To Impute or Not to Impute.....Intent is the Question

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INTRODUCTION

This paper considers the imputation of income for child support purposes, with a particular focus on s.19(1)(a) of the Child Support Guidelines\(^1\) (the “Guidelines”) and circumstances where it is alleged that the payor is intentionally unemployed or underemployed. A review of the case law in this area is particularly topical, given the prolonged economic downturn in Alberta.

Themes that emerge from the case law are amalgamated to provide practitioners with guidance as to the manner in which s. 19(1)(a) is interpreted and applied in Alberta. Practical tips are also suggested to assist in preparing clients from an evidentiary perspective when alleging unemployment or underemployment or, conversely, to best position unemployed or underemployed clients to avoid the imputation of income.

ALBERTA, THE UNIQUE SNOWFLAKE – BAD FAITH VERSUS REASONABLENESS

Pursuant to s. 19(1) of the Guidelines, the Court may impute the amount of income to a parent that it considers appropriate in the circumstances. The provision includes an unquestionably inexhaustive list of enumerated circumstances where imputation may be appropriate. However, the enumerated list nonetheless provides insight into the overall legislative intent behind the provision, which assists in any analysis involving non-enumerated circumstances.

Section 19(1) reads:

19 (1) the court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

(b) the spouse is exempt from paying federal or provincial income tax;

(c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(e) the spouse’s property is not reasonably utilized to generate income;

\(^{1}\)SOR/97-175: Alta Reg 147/2005
(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

While perhaps well appreciated, extreme caution must be taken when considering s. 19(1)(a) case law from outside of Alberta, as Alberta has embraced a markedly different interpretation of the provision than nearly all other jurisdictions in Canada.

The Alberta Interpretation: Bad Faith

The seminal Alberta jurisprudence in this respect is the Court of Appeal decision in Hunt v. Smolis-Hunt (“Smolis-Hunt”). Here, the recipient mother was successful at trial in alleging that the payor husband was underemployed because he chose to continue in an unsuccessful legal practice where there was no reasonable prospect of future financial improvement. In overturning the trial court decision, a majority of the Court of Appeal determined that income may only be imputed pursuant to s. 19(1)(a) (subject to the qualifications regarding childcare, education and health) where the payor has either deliberately pursued a course of conduct to avoid child support obligations or where the circumstances are sufficient to permit an inference that the obligor intended to undermine or avoid child support obligations. While mala fides are not required, actual or inferred intent to avoid child support must be found. The Court of Appeal found insufficient evidence to determine or infer such an intention.

Two broad policy rationales drove the determination that actual or inferred intent was required. First, consistency and predictability: wide judicial discretion in assessing the reasonableness of the under/unemployment would create considerable unpredictably. Given that one of the purposes of the Guidelines is to instill a measure of certainty, a legal test that did otherwise would be contrary to that legislative intent. Secondly, the Court of Appeal found no requirement in the Guidelines that a

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3 Smolis-Hunt at para 95
4 Smolis-Hunt at para 42
5 Smolis-Hunt at para 48
6 Smolis-Hunt at para 63