“Hunt”ing for Income

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Family Law Beyond the Basics

Prepared By:

Tina Huizinga

Barr Picard

Edmonton, Alberta

Presented By:

Norman F. W. Picard Q.C.

Barr Picard

Edmonton, Alberta

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"HUNT"ING FOR INCOME

Has imputation of income gone the way of the dodo since the Alberta Court of Appeal issued their decision in *Hunt* v. *Smolis-Hunt*[1] in 2001? The short answer, as any good lawyer would say, is: it depends.

It depends on the judge hearing the matter, and it depends on which basis one seeks to impute income.

The starting point, as always, is s. 19 of the Federal Child Support Guidelines. This allows for numerous ways in which income is to be imputed: lack of disclosure, differing tax rates, deductions from income, corporate income, and the most difficult of all: intentional unemployment or underemployment for the purposes of avoiding child support obligations.

Imputation is never easy in Alberta, but on a sliding scale, the easiest of options is a lack of disclosure. Most often, our courts have very little patience with payors who refuse to disclose their income. We have all faced the circumstance in which an intractable (and most often, self represented) individual simply ignores the Notice to Disclose. When these individuals are plumbers, or pipefitters or welders, the solution is relatively simple. Go to the Canadian government website which gives salary ranges in Alberta for these trades, get a range, and seek the high point in income as "incentive" for the non-disclosing party to produce. What though, of those who are not in a trade…doctors, lawyers, oilfield workers in Fort McMurray, and the most difficult: those who have a number of corporations through which they filter income? Our courts are far less likely to find a high point in income for those individuals due to the varying ranges of income available.

The next circle (if one was to equate imputing income to Dante's Inferno) is for those who have different tax obligations, because they work overseas and receive the associated tax credits, or obtain a large portion of their income from dividends, either through stock options or closely held corporations. In *Chalifoux v. Chalifoux*[2], the wife sought to impute income to the payor father who worked overseas and received a number of tax credits. The court was provided with the ChildView calculations demonstrating that his income tax returns evidenced tax rates of between 8% and 10%. The court declined to impute income as expert evidence had not been called to prove the standard tax rates in Canada (notwithstanding that it is set by statute, and the Guidelines are premised on Canadian tax rates). The wife appealed, but the Court of Appeal declined the appeal on that issue.

The most difficult means of imputing income, however, is intentional unemployment or underemployment. Alberta is the only jurisdiction in Canada which has adopted the stringent test outlined in *Hunt*. Our Court established a high standard for s. 19(1)(a) of the Guidelines, when they interpreted "intentional" as requiring a specific course of conduct with the intent to avoid child

[1] *Hunt v. Smolis-Hunt* [2001] A.J. No. 1170

[2] *Chalifoux v. Chalifoux* 2007 ABQB 111; 2008 ABCA 70

support obligations, and putting the onus upon the Applicant to prove that intent. The practical result of this decision has simply been that payors who reduce their income after separation are able to state that they wish to pursue employment which makes them happier or allows them to spend more time at home as a lifestyle choice (whether legitimate or not). This becomes virtually impossible to contradict as they are subjective rather than objective factors.

Madam Justice Picard wrote the dissenting view in *Hunt* (which is exceedingly well reasoned, and we're not just saying that because of the commonality in names…really, we swear). The dissent was a child centered approach, which Her Ladyship tied to the prevailing philosophies in legislation and jurisprudence that parents have an obligation to financially support their children, and the child's rights dominate over that of the parents. She found that the test should be the reasonableness of the decisions made by payor parent that affect their ability to meet their obligations. This is, however, a dissent, and thus has been of little assistance to counsel in Alberta.

Other provinces, most obviously British Columbia, have rejected the ratio set by our Court of Appeal. In *Barker v. Barker*, the B.C. Court of Appeal specifically rejected the principals enunciated in *Hunt*, stating:

> What matters under the Guidelines is what mattered under the Divorce Act and the Family Relations Act before the Guidelines – whether the payor parent is earning what the parent is capable of earning…That is the view of other appellate courts in Canada who have considered the issue, as well as that of Picard J.A. in dissent in *Hunt*.[3]

It would seem we were stuck with the high threshold set by the Court of Appeal, and certainly there are many decisions which have maintained that strict view. In *Sargent*, the husband applied to impute income to the wife in a shared parenting regime. The Court noted:

> One can observe that, during the period of voluntary under-employment, Ms. Sargent re-partnered, had a baby, that her partner's employment changed and that Ms. Sargent moved away from the Edmonton area to be with her new partner. It is only necessary to determine whether the court can conclude, or draw the inference, that Ms. Sargent is unemployed because she is trying to avoid her obligations to the children of the marriage. There is no basis in evidence for doing so…[4]

In *Nesimiuk v. Bilodeau*, the mother sought to impute income to the father who had earned between $120,000 and $163,000 in 3 years preceding being fired from the company he worked for in Fort McMurray, but was currently earning $85,000 after being re-hired on his stipulation that he only work in Edmonton. The court stated:

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[3] *Barker v. Barker* [2005] B.C.J. No. 687, par. 19

[4] *Sargent v. Sargent* [2009] A.J. No. 914, par. 43