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By Michael Ghert

Ever since the decision of the Alberta Court of Appeal in *Hunt v Smolis-Hunt*, 2001 ABCA 229, the province has been unique in Canada in requiring a finding that a child support payor intends to undermine or avoid their support obligations before income can be imputed for intentional underemployment or unemployment pursuant to s. 19(1)(a) of the *Federal Child Support Guidelines*. In every other province, courts apply a reasonableness test. The strict test set out in *Hunt* has made it difficult for judges in Alberta to find just results. Over the years, many judges have looked for ways around *Hunt*. As Yungwirth J. commented in *Smith v Gulka*, 2020 ABQB 32: "Even to Alberta trial courts, the test set out by the majority in Hunt has been identified as unsatisfactory, and many have distinguished Hunt to circumvent having to apply the stringent test."

In *McComiskey v. McComiskey*, [2018] A.J. No. 1407, the Alberta Court of Queen's Bench started a line of shared parenting cases that skirt *Hunt* by finding that s.19 does not apply to cases of shared parenting. The rationale provided is that, as stated by the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63, s.9 of the *Guidelines* establishes a complete system for determining child support in shared parenting situations.

In *MacDonald v. Brodoff*, [2020] A.J. No. 695, I argued that this reasoning was not mandated by *Contino*, inconsistent with the wording of the *Guidelines*, and would lead to problematic results. It would lead to unjustified different treatment of people in shared parenting situations. An interpretation of the Guidelines that requires proof of "specific intention" in order to impute income where parenting is not shared, but effectively eliminates that requirement where parenting is shared would derogate from the *Guideline* objective of consistent treatment of payor parents by setting differing standards dependent on the parenting regime.

In *MacDonald* the Court of Appeal brought greater certainty to the law by clarifying that considerations respecting imputation of income in s.19 are not replaced by s.9 of the *Guidelines* in shared parenting situations. The Court found that a determination of income under ss.15 to 20 of the *Guidelines* must be done at the s.9(a) stage of the shared parenting child support analysis. The Court found that "[i]gnoring *Hunt* in those instances, while continuing to apply it in general calculations of child support, would confuse, would heighten unpredictability and may unduly influence a parent's push for or opposition to shared parenting."

Notwithstanding the intention of the Court of Appeal to promote certainty, there are parts of its decision in *MacDonald* that inject greater uncertainty into the law of child support in Alberta. Both the specific outcome of the case and the *obiter dicta* may increase unpredictability.

In *MacDonald* the mother was unemployed, found not to be intentionally unemployed and had income of $nil. The father was found to have had income of $102,000. The straight set-off amount of child support would have been $933.60 payable by the father to the mother. The Court upheld the lower court finding that child support should instead be set at $nil. In its

decision, the Court of Appeal emphasized the following facts: that the mother held clear title to a home worth $1.1 million, that she had access to $200,000 in savings, that her net worth was "somewhat superior" to the father, and that the father cared for more children from other relationships. While we know from *Contino* that the set-off amount is not presumptive, counsel do not generally expect such radical departures from the set-off. In *Obiter* the Court expressed concern that lawyers and parties are too reliant on the straight set-off approach. Moreover, the heavy emphasis on the mother's capital (and not its ability to generate income) suggests a surprising differentiation between the child support obligations of those who share parenting and those who do not. Where parenting is not shared, a parent's ownership of a home or savings are not generally relevant (unless those assets can generate income). Clearly, the Court of Appeal is encouraging lower court judges to exercise discretion in shared parenting child support cases.

Further, while the Court clarifies the applicability of *Hunt* in shared parenting situations, its *obiter dicta* hinted at changes to come. The Court expressly states that it may be time for *Hunt* to be reconsidered, and concludes that "Hunt may be upheld, over-ruled or varied, but it may be time to look at this issue again." We are left with qualified certainty: while *Hunt* remains the law it must be followed, but the law may change.