INTENTIONAL UNDER-EMPLOYMENT AND IMPUTING INCOME: A SURVEY OF ONTARIO CASE LAW

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INTENTIONAL UNDER-EMPLOYMENT

AND IMPUTING INCOME

1. INTRODUCTION

1:01 Introduction

Section 26.1(2) of the *Divorce Act* maintains the traditional support concept of a joint parental obligation based on the spouses' capacity or ability to pay. Thus, while the Guidelines focus on spousal income, s. 19 allows the court to impute income based on a spouse's capacity: *Contino v. Leonelli-Contino* (2003), 42 R.F.L. (5th) 295 (C.A.).

By s. 19 (1) of the Guidelines, a court "may impute such amount of income to a spouse as it considers appropriate". Section 19 (1) includes a list of nine circumstances in which the court may impute income. It is not exhaustive: *Quintal v. Quintal* (1997), 73 A.C.W.S. (3d) 484 (U.F.Ct.).

Nonetheless, Ontario courts have attempted to circumscribe the circumstances in which income may be imputed. For example, in *Risen v. Risen* (1998), 81 AC.W.S. (3d) 669 (Ont. Ct.)(Gen Div), the court conceded that while the list of circumstances described in s. 19 (1) was not exhaustive, it held that any expansion of the list must bear some similarity to the enumerated circumstances. In *Mascarenhas v. Mascarenhas* (1999), 44 R.F.L. (4th) 131 (Ont. Ct.)(Gen Div),

the court also held that any new ground advanced for imputation should be similar in purpose to the enumerated circumstances of s. 19 (1).

There must be an evidentiary basis for imputing income: *Quintal v. Quintal, supra*, *Drygala v. Pauli* (2002), 29 R.F.L.. (5th) 293 (C.A.). The onus of proof will be on the party alleging that income should be imputed: *West v. West* (2001), 18 R.F.L. (5th) 440 (S.C.J.). The imputation of income is a judicial exercise and must be approached as such. There must be a rational basis underlying any imputed income: *Fawcett v. Hurd* (1998), 83 A.C.W.S. (3d) 243 (Gen Div).

Whether income should be imputed is an issue of fact within the domain of the trial judge. Absent a misconception of the facts or an error in law, an appeal court should not normally intervene: *Kaye v. Kaye* (2002), 32 R.F.L. (5th) 368 (Div. Ct.).

2. INTENTIONAL UNDER-EMPLOYMENT

2:01 Introduction

Section 19 (1)(*a*) of the Guidelines allows the court to impute income to a spouse who is intentionally underemployed or unemployed. A court may not impute income, however, if the under-employment or unemployment is necessitated by the needs of a child of the marriage, by the needs of any child under the age of majority, or by the reasonable educational or health needs of the parent.

2:02 "Intentional".

The Ontario Court of Appeal had occasion to interpret s. 19 (1)(*a*) in the case of *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293. In that decision, they held that the word "intentionally" means a voluntary act. Unemployment or underemployment is intentional if a parent chooses to earn less than he or she is capable of earning. Conversely, the provision would not apply to situations in which through no fault or neglect of their own, spouses are laid off, terminated, or given reduced hours of work.

The court rejected a line of authority which held that the use of the word "intentionally" implied a deliberate course of conduct for the purposes of undermining or avoiding support obligations: see, in particular, decisions such as *Hunt v. Smolis-Hunt* (2001), 20 R.F.L. (5th) 409 (Alta C.A.). Bad faith, will not be necessary, but it will certainly colour the Act: West v. West (2001), 18 R.F.L. (5th) 440 (S.C.J.).

In reaching its conclusion, the court interpreted s. 19 (1)(*a*) within the entire context of the legislation. The court noted that s. 26.1 (2) provided for a joint financial obligation upon parents. Section 1 of the Guidelines provided that an objective of the Guidelines was to establish a fair standard of support for children that ensured that they continue to benefit from the financial means of both

parents after the separation. The court concluded that the imputation of income, would give effect to the joint and ongoing obligation.

In determining a spouse's capacity to pay, the court will look to the traditional factors such as age, education, experience, skills and health. The court will also consider such things as the availability of work, the parent's freedom to relocate, and any other obligations that the parent may have. The issue is not to be determined on the circumstances of the spouse standing alone, it must be determined on all of the circumstances, including those of the children to be supported.

2:03 Particular Cases

Where a spouse becomes under-employed or unemployed as a result of a planned and deliberate act, the court will readily impute income. The court did so in *Olah v. Olah* (2000) 7 R.F.L. (5th) 173 (S.C.J.), where the husband quit his job to move back to Hungary to be with the woman he loved.

Where the unemployment or under-employment is the direct result of a spouse's misconduct, the court will readily impute income. The question frequently posed is "why should the children bear the financial consequences of the parent's misconduct?": *Quintal v. Quintal* (1997), 73 A.C.W.S. (3d) 484 (Ont. U.F. Ct.).

Income may be imputed where a spouse leaves secure employment for self-employment. In *Depace v. Michienzi* (2000), 5 R.F.L. (5th) 40 (S.C.J.), the court suggested that a support payor might be allowed a grace period for start-up losses. The more traditional approach, however, is expressed in *Visnjic v. Visnjic* (2000), 7 R.F.L. (5th) 195 (S.C.J.). The court held that spouses wishing to start their own businesses would have to meet their financial responsibilities out of capital or through borrowing during any period of start-up losses. In *Currie v. Currie* (2000), 2 R.F.L. (5th) 153 (S.C.J.), the court imputed income to a lawyer who left secure employment as a Crown Attorney to establish a practice as defence counsel.

