



TRAVERSING THE CHANGING TIDES OF CHILD SUPPORT



CHILD SUPPORT DIRECTORS ASSOCIATION



ANCHORED IN PRECEDENT

Earning Capacity Case Law and Appellate Review

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CHILD SUPPORT DIRECTORS ASSOCIATION



Relevant Statutes





Family Code § 17400 (d)(2)(A)

The simplified complaint form shall provide notice of the amount of child support that is sought pursuant to the guidelines set forth in Article 2 (commencing with Section 4050) of Chapter 2 of Part 2 of Division 9 based upon one of the following methods used to determine income:

- i. **If sufficient information is available to determine actual income**, pursuant to subdivision (a) of Section 4058 and Section 4060, **the local child support agency shall use actual income** as the basis of the proposed support obligation, **unless** the local child support agency has sufficient information to proceed under clause (ii).
- ii. If the local support agency has sufficient information that **the earning capacity is greater than the actual income, and sufficient evidence** is available to establish earning capacity pursuant to subdivision (b) of Section 4058, the local child support agency **may use earning capacity** as the basis of the proposed support obligation.
- iii. **If the actual income of the support obligor is unknown** to the local child support agency, **and sufficient evidence** is available to establish earning capacity pursuant to subdivision (b) of section 4058, **the local child support agency shall use earning capacity** as the basis of the proposed support obligation.





Earning Capacity



Family Code § 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.**



2-Prong Test & Family Code § 4058 Factors



ABILITY + OPPORTUNITY

- ⚓ **Employment and earnings history**
 - ⚓ **Job skills**
 - ⚓ **Educational attainment**
 - ⚓ **Literacy**
 - ⚓ **Age**
 - ⚓ **Health**
 - ⚓ **Assets**
 - ⚓ **Residence**
 - ⚓ **Relevant background factors affecting a parent**
- ⚓ **Other employment barriers**
 - ⚓ **Record of seeking work**
 - ⚓ **Local job market**
 - ⚓ **Availability of employers willing to hire the parent**
 - ⚓ **Prevailing earning levels in the local community**





Evolution of Earning Capacity





IRMO Destein, (2001) 91 Cal.App.4th 1385: The Philbin rule failed to survive the enactment of Family Code § 4058.

Philbin – courts recognized imputing income based on a parent’s potential earning capacity.

Regnery – clarified and refined how courts should assess earning capacity. Emphasizes courts must carefully evaluate the parent’s realistic ability to earn, considering factors. Hence, can’t be speculative or punitive.

PHILBIN

Courts limited consideration of a parent’s earning capacity to the narrow situation where the record demonstrated the parent was “deliberately shirking family financial responsibilities by intentionally suppressing income or refusing to accept or seek gainful employment.”

Family Code Section 4050 et seq

Expressly gives trial courts discretion to impute earning capacity to a parent “in lieu of” that parent’s actual income without specifically narrowing the appropriate circumstances to deliberate attempts to shirk support responsibilities.

Regnery Test

Ability and Opportunity

The statutory scheme does not restrict the manner in which the trial court may consider earning capacity in fixing child support

A bad faith finding is not a prerequisite



Thought process...



“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.4th 1291.





Evidence & Burden of Proof





PROVE IT UP – BURDEN OF PROOF



Burden of proof involves two distinct issues: (1) which party must prove a fact; AND (2) the degree to which that fact must be proved. (Evidence Code § 500.)

The threshold “earning capacity” test must be satisfied on the basis of the parent’s current circumstances.

- In other words, the court must determine that the parent presently has both the ability and opportunity to work (or otherwise earn) at the imputed earnings level.





PROVE IT UP – BURDEN OF PROOF



IRMO McHugh, (2014) 231 Cal. App. 4th 1238

- Where the obligor is the moving party requesting a reduction in child support due to job loss, that party has the burden of proof to establish a lack of ability and opportunity to earn income.
- Where the payee is the moving party requesting an increase in child support by imputing a higher income than the current order the payee parent has the burden of proof to show that the payor has the ability and opportunity to earn the imputed income.
- Once evidence is shown there is ability and opportunity, the burden shifts to the parent opposing imputation to show he/she could not secure the job despite reasonable efforts.





Unpublished Decision on 09/17/2025 (E083830)

Facts:

- Riverside DCSS filed a motion to modify child support in June of 2023 for 3 minor children residing primarily with Dad (**Jeffrey Millard**).
- Mom (**Breanna N. Sanderson**) alleged that she was disabled and unable to work. Mom provided an SSI award letter from 2020 as evidence of her disability.
- DCSS and Dad's Attorney requested updated verification of Mom's disability. Mom did not provide any updated evidence indicating she was disabled.
- Court found that the 2020 letter did not state that PPS was disabled.
- Dad's Attorney requested to impute income of full-time minimum wage to Mom.





