

## Chapter 178: How Much Can You Earn? Increasing Access to Vocational Evaluators

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### Code Sections Affected

California Family Code § 4058(b) and § 4331(e)(1) (amended).  
AB 2780 (Bloom); 2018 Stat. Ch. 178.

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I. INTRODUCTION

Divorce often invokes emotions of fear, uncertainty, and anger.<sup>1</sup> Along with the emotional strain accompanying separation, a concealed financial reality appears: “two people—two families—simply cannot live apart as cheaply as they lived together.”<sup>2</sup> Divorced parents face issues of how they will support their children.<sup>3</sup> It is not uncommon for one parent to take time off work to spend more time with the children, while the other parent finds a job to generate income.<sup>4</sup> “Both spouses see the other’s actions as too little, too late, creating even more problems and adversity in the divorce. Everyone feels used, upset, and underappreciated.”<sup>5</sup>

Ultimately, both parties to a divorce must discuss spousal and child support.<sup>6</sup> “Both sides charge that the other can earn more money and contribute more to the family’s well-being.”<sup>7</sup> Sometimes, in an attempt to pay minimal child support, parties will sometimes switch jobs or refuse to find employment.<sup>8</sup> If parties are attempting to minimize their child support payments, a vocational counselor will be forced the step in.<sup>9</sup> The vocational counselor will assess the kinds of work a party can do, his or her salary potential and employment opportunities depending on the parties’ age, education, work experience, and other factors that “enhance or limit ability to work.”<sup>10</sup>

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1. Martin A. Kranitz, *Understanding the Vocational Evaluation*, 35 FAM. ADVOC. 38, 38 (2012), available at [https://1.next.westlaw.com/Link/Document/FullText?cite=35SUM+Fam.+Advoc.+38&findtype=Y&transitiontype=Default&contextdata=\(sc.Default\)&originationcontext=RequestDirector&\\_\\_lrTS=20180802175142928](https://1.next.westlaw.com/Link/Document/FullText?cite=35SUM+Fam.+Advoc.+38&findtype=Y&transitiontype=Default&contextdata=(sc.Default)&originationcontext=RequestDirector&__lrTS=20180802175142928) (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*; Mike Nelson, *Using Vocational Evaluations in Family Law Cases*, VENTURA CTY. STAR (June 22, 2016), <http://archive.vcstar.com/sponsored/Richard-Ross-Using-vocational-evaluations-in-family-law-cases-384035181.html> (on file with *The University of the Pacific Law Review*).

5. Kranitz, *supra* note 1.

6. *Id.*

7. *Id.*

8. See Edward M. Mazze and Candace E. Mazze, *Putting a Vocational Expert to Work in a Divorce Case*, 36 FAM. ADVOC. 26, 30 (2014), available at <http://lawschool.westlaw.com/shared/westlawRedirect.aspx?task=find&cite=36+Fam.+Advoc.+26&appflag=67.12> (on file with *The University of the Pacific Law Review*); see *In re Marriage of McHugh*, 231 Cal. App. 4th 1238, 1242 (4th Dist. 2014) (showing a former spouse voluntarily terminating his job to avoid support obligations).

9. Mazze, *supra* note 8.

10. Kranitz, *supra* note 1.

Chapter 178 increases access to vocational evaluations by expanding the educational requirements for vocational counselors.<sup>11</sup> In addition, Chapter 178 allows courts to consider the overall welfare and developmental needs of the child, as well as the time the parent spends with the child when determining the earning capacity of a parent.<sup>12</sup>

## II. LEGAL BACKGROUND

In California, spouses owe a duty to support one another<sup>13</sup> and their children if they have any.<sup>14</sup> Section A discusses California's statewide uniform guideline for calculating child support.<sup>15</sup> Section B examines a court's determination of spousal support.<sup>16</sup> Section C explores the role of earning capacity in child and spousal support proceedings and Section D looks at imputation of income.<sup>17</sup>

### A. *The Statewide Uniform Guideline Regarding Child Support*

California courts must abide by the principles set out in the statewide uniform guideline relating to child support.<sup>18</sup> A court must consider "each parent's actual income and level of responsibility for the children,"<sup>19</sup> and must hold the parents accountable to pay "according to his or her ability."<sup>20</sup> Furthermore, the guideline operates under the assumption that the parent with primary physical care will "contribute a significant portion of available resources for the support of the children."<sup>21</sup> Therefore, child support is intended to "improve the standard of living of the custodial household to improve the lives of the children."<sup>22</sup>

Parents owe a duty to support their minor and sometimes adult children.<sup>23</sup> When parents cannot agree, courts determine the appropriate child support amount.<sup>24</sup> To calculate child support under the statewide uniform guideline, courts assess "how much money the parents earn or can earn and other income

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11. Assem. B. 2780, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

12. *Id.*

13. CAL. FAM. CODE § 4300 (West 1992).

14. *See* CAL. FAM. CODE §§ 3900–3901 (West 1994) (showing parents owe a duty of support to their children).

15. *Infra* Part II.A.

16. *Infra* Part II.B.

17. *Infra* Parts II.C–D.

18. CAL. FAM. CODE § 4053 (West 1994).

19. *Id.* § 4053(c).

20. *Id.* § 4053(d).

21. *Id.* § 4053(i).

