



## Broad Definition of 'Income' Has Limits in Support Cases

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In *In re Marriage of Henry*, 126 Cal.App.4th 111 (2005), the court rejected one of the more creative arguments regarding child support, holding that appreciation of a mother's home was not "income" for child support purposes. The case presents a limit on the ever-expanding definition of income for child support purposes.

On another issue, the court found that although the mother was an unemployed nurse who would find work soon, support should be based on her actual income (unemployment/disability payments) because the father did not present sufficient evidence of the amount she could earn from working. With respect to the father's income, the court found that his income was the amount of his expenses, which were greater than the amount of

The Court of Appeal began by explaining that "income" for child support is defined broadly. The court cited Family Code Section 4058(a) as defining "income" to be "income from whatever source derived." Despite this broad definition, appreciation of a home is not income.

The husband advanced the case of *In re Marriage of Destein*, 91 Cal.App.4th 1385 (2001). In that case, the court included in a parent's income a rate of return on an investment property that was not producing any income, based on the "earning capacity doctrine." That court held that the only limit on the application of that doctrine was the best interests of the children.

The court in *Henry* distinguished *Destein* because, in *Henry*, the property was the mother's residence, whereas in *Destein*, the property was an investment. Also, the court in *Destein* explicitly held

With regard to the father's income, the mother argued it was \$12,000 per month before taxes, based on her expert's declaration of the amount he needs to maintain his lifestyle.

The father's income and expense declaration stated that his net monthly income was \$2,254. His tax return reported total income of \$33,897. The Court of Appeal upheld the trial court's finding that the father's income should be the amount of his monthly expenses on his income and expense declaration, \$6,461. A finding that net income must be equal to expenses is "a product of logic and reason that rests on the evidence."

The Court of Appeal acknowledged the rule that income reported on a tax return is presumptively correct for child support purposes, but it departed from that presumption. The trial court acted within its discretion in giving father's income and expense declaration more weight than the mother's expert's declaration.

The mother's request for a hardship deduction for her baby was rejected. The Court of Appeal held that the deduction is not automatic, and it is limited "to the unusual situation, such as where the custodial parent does not receive any support for these children or the reasonable minimum living expenses are unusually high in the context of the family's income."

Also, a new spouse's income may be considered in deciding whether to grant the deduction. In this case, there was nothing in the record to support a finding for the deduction: The mother's new spouse earned \$6,000 per month, and her possible future income was \$14,000 per month or more.

This case highlights important issues for other child support cases. The father was very creative in arguing that the appreciation of the mother's home should be considered support, and he convinced the trial court. Although this case somewhat contracts the broad definition of income, all assets of the other party should be discovered to determine whether there are any "investment" assets upon which a rate of return can be imputed.

For example, income could be imputed based on a party's collection of art or coins. In this same light, a litigant could be very careful of how assets are valued on the income and expense declaration because asset values could be used as a basis for imputing income.

With respect to the mother's income, it is unclear why the father did not obtain a vocational examination. A cost-benefit analysis for each case can determine whether the expense of the examination is justified.

Finally, if a party's income is believed to be greater than he or she declares, bank records and credit cards should be reviewed to determine whether expenses exceed income. Unfortunately, the opinion does not state why the trial court disregarded the mother's expert's report. This would have provided guidance for future cases.

In any case, before submitting an income and expense declaration with expenses exceeding income, the ramifications should be carefully considered, and all debt incurred to finance the expenses should be included.

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income he declared on his income and expense declaration, and on his income tax return.

The parties had two minor children and were married in November 1983. Pursuant to a stipulated judgment filed in 2000, the father had primary physical custody of the children, and the mother paid the father \$500 support per month for each child.

In April 2003, the mother filed in an order to show cause to lower support because complications from her pregnancy prevented her from working. Her profession was medical sales and nursing. Her child was born in July 2003.

Her order to show cause was not heard until December 2003, with the order being entered in January 2004. The trial court increased support to \$735 per month per child, effective Jan. 1, 2004. The Court of Appeal reversed and remanded the case for a recalculation of child support because the trial court improperly considered the appreciation of mother's home as her "income."

The mother did not dispute the court's findings regarding her ability to find employment. These findings included that she "is highly skilled in a sought-after profession: nursing, she expects to be re-employed, and she was currently receiving unemployment benefits and is seeking employment. Nurses find jobs quickly."

The trial court found that wife's income was \$8,000 per month consisting of the appreciation of her home. Her home appreciated in value \$240,000 from April 2003 to December 2003, according to the mother's income and expense declaration.

The mother jointly owned the home with her new husband. The trial court attributed half of the appreciation to the mother, and prorated the amount to \$13,000 per month. The court then, without explanation, "exercised its discretion" and lowered the amount to \$8,000 per month.

that it was not deciding whether a rate of return should be imputed to a parties' residence for child support purposes.

The court also found support in *Mejia v. Reed*, 31 Cal.App.4th 657 (2003). The court's holdings in that case included that "support payments usually are paid from present earnings, not liquidation of assets." The court also held that assets are only relevant to support in "exceptional circumstances." Even when the assets are relevant, the court considers earnings from "invested assets," or when a special circumstance justifies deviation from the guideline formula.

The court also interpreted Family Code Section 4058 to exclude appreciation of a home. The examples of income in that section are all money received by a party, "including but not limited to, the following: (1) Income such as commissions, salaries, royalties, wages."

The court further reasoned that if the Legislature had intended to include appreciation of a home as income, it would have explicitly stated this. The Legislature did not intend to require a parent to sell or refinance his/her home to pay support.

The trial court explicitly based its finding of the mother's income on the property appreciation, and the father did not meet his burden of proof regarding the mother's earning ability.

Interestingly, on a related issue, the trial court properly held that the mother would be employed soon. She claimed that the proper amount of her insurance deduction should be her \$607 per month COBRA coverage. The court utilized \$258 per month, the amount she paid while employed based on the theory that COBRA coverage was temporary, and that she would be employed soon.

Apparently, the trial court had sufficient evidence to find that she would be employed soon, but not what her income would be. The Court of Appeal directed the trial court to recalculate support effective Jan. 1, 2004, based on the mother's actual income.

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