Riverside DCSS vs. Sanderson



Facts:

- Court found that based on Mom's I&E she had completed H.S. and 2 years of college
- Mom testified that she was attending school part time with accommodations
- Court took judicial notice of the multiple minimum wage jobs in the current market including work from home jobs that could accommodate reasonable requests for accommodation. Court found Mom had the ability to work in some capacity.
- Court imputed minimum wage income of \$15.50/hr. at 40 hours per week and ordered her to pay \$664/mo.

Issue on Appeal:

- Mom contends the trial court abused its discretion by finding she was not disabled and imputing income of full-time minimum wage.
- Mom argued the court's decision was not supported by facts and the court was unfair and biased.





Riverside DCSS vs. Sanderson



Appellate Court:

- For purpose of child support, court can consider a parent's earning capacity instead of actual income—Family Code 4058 & *Mendoza vs. Ramos* (2010) 182 Cal. App.4th 680, 684-685
- Mom's inability to work—The trial court stated, "I don't see anything in this letter saying that you're forever disabled or that you are currently disabled."
- The Appellate Court must accept that the trial court properly interpreted the SSI award letter to conclude that Mom was not disabled at the time the motion to modify child support was filed and could consider imputation of income to Mom.





Riverside DCSS vs. Sanderson



Appellate Court:

- Burden of Proof—the moving party seeking to impute income has the burden (IRMO Bardzik (2008) 165 Cal.App.4th 1291, 1294). Party must present competent evidence of both ability and opportunity.
- There was no substantial evidence presented to support Mom's ability and opportunity to work.
- The family court did not consider Mom's job skills or the local job market.
- Nothing in the record to support the court's judicial notice of the local job market.
- No evidence of prior jobs
- No evidence of job skills that Mom possessed
- We can surmise that a person who graduates from H.S. could obtain a minimum wage job, DCSS and Dad had the burden to show both ability and opportunity.
- DCSS argued that the court had relied on the on the I&E, completion of H.S., 2 years of college, however, there were no evidence of the multiple jobs in the job market, Mom's qualifications, or specific accommodations.
- Case is reversed and remanded to the trial court.





Issue on Appeal:

- Did court err in declining to impute income based on last earnings? No.
- Did court err in determining Husband's income for support? Yes.

Appellate Court:

- The burden of proof cannot be met by evidence of ability alone.
- Husband cannot unilaterally arrange his business affairs to effectively preclude his children from sharing in the benefits of his current standard of living.
- Court could have used deferred salary to set support or deviate from guideline given Husband's assets.





Issue on Appeal:

- Appellant appealed the trial court's application of his earning capacity to determine child and spousal support at a time he was unemployed, without considering his present ability to pay.

Appellate Court:

- Affirmed trial court's consideration of earning capacity where Appellant demonstrated willful intent to avoid fulfilling his financial obligations through deliberate misconduct.
- Legal Standard:
 - Ability to work;
 - Willingness to work, and
 - Opportunity.

NOTE: subsequent case law has recognized the second prong should be taken for granted, and reduced the earning capacity analysis to a two-prong test. *IRMO Bardzik* (2008) 165 Cal.App.4th 1291.





Trial Court:

- Used Appellant's earning capacity, rather than actual income.
- Made a finding that PPS voluntarily reduced his earnings during the divorce proceedings without justification.
- Court relied on PPS's historical earnings.

Appellate Court:

- Affirmed trial court's finding.





Supreme Court

- Trial court has discretion to use earning capacity or actual income, with a key factor being whether the income reduction was within the party's control.
- No limitation on considering earning capacity, as long as it serves the children's best interests.
- Earning capacity should not be based on an excessive work regimen from the marriage, but rather on a reasonable work regimen at the time of support determination, considering factors like job availability, hours and conditions. Established employment norms are important but not controlling





Issue on Appeal:

- Can the court impute the parent's prior earnings when they quit their job in good faith to pursue another income opportunity?

Appellate Court:

- A parent's motivation for reducing available income is irrelevant when the ability and opportunity to adequately and reasonably provide for the child are present.
- Payment of appropriate support is a parent's primary obligation.
- A payor does not have the right to divest himself of his earning ability at the expense of the minor children.





Issue on Appeal:

- Should the court have imputed income? No.

Appellate Court:

- The party seeking imputation of income has the burden of proof to show ability and opportunity (vocational abilities, job ads, opportunities in related fields, etc.).
- Husband did not meet his burden merely by showing the income Wife earned prior to retirement.

Padilla Jail

- Court clarified that there may be times when the best interest of the children are promoted when parents leave stressful, time-consuming, although high paying jobs, to be able to spend more time with their children.