22. *Id.* § 4053(f).

23. CAL. FAM. CODE §§ 3900, 3910 (West 2017).

24. *Child Support*, CAL. JUD. BRANCH, <http://www.courts.ca.gov/selfhelp-support.htm> (last visited Aug. 10, 2018) (on file with *The University of the Pacific Law Review*).

each parent receives.”<sup>25</sup> In addition, courts consider how many children the parents have together, the time spent by each parent with their children, the tax filing status of each parent, and other expenses and factors.<sup>26</sup> Following the calculation, a court may order the parents to share the cost of child care, health-care expenses, visitation, and expenses for the child’s educational “and other special needs.”<sup>27</sup> Moreover, “the guideline amount is presumed to be correct,”<sup>28</sup> and the court “can only order something other than the guideline amount in very limited situations.”<sup>29</sup>

## B. Spousal Support

In divorce or separation proceedings, California courts may order a spouse or domestic partner to pay the other.<sup>30</sup> A court must be “just and reasonable” when determining how much a party pays and for how long.<sup>31</sup> A court must also base its determination on “the standard of living established during the marriage.”<sup>32</sup> To determine the time period and amount a party must pay, a court reviews factors such as the earning capacity of each party, the supported party’s marketable skills, the supported party’s period of unemployment, and the needs of each party “based on the standard of living established during the marriage.”<sup>33</sup>

### 1. Vocational Evaluations/Examinations

Courts may also order a party in a divorce or separation proceeding to

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25. *Id.*

26. See CAL. FAM. CODE § 4055 (West 2018) (showing the formula for child support calculation:

CS = K [HN – (H%) (TN)]. CS is the child support amount. K is the amount of both parents’ income allocated for child support. K is determined by another formula: K = 1 + H% (if H% is less than or equal to 50%) or K = 2 - H% (if H% is greater than 50%) times the fraction determined by a party’s income per month. HN is the higher earner’s net monthly disposable income and H% is the percentage of time the high earner has primary physical responsibility of the child compared to the other parent. TN is the total net monthly disposable income of both parties. For more than one child, CS is multiplied by the number of children outlined in Section 4055 of the Family Code. The net monthly disposable income is calculated by dividing the annual net disposable income by 12. The annual net disposable income is determined by deducting state and federal income tax, health insurance, union dues, and other child or spousal support being paid to a person, from a party’s annual gross income. The annual gross income of each parent is income derived from commissions, salaries, royalties, wages, bonuses, etc., and does not include child support payments already received or income derived from any public assistance program. It is within the court’s discretion to consider a parent’s earning capacity instead of the parent’s actual income, if doing so is within the best interests of the child); *Child Support, supra* note 24.

27. *Child Support, supra* note 24.

28. CAL. FAM. CODE § 4057(a) (West 2014).

29. See *id.* § 4057 (explaining situations where a court can change the guideline amount); see also CAL. FAM. CODE § 4057.5 (West 1995) (further showing a court’s ability to change the guideline amount); *Child Support, supra* note 24.

30. CAL. FAM. CODE § 4330(a) (West 2000); *Child Support, supra* note 24.

31. CAL. FAM. CODE § 4330(a) (West 2000).

32. *Id.*

33. CAL. FAM. CODE § 4320 (West 2016).

undergo a vocational evaluation gauging that party's ability to maintain him- or herself at the "marital standard of living."<sup>34</sup> A party who wants to conduct a court-ordered examination must notify all parties and submit a motion to the court.<sup>35</sup>

A vocational evaluator is someone with "sufficient knowledge, skill, experience, training, or education in interviewing, administering, and interpreting tests for analysis of marketable skills, formulating career goals, planning courses of training and study, and assessing the job market."<sup>36</sup> A vocational evaluator must possess: a master's degree in the behavioral sciences; the ability to interview clients and assess marketable skills (considering the age constraints, physical and mental health, education, experiences, time constraints, and geographic mobility constraints); knowledge of current employment conditions, job market, and wages in a geographic area; an understanding of education and training programs in the area; and the capability to administer and interpret inventories for assessing career potential.<sup>37</sup> Additionally, the court may order the supporting spouse to pay the "expenses and costs of the counseling, retraining, or education" of the supported spouse.<sup>38</sup>

### C. Earning Capacity

Three types of earnings exist: actual earnings, expected earnings, and earning capacity.<sup>39</sup> Earning capacity is based on a party's ability and opportunity to find work<sup>40</sup> and "refers to what a parent could potentially earn, rather than what he or she actually is earning."<sup>41</sup> California courts may use earning capacity to determine child and spousal support.<sup>42</sup> For example, a court may utilize a parent's earning capacity instead of the parent's income for child support calculations.<sup>43</sup>

The case of *In re Marriage of Regnery* established earning capacity as being composed of:

- (1) the ability to work including such factors as age, occupation, skills,

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34. CAL. FAM. CODE § 4331 (West 2005).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* § 4331(f).

39. Mazze, *supra* note 8.

40. *Id.*

41. *Hearing on AB 2780 Before the S. Rules Comm.*, 2018 Leg., 2017–2018 Sess. (Cal. 2018) [hereinafter *S. Rules Comm. Hearing*] (on file with *The University of the Pacific Law Review*).

