



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

September 18, 2025

# NO INCOME? NO PROBLEM!

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## *VERSION 2.0*

*earning capacity in a post-presumed  
income world*

*Commissioners Angela Villegas and Bobby  
P. Luna*

*2025 Annual AB1058 Child Support Training  
Conference*



# Support Orders Need Income Findings

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

# Support Orders Need Income Findings

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

# “Income Available for Support”

## FC § 4058

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

# “Income Available for Support”

## FC § 4058

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Income includes, but is not limited to

- (1) wages, passive income, benefits, spousal support from different relationship;
  - (2) business income net of “expenditures required for the operation of the business”;
  - (3) work perks in the court’s discretion
  - AND potpourri: e.g., recurring gifts; dubious “loans”; inference of cash flow from unexplained household expenses, bank deposits, unreliable tax return (e.g., *Pratt v. Ferguson* (2016) 3 Cal.App.5th 102; *IRMO Smith* (2015) 242 Cal.App.4th 529; *IRMO Alter* (2009) 171 Cal.App.4th 718; *IRMO Calcaterra & Badakhsh* (2005) 132 Cal.App.4th 28)
- 
- **AND/OR.... EARNING CAPACITY (aka imputed income)**

# Real vs Fictional Income



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

***Do you see a problem with this statement?***

# Real vs Fictional Income

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

# Earning Capacity

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- FC § 4058(b)(1) – As of September 1, 2024, the statute addresses income **known** versus **unknown**
  - (b)(1)(A): When parent's (not *payor's*) annual gross income is **unknown**:
    - Court **shall** consider parent's earning capacity
  - (b)(1)(B): When parent's annual gross income is **known**:
    - Court **may**, in its discretion, consider parent's earning capacity in lieu of actual income—consistent with children's best interests, developmental needs, and parent's time share

# Parent's Specific Circumstances: Statutory Factors (FC 4058(b)(2))

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

# Best Interests of the Children

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



# Imputation *AND* Circumstantial Evidence of Actual Income

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- Both are fundamentally fact-based inquiries
- Evidence might support both:
  - (1) a finding that a party truly *has* ongoing regular income (e.g., based on regular payment of high expenses) **AND**
  - (2) a finding of an *earning capacity* consistent with regularly maintaining such expenses
- For any given income category, must choose one or the other, not both

# Imputation *AND* Circumstantial Evidence of Actual Income

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

# Imputation Limitations

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- Can you use **both** actual AND imputed (earning capacity) income? *Yes and no!*
  - Imputation is “in lieu of” actual income
  - Therefore: cannot combine both in a single category: e.g., actual plus imputed wages
  - But can go category by category: e.g., actual income in some categories (e.g., wages) PLUS imputed in others (e.g., unearned income, interest, dividends) (*Stewart v. Gomez* (1996) 47 Cal.App.4<sup>th</sup> 1748)

# Imputation Limitations

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## **Need-Based Cash Aid:**

- No imputation if person gets need-based cash aid (E.g., *Mendoza v. Ramos* (2010) 182 Cal.App.4<sup>th</sup> 680; *County of Yolo v. Garcia* (1993) 20 Cal.App.4<sup>th</sup> 1771)
- No imputation to incarcerated obligor absent proof of ability and opportunity to earn (FC § 4058(b)(3); *IRMO Smith* (2001) 90 Cal.App.4<sup>th</sup> 74, 82)
- But CAN STILL FIND aid recipient has ACTUAL income (e.g., paychecks, social media, expenses, admissions)

## **Contrary to children's best interests—when actual income is known:**

- Key limitation: “consistent with the best interests of the children, taking into consideration the overall welfare and developmental needs of the children, and the time that parent spends with the children” (FC § 4058(b)(1)(B))

# When to Impute?

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

# When to Impute? Other Possibilities:

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

# When to Impute?

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

# Initial Burden of Proof

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- Burden on party seeking imputation (Evid. Code § 500)
- Must show *ABILITY* and *OPPORTUNITY* to earn at the level urged (*IRMO Smith* (2001) 90 Cal.App.4<sup>th</sup> 74, 82)
- FC § 4058(b)(2) factors guide analysis of ability and opportunity
- Non-exhaustive list: can consider “other relevant background factors affecting the parent’s ability to earn”
- Once burden met, then burden shifts to other party

# Burden Shifts?

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- Yes!
- Once party seeking imputation meets his/her burden, then burden shifts.
- Now, party resisting imputation has burden to show lack of ability and/or opportunity to earn at the imputed level
  - E.g., could not find employment despite reasonable efforts; had no reasonable opportunities to secure the income urged