Trial Court:

- Used both earning capacity and disability benefits in calculating child support.
- Used rent-free housing on Indian reservation and meal allowance during vocational training.

Appellate Court:

- Upheld trial court's ruling.
- Family Code § 4058 – definition is expansive and non-exhaustive.
- It held the court can consider both earning capacity and disability benefits.
- Rent free housing – court can take into consideration any reduction in living expenses.
- Meal allowance is not a job-related expense, but an employee benefit and is not considered a deduction as Family Code § 4059 is narrowly construed.





Facts:

- Appellant was terminated by his employer for misconduct.
- He filed a motion to modify child support.
- Change of circumstances – he lost his job.

Trial Court:

- Denied his request to modify and imputed income based on his earnings from his former employment.
- In essence – equating the conduct that led to his loss of employment to a voluntary or intentional reduction in income.

Appellate Court:

- Reversed and remanded.
- Trial court erred by construing the termination of employment as voluntary where defendant's employment was terminated for using "extremely poor judgment."





Trial Court:

- Appellant (a commissioned investment salesman) appealed trial court's pendente lite orders for child support and spousal support, based on his last two months of commissions.

Appellate Court:

- Reversed and remanded for trial court to recalculate support based on net disposable income.
- Trial court abused its discretion by using an unrepresentative sample.
- Similarly, trial court's order could not be justified on the basis of imputing Appellant's historical earnings.





Facts:

- This is an appeal from an order setting pendente lite spousal support.
- Why do we care about a case that deals with pendente lite spousal support?
- Appellant's job – investment management business. Income fluctuates “considerably” from year to year depending on the performance of the market.
- **IRMO Riddle** held “court must calculate future income based on a representative sample of past income.”
- Appellant's earnings salary and bonus:
 - 2014: \$1.13 million
 - 2015: \$540,00
 - 2016: \$490,000
 - 2017: \$505,000
 - 2018: \$1,097,000
 - 2019: \$1.59 million
- Issue at trial: (1) Appellant had multiple business and volatile structure of pay. At issue, was Appellant's ability to pay.





- Trial court made a finding of Appellant's future income based on the most recent year of historical income.
 - What's the problem with this approach?
- **Issues before the Appellate Court:**
 - Court erred in basing his ability to pay on a single year of income; and
 - Court erred in disregarding the money he invested, and the losses he incurred, in the theater business in assessing his ability to pay.
- **Appellate Court:**
 - Order setting pendente spousal support is reversed.
 - Remanded for the court to recalculate pendente lite spousal support consistent with its opinion.





Credibility





Issue on Appeal:

- Was the imputation of income appropriate? Yes.

Appellate Court:

- When the credibility of one party is questionable and court cannot ascertain the party's actual income, it can consider the parties earning capacity and there was substantial evidence for the court's finding.





Issue on Appeal:

- Was the evidence at trial sufficient to support court's determination of Husband's income?

Appellate Court:

- Where the trial court recognizes deception, it may draw adverse factual inferences and even refer the matter to perjury prosecution.
- Court may rely on income reported in a loan application.





Imputing Income to Caretakers of Children



Issue on Appeal:

Was the imputation of income appropriate? Yes.

Appellate Court:

- Imputation was appropriate there was substantial evidence of earning capacity and order was consistent with the best interest of the children.
- Husband provided declaration with Wife's prior earnings in insurance industry, resume showing education and work history, letter from employment agency showing Wife had an earning potential of 35-50K, satisfactory letters from Wife's previous employers.





Issue on Appeal:

- Is imputation of income a deviation?
- Are job ads admissible? Did Husband meet his burden?
- Is there a policy against imputing income to primary caretakers?

Appellate Court:

- Imputation of income under FC 4058 is not a deviation.
- Job ads were admissible for the non-hearsay purpose of showing that there are available jobs. There is no burden to show the parent would be hired.
- Evidence of qualifications and available jobs is sufficient for the court to apply FC 4058.
- Primary caretakers can be imputed income, both parents have equal responsibility.





Issue on Appeal:

- Was the imputation of income appropriate? No.

Appellate Court:

- The trial court had no discretion to use earning capacity due to the exemption from the work requirement for single parents of young children under AFDC work incentive programs.
- The range of judicial discretion is determined by the rules contained in the general law and in the specific body or system of law in which the discretionary authority is granted.
- The policy in support of parent-provided childcare for very young children is stronger than the competing policy in favor of reducing the burden of AFDC on the public fisc by inducing recipients to seek and accept employment.





Issue on Appeal:

Was the denial of imputation proper? Yes.

Appellate Court:

- Father did not meet his burden to prove ability and opportunity.
- There was no evidence of Mother's vocational abilities and employment opportunities.
- In addition, imputation of income to a parent on CalWorks is contrary to public policy.





Thank You!

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