42. *See In re Marriage of Simpson*, 4 Cal. 4th 225, 232 (1992) (using earning capacity to determine child support and spousal support); *see also* CAL. FAM. CODE § 4320 (West 2016) (explaining a court's use of earning capacity for spousal support); *see also* CAL. FAM. CODE § 4058(b) (West 1994) (explaining a court's discretion in considering earning capacity).

43. FAM. § 4058(b).

education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire.<sup>44</sup>

Case law has affirmed that “when the ability to work or the opportunity to work is lacking, earning capacity is absent and the application of the standard is inappropriate.”<sup>45</sup> However, “as long as ability and opportunity to earn exist, the court has discretion to consider earning capacity.”<sup>46</sup>

Vocational evaluators are employed to determine the earning capacity of the parties for the purpose of imputing income on one of the parties, determining a spousal support award, or for imputing income on a party who is “voluntarily unemployed or underemployed.”<sup>47</sup>

#### D. Imputing Income

As noted above, vocational evaluators determine earning capacity.<sup>48</sup> Earning capacity is income that parties “should have earned (i.e. probable income) had they diligently pursued reasonable employment opportunities, or reasonably utilized, applied or invested assets.”<sup>49</sup> Family Code sections 4320(a) and 4058(b) authorize a court’s discretion to impute income based on earning capacity in spousal and child support proceedings.<sup>50</sup> By imputing income on a party, a court is “attributing income to a parent that the parent does not actually have.”<sup>51</sup> In other words, the court or vocational evaluator determines how much income a party could potentially earn and assigns or imputes that income to that party.<sup>52</sup> Courts often impute income on parties who can work but choose to “remain unemployed or underemployed.”<sup>53</sup> The only difference between imputing income for child and spousal support proceedings is that spousal support proceedings do not require a court’s consideration of the “best interests of the children.”<sup>54</sup>

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44. *In re Marriage of Regnery*, 214 Cal. App. 3d 1367, 1372 (4th Dist. 1989).

45. *In re Marriage of McHugh*, 231 Cal. App. 4th 1238, 1246 (4th Dist. 2014).

46. *Id.*

47. Roberta G. Stanley & Kenneth A. Gordon, *Working with the Vocational Expert: How a Skilled Lawyer Can Foster Unassailable and Credible Testimony on Future Employment and Salary Potential*, 29 FAM. ADVOC. 14, 17 (2007), available at <http://lawschool.westlaw.com/shared/westlawRedirect.aspx?task=find&cite=29+Fam.+Advoc.+14&appflag=67.12> (on file with *The University of the Pacific Law Review*).

48. *Id.*

49. JOHN E. B. MYERS & HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 185 (6th ed. 2017).

50. See CAL. FAM. CODE § 4320(a) (West 2016) (considering earning capacity for spousal support calculations); see also CAL. FAM. CODE § 4058(b) (West 1994) (using earning capacity for child support calculations instead of income); see also *In re Marriage of Cheriton*, 92 Cal. App. 4th 269, 301 (6th Dist. 2001) (holding the trial court erred when it disregarded the father’s substantial wealth in child support calculations).

51. MYERS & KRAUSE, *supra* note 49.

52. JOHN E. B. MYERS, CALIFORNIA FAMILY LAW 294–95 (2018).

53. *Id.*

54. FAM. § 4320(a); FAM. § 4058(b).

1. “Best Interests of the Children”

Family Code § 4058(b) gives courts the discretion in child support proceedings to consider a parent’s earning capacity instead of that parent’s income if it is “consistent with the best interests of the children.”<sup>55</sup> Existing case law shows that a parent reducing his or her hours at work to spend more time with his or her children promotes the “best interests of the children.”<sup>56</sup> In these cases, the courts found that it would be improper to attribute a full-time working schedule income to the parent.<sup>57</sup> Additionally, courts have found that forcing a parent to take a high-stress job that involves traveling and late nights is not in the child’s best interest even though the job paid well.<sup>58</sup> Subsequently, these courts found it would be improper to impute income on the parent; as one court noted, “Family Code Section 4058 is not a one-way street requiring a squeeze-the-last-drop workaholism from either parent.”<sup>59</sup>

III. CHAPTER 178

Chapter 178 amends sections 4058(b) and 4331(e)(1) of the Family Code.<sup>60</sup> It expands the educational requirements for vocational training counselors in spousal support proceedings.<sup>61</sup> A vocational training counselor may possess either a master’s degree in the behavioral sciences or any other postgraduate degree that a court finds sufficient to conduct a vocational evaluation.<sup>62</sup> Furthermore, Chapter 178 allows a court to consider the “overall welfare and developmental needs of the child” and the amount of time the parent spends with the child in determining the parent’s earning capacity.<sup>63</sup> Chapter 178 does not interfere with a court’s discretion to consider the earning capacity of the parent

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55. FAM. § 4058(b).

56. See *In re Marriage of Lim and Carrasco*, 214 Cal. App. 4th 768, 777–78 (6th Dist. 2013) (ruling that a supporting spouse does not need to work excessive hours to support children); see also *In re Marriage of Mosley*, 165 Cal. App. 4th 1375, 1390 (4th Dist. 2008) (showing the reduction of work hours is in the “child’s best interest”); see also *In re Marriage of Bardzik*, 165 Cal. App. 4th 1291, 1311 (4th Dist. 2008) (showing the reduction of work hours is in the “child’s best interest”).