# So, Must Parent Keep that High-Paying Job?

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- Parent might have good reasons for leaving
  - No longer deriving job satisfaction (career stagnation, personality conflicts, toxic new supervisor, difficult/hostile work environment, hours/pay manipulation, golden parachute, etc.)
  - Poor work/life balance—stress causing physical/mental issues
  - Work demands impede visitation
  - New or worsening health condition
  - Changing economy, employer downturn
  - Countless other reasons for seeking a different situation

# Maybe not....

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- Law does not impose “inflexible income ratchet rule” under which a parent can never change jobs or otherwise reduce income without having child support calculated on the last and highest earnings level:

**We have every confidence that trial judges can sniff out shirking and efforts to skirt legitimate obligations well enough that a per se “last and highest income rule” is not only contrary to statute, but unwise and unnecessary as well.**

*IRMO Bardzik* (2008) 165 Cal.App.4<sup>th</sup> 1291, 1311-1313

# How Much To Impute?

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

# The Presumed Income World

- OLD FC § 17400(d):
- Applied only to default judgments
- When payor's whose income was unknown to LCSA
- In such cases, LCSA was required to plead full-time statewide minimum wage as the payor's income in calculating support
- OLD FC § 17430: On default, court must conform proposed judgment as the judgment
- Old sections ineffective 1/1/2026; sunset as of 1/1/2027

# The Post-Presumed Income World

- NEW FC § 17400(d):
- **Actual income known:** LCSA shall use actual income, unless” LCSA has “sufficient” information and evidence of greater earning capacity: then, LCSA plead earning capacity instead
  - *Note this is NOT limited to the “support obligor”*
- **Obligor’s** actual income unknown to LCSA, and LCSA has “sufficient” evidence of earning capacity: then, LCSA **shall** plead earning capacity
  - Complaint must “set forth the steps” taken to ascertain actual income
  - If matter goes by default, new procedures apply

# Earning Capacity Default Procedure, part 1

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- Work in progress
- Specifics will vary county to county
- NEW FC § 17400(d):
  - LCSA must file Motion for Judgment
  - Motion must be served on “defendant” (mail service OK)
  - Hearing set: may be continued with or without temp order

# Earning Capacity Default Procedure, part 2

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- NEW FC § 17430 earning capacity default judgment hearing:
  - Court must allow either/both parents to participate if they wish
    - *Best practice—let respondent file an Answer?*
  - Court must consider FC § 4058(b) factors “and state[ ] . . . findings on the record”
  - Even if no appearance, court “may inquire” of LCSA re: FC § 4058(b) factors “or any other relevant matter”
  - If no appearance, court can make a LOWER support order
  - If respondent answers or appears, then either HIGHER or LOWER order allowed



**SONOMA STATE**  
UNIVERSITY



# Earnings Capacity Study AB 1058 CS Training Conference

Sept 2025

Robert Eyster, PhD

Professor of Economics

Sonoma State University



# Agenda

1. Earning capacity and economics
2. Literature and economics of various parameters that affect earning capacity
3. Evaluate models in other states' guidelines regarding presumed income determination from an economics viewpoint
4. Provide a baseline model to determine presumed income that is flexible for:
  - a) All 58 counties, parent characteristics core information
  - b) FC 4058 and called-out barriers to earning capacity
  - c) Challenges range from lack of information to lack of third-party data on effects of characteristics and barriers