A change of employers may warrant the imputation of income. However, the courts appear to be sensitive to a parent's right to choose meaningful and satisfying work. For example, in *Brain v. Brain* (2000) 4 R.F.L. (5th) 341 (S.C.J.), the court found some justification in the respondent's change of employers. His employer had undergone a corporate reorganization, there were significant changes made to his compensation package, and his sales territory had been adjusted. There was some imputation of income, however, as the court concluded that there was some evidence of evasion on the respondent's part. The court was particularly forgiving in *Chatwood v. From* (2000), 100 A.C.W.S. (3d) 280 (C.J.). In that case, the respondent left his managerial job to become a truck driver. He was only 25 years of age and had become disenchanted with his employer as a result of job pressures, a proposed transfer, and corporate politics.

The court held that he was “entitled to assess his career options from time to time and make the changes necessary” to protect his physical and emotional health.

A spouse’s persistence in the pursuit of unprofitable ventures may warrant the imputation of income. In *Le Page v. Porter* (2000), 7 R.F.L. (5th) 335 (S.C.J.), the court imputed income. Although the reasons for the respondent’s income decline appeared to be beyond his control, he refused to consider obtaining meaningful employment commensurate with his work history and experience as a social worker. Rather, he preferred to engage in stock speculation, residential real estate investing, and being a handy man.

Leaving employment to return to studies will frequently attract the imputation of income. *Drygala v. Pauli*, *supra*; *Marucci v. Marucci* (2001), 110 A.C.W.S. (3d) 509 (S.C.J.).

2:04 Savings Provisions

Intentional under-employment or unemployment may be justified. Section 19 (1)(*a*) sets out four distinct circumstances in which justification can occur. It can be justified if the under-employment or unemployment is required:

(a) By the needs of a child of the marriage;

(b) By the needs of any child under the age of majority;

(c) By the reasonable educational needs of the spouse; or

(d) By the reasonable health needs of the spouse.

The writer submits that these circumstances are not exhaustive. A spouse may legitimately change careers or change employers if he or she can demonstrate the reasonableness of the change. The courts are mindful of a spouse's right to pursue career options or secure meaningful and satisfying employment: *Chatwood v. From* (2000), 100 A.C.W.S. (3d) 280 (C.J.). The onus, however, would be on the support payor to demonstrate the reasonableness of the change having regard not only to his or her interests, but also the interests of the children. In *Barnsley v. Barnsley* (1998), 43 R.F.L. (4th) 290 (Gen. Div.), the court refused to find that a 68-year-old retiree was intentionally under-employed.

In *Drygala v. Pauli, supra*, the court held that the imputation of income was a three-step process. At the first step, the court would determine whether or not the under-employment or unemployment was "intentional". This determination, as mentioned above, is measured by whether or not the respondent is capable of earning a greater level of income having regard to all of the circumstances. If, in the first step, it is determined that the under-employment or unemployment is, in fact, intentional, the onus shifts to the support payor to justify the under-employment or unemployment. The reason for the shift in onus, of course, is because the support payor is in command of the facts.

The support payor must prove two different things. First, he or she must prove that the circumstances giving rise to the change are justifiable and reasonable. Second, he or she must also demonstrate that the degree of under-employment or unemployment is also justified and reasonable.

For example, in *Drygala v. Pauli, supra,* the court held that the respondent was justified in returning to school. He was entitled to seek a different career to which he was better-suited. However, in pursuing his education, he could still earn income through part-time or summer employment. In *Lachapelle v. Vezina* (2000) 11 R.F.L. (5th) (S.C.J.), the court concluded that the mother's planned maternity leave of 15 months (nine of which would be unpaid) was unreasonable. Employment income for the nine months was imputed to her.

3. QUANTUM

3:01 Quantification of Imputed Income

Section 19 (1) of the Guidelines enables the court to "impute such amount of income to a spouse as it considers appropriate in the circumstances". This does not give the court free rein. Rather, there must be a firm evidentiary basis to establish the quantum or level of income to be imputed: *Drygala v. Pauli* (2002), 29 R.F.L.. (5th) 293 (C.A.); *Fawcett v. Hurd* (1998) 83 A.C.W.S. (3d) 243 (Gen. Div.).

In many instances, a spouse's capacity to earn can be equated with his or her former level of income: *Olah v. Olah* (2000), 7 R.F.L. (5th) 173 (S.C.J.). If, however, that employment is no longer available to the spouse, the prior level of income is not an appropriate standard. Rather, the court must examine all of the circumstances to determine the spouse's capacity to pay: *Currie v. Currie* (2000), 2 R.F.L. (5th) 153 (S.C.J.).

In such cases, the courts often look to market wage rates for evidence of the proper level of income imputation. In *Depace v. Michienzi* (2000), 5 R.F.L. (5th) 40 (S.C.J.), the court held that the proper assessment of imputed income would be the amount that the respondent, a self-employed painter, could earn if he worked for wages. A similar approach was taken in *Le Page v. Porter* (2000), 7 R.F.L. (5th) 335 (S.C.J.). In some cases, the imputation may be at the minimum wage level: *Sandy v. Triskle* (2000), 101 A.C.W.S. (3d) 1140 (C.J.).

More complex, is the imputation of income based on a "maintenance of lifestyle" basis. In such cases, the court may impute income by calculating the amount that the spouse would need to maintain his or her lifestyle.