57. See *Carrasco*, 214 Cal. App. at 777–78 (finding it was not in the child’s best interest to impute income on the mother based on previous full-time income as an attorney); see also *Mosley*, 165 Cal. App. at 1390 (finding the trial court erred when it declined to impute income on underemployed ex-wife); see also *Bardzik*, 165 Cal. App. at 1311 (declining to impute income on retired wife).

58. See *In re Marriage of Ficke*, 217 Cal. App. 4th 10, 23 (4th Dist. 2013) (acknowledging a party’s impaired earning capacity due to domestic duties); see also *Carrasco*, 214 Cal. App. at 777–78 (finding former partner at law firm was not required to continue full-time work schedule because it was not in the “best interest of the child”).

59. *Bardzik*, 165 Cal. App. at 1311; see *Ficke*, 217 Cal. App. at 23 (declining to impute income on mother); see also *Carrasco*, 214 Cal. App. at 777–78 (declining to impute income on mother).

60. CAL. FAM. CODE § 4058(b) (amended by Chapter 178); CAL. FAM. CODE § 4331(e)(1) (amended by Chapter 178).

61. FAM. § 4331(e)(1) (amended by Chapter 178).

62. *Id.*

63. FAM. § 4058(b) (amended by Chapter 178).

instead of the parent's income.<sup>64</sup>

#### IV. ANALYSIS

Assembly Member Richard Bloom introduced Chapter 178 because he believes that vocational evaluators are “underutilized tools in family law cases.”<sup>65</sup> Chapter 178 “seeks to increase access to vocational evaluations”<sup>66</sup> by diversifying the pool of vocational evaluators, thereby creating better opportunities for both parties to retain an evaluator.<sup>67</sup> Furthermore, Chapter 178 strives to protect a stay-at-home parent from the adverse effects of a court's earning capacity calculation.<sup>68</sup> Section A evaluates the potentially high costs of a divorce and the cost-cutting measures available to the parties.<sup>69</sup> Section B examines the scope of postgraduate degrees that can satisfy the educational requirements of a vocational evaluator under Chapter 178.<sup>70</sup> Section C analyzes Chapter 178's goal of providing safety nets for stay-at-home parents.<sup>71</sup> Finally, Section D looks at prior versions of Chapter 178.<sup>72</sup>

##### A. *The Cost of Divorce in California: Do Parties Need to Hire an Attorney or an Expert?*

Parties in either a child or spousal support case can hire vocational evaluators as expert witnesses to testify at trial without a court order.<sup>73</sup> Chapter 178 is meant to increase access to vocational evaluators, but the emotional toll and high expenditures of a divorce may compel parties to find ways to expedite the process and lower costs.<sup>74</sup> One way parties may expedite the process and lower costs is by not hiring an attorney or employing a vocational evaluator.<sup>75</sup>

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64. *Id.*

65. *Hearing on AB 2780 Before the Assemb. Judiciary Comm.*, 2018 Leg., 2017–2018 Sess. (Cal. 2018) [hereinafter *Assemb. Judiciary Comm. Hearing*] (on file with *The University of the Pacific Law Review*).

66. *S. Rules Comm. Hearing*, *supra* note 41.

67. Telephone Interview with Annie Chou, Legislative Assistant, Assembly Member Richard Bloom (July 30, 2018) (notes on file with *The University of the Pacific Law Review*).

68. *Id.*

69. *Infra* Part IV.A.

70. *Infra* Part IV.B.

71. *Infra* Part IV.C.

72. *Infra* Part IV.D.

73. Thomas C. Ries & Kathryn E. Hummel, *Establishing Earnings Potential & Employability Without an Expert*, 36 FAM. ADVOC. 28, 28 (2013), available at [https://1.next.westlaw.com/Link/Document/FullText?cite=36-FALL+Fam.+Advoc.+28&findtype=Y&transitiontype=Default&contextdata=\(sc.Default\)&originationcontext=RequestDirector&lTS=20180801233051924](https://1.next.westlaw.com/Link/Document/FullText?cite=36-FALL+Fam.+Advoc.+28&findtype=Y&transitiontype=Default&contextdata=(sc.Default)&originationcontext=RequestDirector&lTS=20180801233051924) (on file with *The University of the Pacific Law Review*).

74. Linda A. Olup, *Controlling Divorce Costs*, 34 FAM. ADVOC. 14, 14 (2011), available at <http://lawschool.westlaw.com/shared/westlawRedirect.aspx?task=find&cite=36FALL+FAMADVO+28&appflag=67.12> (on file with *The University of the Pacific Law Review*).