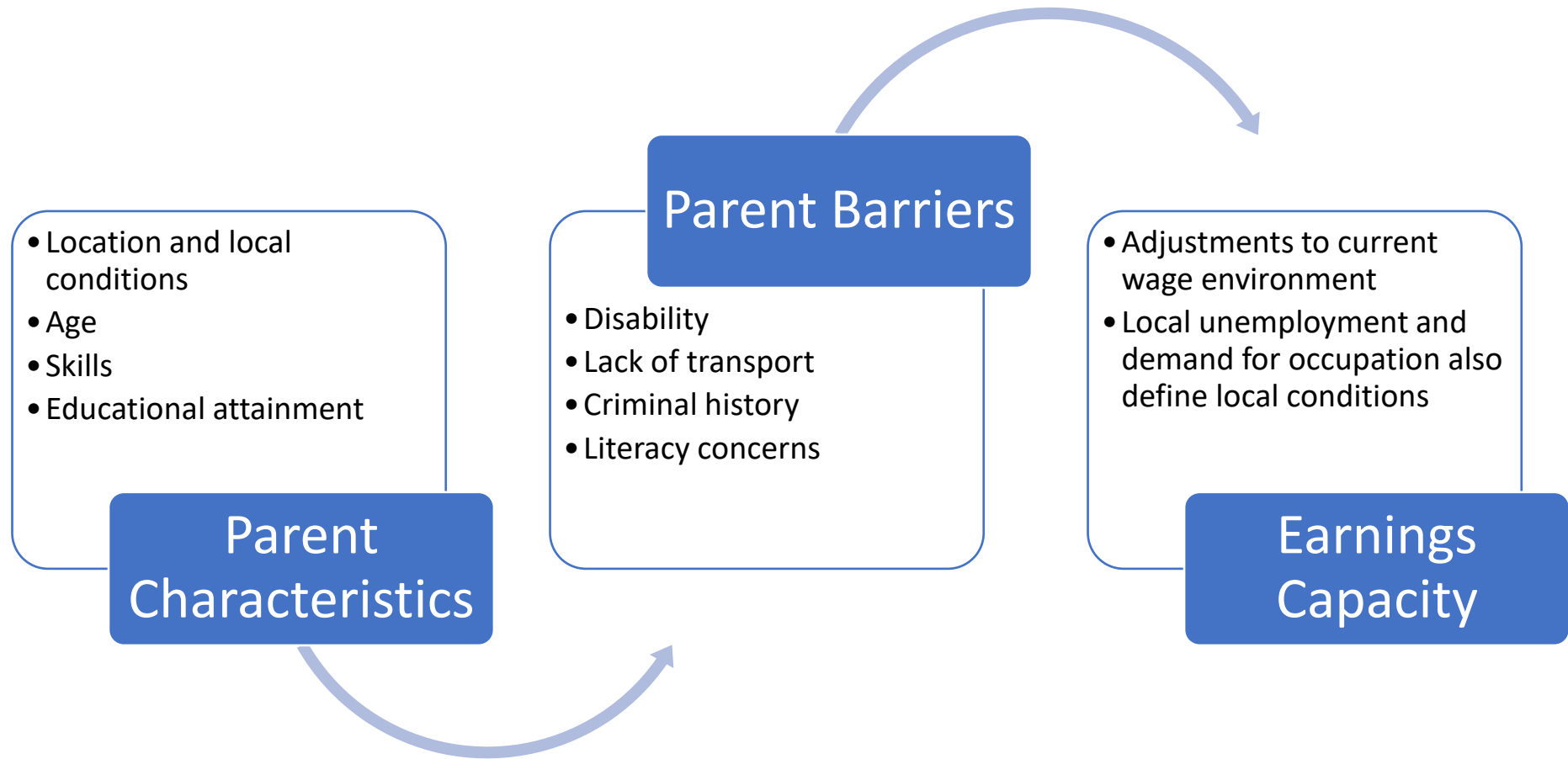


# Earning Capacity

## Economics

Parents have earning capacity based on time available: all have time

- Some parents have high skills, some no skills and no work history information
- Age, educational attainment, location all defined core “ability” and “opportunity”
  - Local labor market conditions help understand opportunity
- Parents that have disabilities, lack transportation options, lack literacy, or have a criminal background face “barriers” to earnings
- Blend provides earning capacity estimate: maximum based on info available





# Income Defined

Focus is on what one can earn from working

Trading time for a wage/salary:

- Constraint is how many hours per week are available

Wages by industry

- a) This is what employers pay generally, not necessarily by skill

Wage by occupation

- a) Closer to earnings capacity by specific skill
- b) NCP identifies skill and location, starts the process of determining what could be



# Literature

Somewhat limited on earnings capacity per se, really about human capital and barriers to employment

1. Human capital literature sprawling and really about building skills and implications for earnings
2. Detriment of other traits (“barriers”) in terms of:
  - Worker disability,
  - Previous incarceration/felony conviction,
  - Lack of own transportation reduce earnings
3. Educational attainment increases earnings as it rises: non-linear
4. Voluntary unemployment and underemployment as reductions to earning capacity
5. Time away from work and earnings capacity: will labor market be less likely to hire the worker?



