<u>In re Marriage of Destein (8/30/01 – 91 Cal. App. 4th 1385)</u>

This case involved a husband challenging the amount of child support awarded. The trial court determined his income for child support purposes by imputing a rate of return to his separate property investments which included non-income producing real estate. The Court of Appeal affirmed the decision of the trial court.

During their marriage, Joseph and Patricia Destein enjoyed a “lavish” lifestyle that was supported by income from separate property investments made with the proceeds from the sale of his businesses. Joseph did not work and Patricia only worked part-time. In her supporting declaration, Patricia explained that they did not rely on Joseph’s minimal income for their living expenses, but rather on his, “substantial wealth and property.”

In his income and expense declaration, Husband listed assets totaling over $6 million:

- $1.2 million in stocks, bonds, and other securities
- $1.2 million in a retirement account
- $2.5 million in investment real estate
- $1.2 million in his personal residence

He listed his monthly expenses at $14,488 with an annual income of $65,555 derived from investment income reduced by net real estate losses.

Patricia’s expert proposed that support be based on the income that would be produced if Husband’s equity in his real estate investments were invested in income producing assets.

The accountant used the purchase price of real estate investments at their recent acquisition, reduced by the costs of a hypothetical sale, including taxes. He then added the value of the husband’s brokerage accounts to the real estate value and applied a 6 percent investment return. The accountant testified that a 6% return could be realized without risk through an investment in a short to intermediate-term Treasury bill or certificate of deposit.

The accountant also included Income from the husband’s $1.2 million retirement account, but the trial court rejected that approach because, at 58 years of age, the husband would not be eligible to receive distributions until he was 59 1/2.

The accountant did not impute a rate of return to Joseph personal residence.

The Husband tried to argue that the trial court abused its discretion because it was not entitled to impute investment earnings to assets that did not "historically" produce income. The Court of Appeal stated that while an asset's income-producing history is a factor that should be considered, it is not a barrier to the exercise of discretion, and that "nothing in Family Code §4058(b) suggests that the court's discretion to charge a reasonable rate of return to an investment asset depends on [the asset's] income-producing history."

Joseph also tried to argue that the court was not entitled to second guess his investment strategy. He said that since his separate property investments during the marriage were devoted to growth, not income, the trial court must defer to his reasonable investment approach. The Court of Appeal again disagreed. They wrote that similar to a situation in which the courts should consider, but not always defer to, employment choices, there was no good reason to not adopt a different approach when imputing income to investment assets.

In its discussion, the Court of Appeal pointed out that historically California courts limited consideration of a parent's earning capacity to situations where the parent was found to be intentionally suppressing income to avoid meeting family financial responsibilities. The Court noted that, currently, Family Code §4058 expressly authorizes the court to attribute income, without regard to deliberate attempts to reduce income, adding:

> *"So long as a parent has an earning capacity, that is, the ability and the opportunity to earn income, the trial court may attribute income."*