75. Ries & Hummel, *supra* note 73; Joe Dillon, *How to Get a Divorce in California Without a Lawyer*,



In a 2015 divorce study by Martindale-Nolo Research, the average cost of a divorce in California was \$17,100 without children involved and \$26,300 with children involved.<sup>76</sup> Nationally the average cost of a divorce was \$12,800, making California 37% more expensive to undergo a divorce compared to other states.<sup>77</sup> In addition, California divorces, on average, take 15 months to resolve.<sup>78</sup> Most of the costs go to attorneys' fees<sup>79</sup> for hearing appearances, drafting pleadings, discovery, and settlement discussions.<sup>80</sup> Furthermore, vocational evaluator fees range from \$4,000 to \$5,000, in addition to \$1,000 to \$1,500 to testify at court, which may appear expensive as well,<sup>81</sup> causing parties to avoid hiring experts<sup>82</sup> or "to skip lawyers altogether."<sup>83</sup>

### *1. DIY Divorces: The One-Day Divorce Program*

It is possible to file for a divorce without hiring an attorney<sup>84</sup> and in California that is apparent since "three-fourths of family law litigants lack lawyers."<sup>85</sup> Although self-litigants face potential pitfalls, "D.I.Y. divorce remains a lure for people seeking to avoid the cost and time of a traditional dissolution."<sup>86</sup> In response to budget cuts, clogged court dockets, and litigants unable to afford or unwilling to hire an attorney, courts in San Diego and Sacramento counties created one-day divorce programs.<sup>87</sup> Prior to seeing a judge, applicants must meet "residency and notification requirements."<sup>88</sup> If a party participates in the one-day divorce program, he or she may not need to hire an attorney because the court

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MEDIATION AND DIVORCE BLOG – EQUITABLE MEDIATION SERVS., <https://www.equitablemediation.com/blog/how-to-get-a-divorce-in-california-without-a-lawyer> (last visited on Aug. 1, 2018) (on file with *The University of the Pacific Law Review*).

76. Martindale-Nolo Research, *Divorce in California: How Much Does It Cost? How Long Does It Take?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/family-law/divorce/divorce-in-california.html> (last visited Aug. 8, 2018) (on file with *The University of the Pacific Law Review*).

77. *Id.*

78. *See id.* (showing the duration of a divorce takes 11.7 months when children are not involved and 18.2 months when children are involved).

79. *Id.*

80. Olup, *supra* note 74.

81. Nelson, *supra* note 4.

82. Ries & Hummel, *supra* note 73.

83. Mandi Woodruff, *9 Cities Where Getting a Divorce Will Cost You the Most*, BUS. INSIDER (Nov. 19, 2013, 6:09 PM), <https://www.businessinsider.com/cities-where-getting-divorce-will-cost-you-2013-11> (on file with *The University of the Pacific Law Review*).

84. Dillon, *supra* note 75.

85. Ann Carns, *One-Day Divorces in CA Chop Costs, Pain*, CNBC (June 6, 2014, 4:13 PM), <https://www.cnbc.com/2014/06/06/one-day-divorces-.html> (on file with *The University of the Pacific Law Review*).

86. *Id.*

87. *Id.*

88. Carns, *supra* note 85; *One Day Divorce Program*, SUPERIOR CT. OF CAL. CTY. OF SAC., <https://www.saccourt.ca.gov/family/one-day-divorce.aspx> (last visited Aug. 1, 2018) (on file with *The University of the Pacific Law Review*).

will provide volunteer attorneys and law students to assist with filing the necessary forms prior to seeing the judge.<sup>89</sup> After seeing a judge, the parties may leave with a Judgment for Dissolution of Marriage that same day.<sup>90</sup> Despite expediting the lengthy proceedings and cutting costs, one-day divorce programs may not be suitable for people with significant assets.<sup>91</sup>

## 2. Divorce Mediation

Mediation is another cost-saving option for divorcing couples that does not involve employing an attorney.<sup>92</sup> A mediator oversees and guides a conversation “that allows the parties to reach a settlement through compromise and negotiation.”<sup>93</sup> Divorce mediator costs vary depending on the complexity of the mediation, but on average parties pay between \$5,000 and \$9,000 to retain one.<sup>94</sup> Mediation may be used at the start of the divorce or closer to trial.<sup>95</sup> However, mediation requires an agreement by both parties to use divorce mediation.<sup>96</sup> In addition, a divorce mediator only reviews the discovery provided by the parties and does not file the divorce papers for the parties.<sup>97</sup>

## 3. Are Vocational Evaluators Necessary?

Parties may find it challenging to afford both an attorney and a vocational evaluator.<sup>98</sup> Employing vocational evaluators greatly increases the cost of a case.<sup>99</sup> A vocational evaluator is useful for “gathering information and writing a report” to testify in court and, in some instances, for “certain burdens of proof that may require expert witness testimony.”<sup>100</sup> However, a party can proceed with his or her case without a vocational evaluator as trial courts do not “necessarily need an expert to make a finding of a party’s income potential and employability.”<sup>101</sup> Utilizing discovery, client interviews, the opposing expert, newspapers, and lay witnesses, and informal methods of fact finding can provide

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89. *One Day Divorce Program*, *supra* note 88.

90. *Id.*

91. Carns, *supra* note 85.

92. Dillon, *supra* note 75; Olup, *supra* note 74.

93. Olup, *supra* note 74; see *Can I Get a Divorce Without a Lawyer?*, MEDIATION AND DIVORCE BLOG—EQUITABLE MEDIATION SERVS., <https://www.equitablemediation.com/divorce-mediation> (last visited on Aug. 1, 2018) (on file with *The University of the Pacific Law Review*) (detailing the role of the mediator in a divorce).

94. *Can I Get a Divorce Without a Lawyer?*, *supra* note 93.

