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Please note:

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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

Attorneys for

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF _____

In re

MARRIAGE OF _____

Case No.

TRIAL BRIEF RE: REAL ESTATE SALES AND HOLDINGS AS INCOME

INTRODUCTION

Husband owns several real properties, presumably as investments. During the course of this dissolution action, Husband sold one such property, which netted him more than \$500,000. During the past eight years, Husband has netted more than \$800,000 in similar real estate transactions. The issue before the Court is whether Husband’s real estate sale proceeds can be considered income for child support purposes. A related issue is whether Husband’s remaining real estate holdings can be attributed a hypothetical rate of return, which is likewise considered as income for child-support purposes.

ARGUMENT

1. The Court can consider Husband’s real estate sales proceeds.

“California has a strong public policy in favor of adequate child support.” *Marriage*

1 of *Joseph* (2012) 202 Cal.App.4th 626, 641 (citations omitted). To ensure adequate
2 support, the California legislature has developed certain guidelines California courts must
3 use in calculating child support. Fam. Code §§ 4052, 4053; *Joseph, supra*, at 641.
4 Moreover, in setting guideline support, courts are required to adhere to certain principles,
5 such as: “[a] parent’s first and principal obligation is to support his or her minor children
6 according to the parent’s circumstances and station in life.” Fam. Code § 4053(a); *Joseph,*
7 *supra*, at 641 (citations omitted).

8 The California Legislature did not limit the guidelines simply to parental income
9 from salary, return on investment, or from any other particular source; instead, it adopted
10 much broader concepts, including “station in life,” “ability to pay,” and “standards of
11 living.” Moreover, although the guideline amount is presumptively correct, that
12 presumption can be rebutted by a showing that application of the formula would be unjust
13 or inappropriate due to special circumstances. Fam. Code § 4057(b)(5).

14 Under § 4058, the trial court can either calculate the guideline amount by using a
15 parent’s actual income, or it can impute income to a parent, based on the parent’s earning
16 capacity if it would be more appropriate and in the child’s best interests. *Id.* Alternatively,
17 the court can use Family Code § 4057. *Id.*

18 Section 4058 provides further guidance in ascertaining each parent’s income in
19 calculating the guideline child support amount. Section 4058 characterizes “income” very
20 broadly, providing, in pertinent part: “[t]he annual gross income of each parent *means*
21 *income from whatever source derived . . .*” This section then lists various types of income
22 the court can consider, but the list is not exhaustive. *Joseph, supra*, at 642. In fact, “[t]he
23 judicially recognized sources of income cover a wide gamut.” *Id.* (citations omitted). The
24 California Supreme Court has refused to read any limitation into a trial court’s discretion
25 to impute income when in the child’s best interests. *Marriage of Williams* (2007) 150
26 Cal.App.4th 1221, 1240. Note also that “income” means not only income from labor; it can
27 also be income from passive assets and even assets that operate at a loss. *See, e.g.*
28 *Williams, supra; Joseph, supra; Marriage of Destein* (2001) 91 Cal.App.4th 1385; and

1 *Marriage of Dacumos* (1999) 76 Cal.App.4th 150.

2 Accordingly, the Court can consider “income” Husband received from selling real
3 estate investment properties for the purposes of calculating child support. The Court can do
4 so either by imputing income to Husband under Family Code § 4058 or by finding that the
5 guideline amount based on Husband’s actual income results in an unfair award, and
6 Husband’s other assets constitute a special circumstance under § 4057.

7
8 **2. The Court can use Husband’s real estate holdings to calculate support.**

9 The Court can also consider any real estate properties Husband currently owns,
10 even though they are not for sale or producing any income. Although assets are not always
11 used in calculating child support, the court can use a parent’s assets in determining earning
12 capacity, or if a party has shown unfairness and special circumstances warranting a
13 deviation from the guideline amount. *Id.* And, since parents must support their children
14 according to their ability, station in life, and standard of living, it makes sense that a court
15 would consider the parent’s assets. *Id.*

16 Several courts have held that real estate assets can be considered income for
17 purposes of calculating child support. *Destein, supra*, at 1391; *Williams, supra*, at 1240;
18 *Marriage of Dacumos* (1999) 76 Cal.App.4th 150, 155. Moreover, where the real estate is
19 for investment purposes, and not income-producing, the court can impute a hypothetical
20 reasonable rate of return to the real estate and count that as income. *Id.* Indeed, *Destein*
21 held that, “[t]he only statutory limitation on the court’s discretion to apply the earning
22 capacity doctrine to investment assets is the best interests of the child.” *Id.* at 1394. In
23 *Destein*, the court applied a 6% rate of return to non-income-producing real estate
24 holdings, but other courts have used a 3% rate of return. *Williams, supra*, at 1240.

25 In *Dacumos*, the court even applied a reasonable rate of return where the parent
26 claimed the investment property operated at a loss. The court reasoned: “[j]ust as a parent
27 cannot shirk his parental obligations by reducing his earning capacity through
28 unemployment or underemployment, he cannot shirk the obligation to support his child by

1 underutilizing in-come-producing assets.” *Id.* at 155. A trial court has discretion to impute
2 income to a parent’s equity even in their primary residence if a proper showing is made
3 under § 4057. *Williams, supra*, at 1244.

4 [Father] may not voluntarily prefer his businesses to his child’s right to receive current
5 support in accordance with [Father’s] abilities. [Father] may not invest in businesses and
6 thereby minimize his support obligation while he maintains a wealthy lifestyle. [Father]
7 may not divest himself, in whole or in part, of his earning ability at the expense of his
8 minor child. [Father] may not take a break from his child support obligation in favor of his
9 business investments.

10 *Joseph, supra*, at 648.

11 12 **CONCLUSION**

13 In light of the strong public policy in favor of adequate child support, coupled with
14 the very broad definition of “income” to carry out that policy, this Court should consider
15 both the income from the recent real estate transaction, plus a reasonable rate of return on
16 any remaining real estate holdings, in calculating child support.

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18 Dated:

Respectfully submitted,

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22 Attorneys for
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