## Other States

Most other states default to some variation on minimum wage

Federal poverty level in a few states

Very little about “earnings capacity” in modeling for imputed income

Deviations mentioned generally across states

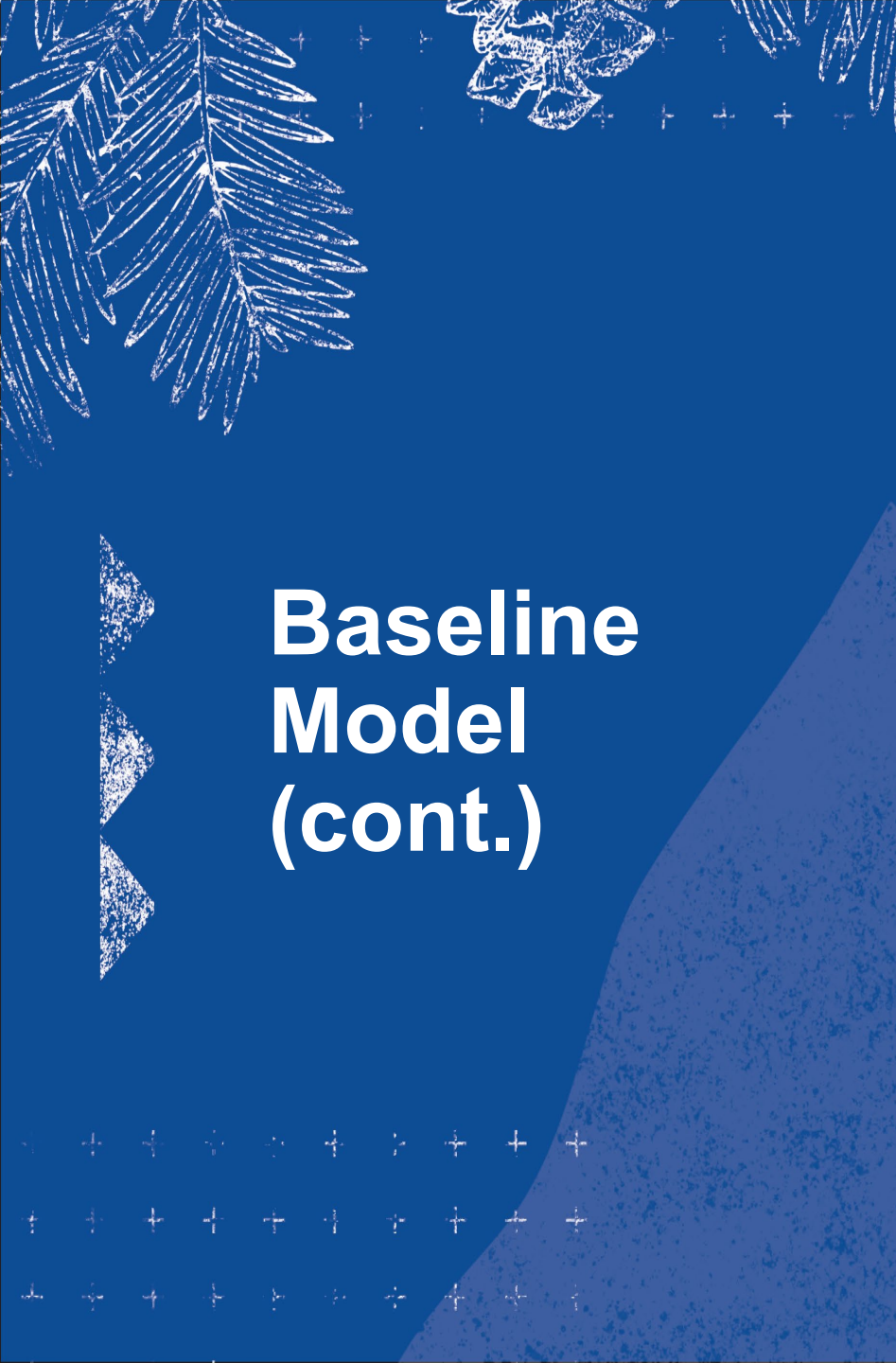
Some mix of presumed income and imputed (makes sense why there is some overlap in philosophy)



# Baseline Model Logic

## Economic Logic to Estimate Earning Capacity

1. Parent has work history: defines occupation most likely to generate earnings.
2. Parent has no history:
  - Assume minimum wage?
  - Assume median wage?
3. Data are assumed to be available for “core” parent characteristics:
  - Educational attainment
  - Age
  - Location (county in California)
4. These data help identify main ways parent has “ability” and “opportunity” to earn income



## Baseline Model (cont.)

What barriers exist?

1. Disability
2. Criminal record and incarceration
3. Lack of own transportation
4. Literacy issues

**Challenge: not all have third-party data links to determine an earnings estimate based on parent characteristics**

Hours available another barrier, perhaps for a variety of other reasons

# Summary

Earning Capacity estimate should be considered a “maximum” estimate:

Combines local labor conditions (wage by occupation or minimum wage), hours worked and then adjustments

Lower bound for estimates:

Current minimum wage x 20 hours/week

## Challenges:

- 1. Data availability for comprehensive estimate: default to minimum wage easy**
- 2. Information parsimony: some parents will have mysterious pasts**
- 3. Data updates: labor markets change over time**



# The End

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*Thank you!*

Commissioner Bobby Luna: [bluna@sftc.org](mailto:bluna@sftc.org)

Commissioner Angela Villegas: [avillegas@lacourt.org](mailto:avillegas@lacourt.org)

Professor Robert Eyler: [eyler@Sonoma.edu](mailto:eyler@Sonoma.edu)

[@bobby7007](https://twitter.com/bobby7007)