95. Olup, *supra* note 74.

96. Dillon, *supra* note 75.

97. *Id.*

98. Ries & Hummel, *supra* note 73.

99. Olup, *supra* note 74.

100. Ries & Hummel, *supra* note 73.

101. *Id.*

a substitution for a vocational evaluator.<sup>102</sup>

However, a vocational evaluator's "cost is often very much worth it because the support obligation could be quite lengthy for some spouses."<sup>103</sup> A vocational evaluator's report "will be accepted more readily because they should be of higher quality."<sup>104</sup> The report may also be used later to modify spousal or child support if the opposing party does not find a job or takes a lower paying job to continue receiving support or to lower the amount paid.<sup>105</sup>

### *B. Educational Requirements for Vocational Evaluators Under Chapter 178*

Chapter 178 intends to expand the educational requirements for vocational evaluators to include postgraduate degrees that "provide[] sufficient training to perform a vocational evaluation."<sup>106</sup> Currently, under Family Code §4331(e)(1), vocational evaluators must possess a master's degree in the behavioral sciences.<sup>107</sup> A behavioral sciences degree pertains to human actions and can include studies in sociology, psychology, social and cultural anthropology, psychiatry, economics, geography, law, and political science.<sup>108</sup> However, neither the sponsors of Chapter 178 nor Assembly Member Bloom provided examples of what other degrees would meet the educational requirements under Chapter 178.<sup>109</sup>

Postgraduate degrees in statistics appear to be a strong candidate<sup>110</sup> for inclusion under Chapter 178, because vocational evaluators conduct labor market research "to produce information as to outlook, earnings, qualifications/training requirements for specific titles within an appropriate geographical area."<sup>111</sup> Statistics degrees provides training in "data collection, tabulation, analysis, and interpretation."<sup>112</sup> This knowledge can be useful or necessary to conduct research on the likelihood of employability in a particular job market.<sup>113</sup> Furthermore,

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102. *Id.*

103. Nelson, *supra* note 4.

104. *Id.*

105. *Id.*

106. CAL. FAM. CODE § 4331(e)(1) (amended by Chapter 178).

107. *See* CAL. FAM. CODE § 4331(e)(1) (West 2005) (prior to amendment by Chapter 178).

108. *Behavioral Science*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/behavioral-science> (last visited Aug. 11, 2018) (on file with *The University of the Pacific Law Review*).

109. ASSEMBLY FLOOR, FLOOR ANALYSIS OF AB 2780, at 3 (July 5, 2018) [hereinafter ASSEMBLY FLOOR ANALYSIS].

110. *See What Can I Do with a Major in Statistics?*, UNIV. OF MINN., <https://cla.umn.edu/wcidwami/statistics> (last visited Aug. 11, 2018) (on file with *The University of the Pacific Law Review*) (showing that "statistics focuses on theories and methods of data collection, tabulation, analysis, and interpretation.").

111. Tracy Duell-Cazes, *What a Client Should Know About a Vocational Evaluation*, TDC FAM. L., <https://www.tdcfamilylaw.com/blog/what-a-client-should-know-about-a-vocational-evaluation> (last visited Aug. 11, 2018) (on file with *The University of the Pacific Law Review*).

112. *What Can I Do with a Major in Statistics?*, *supra* note 110.

113. Duell-Cazes, *supra* note 111.

adding statistics to the list of eligible postgraduate degrees increases the pool of potential vocational evaluators by expanding the current list of eligible postgraduate degrees.<sup>114</sup> Designating and including more eligible degrees will likely increase the amount of available vocational evaluators, thus expanding opportunities for parties to employ one.<sup>115</sup>

### C. *The Stay-At-Home or Custodial Parent*

Chapter 178 amends Family Code § 4058(b) by allowing a court considering the earning capacity of a parent to consider “the overall welfare and developmental needs of the children, and the time that parent spends with the children” in a child support case.<sup>116</sup> With this added language,<sup>117</sup> Chapter 178 intends to shield stay-at-home parents from paying child support to their former spouses.<sup>118</sup> Stay-at-home or custodial parents encounter these issues when they assume child-rearing responsibilities instead of fully utilizing their educational degree or work experience to find employment.<sup>119</sup> Imputing income on the custodial parent could result in reduced child support payments by the former spouse or force the custodial parent to contribute child support to the former spouse.<sup>120</sup> The statewide uniform guideline to child support and existing case law do not explicitly mention the time a custodial parent spends with a child or a child’s developmental needs.<sup>121</sup> However, courts have considered these items without Chapter 178’s assistance.<sup>122</sup> Further, very few courts have upheld imputation of income on the custodial parent.<sup>123</sup>

#### 1. *Can Chapter 178 Prevent Imputing Income on the Custodial Parent?*

“There are very few—’a handful’ overstates it—published appellate decisions which have upheld the imputation of income to custodial parents.”<sup>124</sup>

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114. See Telephone Interview with Annie Chou, *supra* note 67 (noting that expanding educational requirements will likely increase access to vocational evaluators).

115. *Id.*

116. CAL. FAM. CODE § 4058(b) (amended by Chapter 178).

117. See *id.* (adding the phrase “the overall welfare and developmental needs of the children, and the time that parent spends with the children” to Family Code § 4058).

