IRMO Loh* (2001) 93 Cal.App.4th 325, 332-333 (federal income tax return possibly, but rebuttably, presumed correct)

Misleading/unreliable financial evidence justifies imputation/adverse inference

- *IRMO Barth* (2012) 210 Cal.App.4th 363, 369, 375-377 (untruthful/misleading/unreliable financial information warrants imputation tethered to other, more reliable evidence)

- *IRMO Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28, 34-38 (adverse inferences OK when financial evidence “doesn’t add up”)
- *IRMO Chakko* (2004) 115 Cal.App.4th 104, 110 (issue sanction: OK to use loan application)