118. Telephone Interview with Annie Chou, *supra* note 67.

119. See *id.* (noting Chapter 178 includes time spent with the child to prevent stay-at-home parents from paying child support because they are found to not be fully using their degrees).

120. See *In re Marriage of McHugh*, 231 Cal. App. 4th 1238, 1242 (4th Dist. 2014) (reducing child support obligation as a result of losing a large client); see also *In re Marriage of Ficke*, 217 Cal. App. 4th 10, 23 (4th Dist. 2013) (showing the trial court initially imputed income on the custodial parent).

121. See CAL. FAM. CODE § 4053 (focusing solely on the higher earner’s time spent with the children); see also *In re Marriage of Regnery*, 214 Cal. App. 3d 1367, 1372 (4th Dist. 1989) (making no mention of time spent with the children).

122. See *Ficke*, 217 Cal. App. at 20 (noting that “time spent with children is to be valued.”).

123. *Id.* at 18.

124. *Id.*

Child support is intended to “place the interests of the children as the state’s top priority”<sup>125</sup> and it is “counterintuitive—often counterproductive—to impute income to a custodial parent, because the objective effect of such an imputation will be to reduce the money otherwise available for the support of any minor children.”<sup>126</sup> Cases where the court imputed income on the custodial parent all follow a similar theme: the custodial parent’s intentional unemployment.<sup>127</sup> Courts typically impute income on parties who can work but choose to “remain unemployed or underemployed.”<sup>128</sup> Thus, if the court imputes income on the custodial parent who remains unemployed or underemployed, Chapter 178 does not prevent the court from imputing income on the custodial parent.<sup>129</sup>

## 2. Chapter 178 Restates Time Spent and Consideration of Developmental Needs of the Children

Chapter 178 gives the court discretion to incorporate the time a parent spends with the child in its determination of that parent’s earning capacity.<sup>130</sup> However, Chapter 178’s inclusion of “time spent” does little change to what courts have already been doing; for instance, the court in *In re Marriage of Ficke* noted that “time spent with children is to be valued” because this consideration is required by a body of law.<sup>131</sup> The *Ficke* court also referenced Family Code § 3020(b) which “placed a high value on time with children” in its decision to not impute income on the custodial parent.<sup>132</sup> Furthermore, the current state uniform guideline for child support already considers the higher earning parent’s time spent with the child.<sup>133</sup> Thus, Chapter 178’s inclusion of “time spent” to Family

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125. CAL. FAM. CODE § 4053(e) (West 1994).

126. *Ficke*, 217 Cal. App. at 19.

127. See *In re Marriage of LaBass & Munsee*, 56 Cal. App. 4th 1331, 1338 (3d Dist. 1997) (noting the mother’s intentional unemployment: “Catherine made no secret of her intent to avoid working full time even if a job offered child care”); see also *In re Marriage of Paulin*, 46 Cal. App. 4th 1378, 1384 (1st Dist. 1996) (noting the trial court found the custodial parent unwilling to work).

128. MYERS, *supra* note 52.

129. See *LaBass*, 56 Cal. App. at 1338 (finding ex-wife intentionally refused to work following divorce); see also *Paulin*, 46 Cal. App. at 1384 (finding ex-wife decided to be unemployed, which she did not dispute); see also *In re Marriage of McHugh*, 231 Cal. App. 4th 1238, 1246 (4th Dist. 2014) (finding ex-husband intentionally lost job to reduce support obligations).

130. CAL. FAM. CODE § 4058(b) (amended by Chapter 178).

131. *In re Marriage of Ficke*, 217 Cal. App. 4th 10, 20 (4th Dist. 2013); see also *In re Marriage of Bardzik*, 165 Cal. App. 4th 1291, 1311 (4th Dist. 2008) (acknowledging that leaving a high-stress and high-paying job may be in the “child’s best interest”); see also *In re Marriage of Lim and Carrasco*, 214 Cal. App. 4th 768, 777 (6th Dist. 2013) (determining that a reduced work schedule was in the “best interest of the child”); see also *In re Marriage of Simpson*, 4 Cal. 4th 225, 230 n.2 (1992) (noting that time spent with children is a factor to consider when determining support obligations).

132. *Ficke*, 217 Cal. App. at 21; CAL. FAM. CODE § 3020(b) (West 2000) (“[I]t is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated”).

133. CAL. FAM. CODE § 4055(a) (West 2018) (explaining time spent by the lower-earning parent is reflected by the amount of time the higher-earner spends with the children, e.g. higher earner spends 20% of

Code § 4058(b) effects no change because it reiterates a factor that courts have been following prior to the introduction of this bill.<sup>134</sup>

In addition to “time spent,” Chapter 178 directs courts to consider a child’s developmental needs when deciding the earning capacity of a parent.<sup>135</sup> However, this addition does not change how courts factor in disabled children for child support calculations because Family Code § 3910(a) already reads “[t]he father and mother have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means.”<sup>136</sup>

#### D. Prior Versions of Chapter 178

The California Senate amended Chapter 178 on June 11, 2018.<sup>137</sup> Before this revision, Chapter 178 allowed courts in both child and spousal support proceedings to order a party to undergo a vocational evaluation.<sup>138</sup> The goal of Chapter 178 is to “increase access to vocational evaluations in family law cases.”<sup>139</sup> However, omitting language that allowed courts to order vocational evaluations in child support proceedings, in particular, hinders this goal because current state law does not mention vocational evaluations in child support proceedings.<sup>140</sup> Codifying a court’s ability to employ vocational evaluators in spousal and child support proceedings, would likely have increased the pool of vocational evaluators due to demand, as most vocational evaluators do not work as vocational evaluators full-time.<sup>141</sup> Also, parties in both child and spousal support proceedings would have access to additional vocational evaluators due to an increase in personnel.<sup>142</sup>

For now, courts hearing child support arguments may continue to act as vocational evaluators by gaining “more understanding of a parent’s ability to earn” through consideration of a parent’s ability to work, the job market, and

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time with the children, showing lower-earner spends 80% of time with the children).

134. See *Ficke*, 217 Cal. App. at 20 (declining to impute income on unemployed custodial mother); see also *Bardzik*, 165 Cal. App. at 1311 (declining to impute income on retired mother); see also *Carrasco*, 214 Cal. App. at 777 (refusing to impute income on mother’s previous salary as a full-time law firm partner); see also *Simpson*, 4 Cal. at 230 n.2 (noting time spent as a factor in determining support obligations); see also CAL. FAM. CODE § 3020(b) (stating it is public policy of California for children to spend time with their parents after a divorce).

135. CAL. FAM. CODE § 4058(b) (amended by Chapter 178).

136. CAL. FAM. CODE § 3910(a) (West 1994).

137. CAL. FAM. CODE § 4058(b) (amended by Chapter 178); CAL. FAM. CODE § 4331(e)(1) (amended by Chapter 178).

138. *Assemb. Judiciary Comm. Hearing*, *supra* note 65.

139. *S. Rules Comm. Hearing*, *supra* note 41.

140. See CAL. FAM. CODE §§ 3900–4253 (West 2018) (“support” sections of the Family Code do not mention vocational evaluations in child support proceedings).

141. Telephone Interview with Annie Chou, *supra* note 67.

142. *Assemb. Judiciary Comm. Hearing*, *supra* note 65 (stating the original bill applied to both child and spousal support proceedings).

imputing income based on the evidence.<sup>143</sup> But, a court is not as well-versed at finding employability as vocational evaluators, Chapter 178 may well have been more effective at achieving its goals had it not amended away the provision allowing for court-ordered vocational evaluators in child support proceedings.<sup>144</sup>

## V. CONCLUSION

Chapter 178 attempts to increase access to vocational evaluations by expanding the educational requirements for vocational evaluators.<sup>145</sup> In addition, Chapter 178 allows courts to consider the “overall welfare and developmental needs” of the child, and the time a parent spends with the child when determining the earning capacity of that parent.<sup>146</sup> Unfortunately, Chapter 178 may not ultimately achieve its goal of increasing access to vocational evaluations because of the uncertainty of eligible postgraduate degrees,<sup>147</sup> the high costs of divorce,<sup>148</sup> and the popularization of self-help divorces.<sup>149</sup> Furthermore, Chapter 178 restates statutes and case law that courts have been implementing before Chapter 178, causing this bill to effectuate no change.<sup>150</sup> However, vocational evaluators continue to be “important tools in family law proceedings”<sup>151</sup> and can provide courts and parties a way to uncover disguised assets and income.<sup>152</sup> A recommendation for further bills that aspire to increase access to vocational examinations would be to include the degrees to qualify someone as a vocational evaluator and to approve the usage of vocational evaluations in child support proceedings.<sup>153</sup>

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143. *Id.*

144. *See In re Marriage of Ficke*, 217 Cal. App. 4th 10, 17 (4th Dist. 2013) (noting the trial court imputed income on a custodial parent and ordered her to pay child support to former spouse despite earning a small income); *see also* CAL. FAM. CODE § 4331 (listing the qualifications of a vocational evaluator).

145. FAM. § 4331(e)(1) (amended by Chapter 178).

146. CAL. FAM. CODE § 4058(b) (amended by Chapter 178).

147. ASSEMBLY FLOOR ANALYSIS, *supra* note 109.

148. Ries & Hummel, *supra* note 73.

149. *See Carns*, *supra* note 85 (showing the rise in popularity of one-day divorces in California).

150. *See In re Marriage of Ficke*, 217 Cal. App. 4th 10, 20 (4th Dist. 2013) (declining to impute income on unemployed custodial mother); *see also In re Marriage of Bardzik*, 165 Cal. App. 4th 1291, 1311 (4th Dist. 2008) (declining to impute income on retired mother); *see also In re Marriage of Lim and Carrasco*, 214 Cal. App. 4th 768, 777 (6th Dist. 2013) (refusing to impute income on mother’s previous salary as a full-time law firm partner); *see also In re Marriage of Simpson*, 4 Cal. 4th 225, 230 n.2 (1992) (noting time spent as a factor in determining support obligations); *see also* CAL. FAM. CODE § 3020(b) (stating it is public policy of California for children to spend time with their parents after a divorce).

151. *S. Rules Comm. Hearing*, *supra* note 41.

152. Laura W. Morgan, *The Use of Vocational Experts in Support Cases*, 30 J. AM. ACAD. MATRIM. LAW. 351, 377 (2018).

153. *Assemb. Judiciary Comm. Hearing*, *supra* note 65.

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