2007 CarswellAlta 674, 2007 ABQB 358, 75 Alta. L.R. (4th) 252, 39 R.F.L. (6th) 376, [2007] A.W.L.D. 2952, [2007] A.W.L.D. 2954, [2007] W.D.F.L. 3438, [2007] W.D.F.L. 3451, 158 A.C.W.S. (3d) 439

2007 CarswellAlta 674, 2007 ABQB 358, 75 Alta. L.R. (4th) 252, 39 R.F.L. (6th) 376, [2007] A.W.L.D. 2952, [2007] A.W.L.D. 2954, [2007] W.D.F.L. 3438, [2007] W.D.F.L. 3451, 158 A.C.W.S. (3d) 439

W. (V.L.) v. W. (J.E.)

V.L.W. (Applicant) and J.E.W. (Respondent)

Alberta Court of Queen's Bench

C.L. Kenny J.

Heard: April 30, 2007
Judgment: May 25, 2007
Docket: Calgary 4801-110558

Counsel: Kimberley A. **Medora** for Respondent

V.L.W. Applicant for herself

Subject: Family

Family law --- Support — Child support under federal and provincial guidelines — Determination of spouse's annual income — Imputed income

Parties separated in 1999 and were divorced in 2001 — Parties had three children of marriage — At divorce proceedings, father's income was set at $18,564 per year with child support payments of $375 per month plus $125 per month for extraordinary expenses — Prior to separation, father had been working at bank, earning $30,000 per year — After separation, husband was terminated due to drug use — In 2001, he entered rehabilitation program for two years — In 2003, he enrolled full time in university — Husband will complete degree in 2007, and had intentions to pursue graduate studies — Mother had stable employment with income of $90,000 per annum — Mother brought application to vary divorce judgment with respect to child support — Application granted — It had been eight years since parties separated, while father had been paying support since divorce, he had been doing so at significantly reduced income level — There was no evidence to suggest that father could not have gone back to employment once dependency issues were dealt with — Children's day-to-day care and expenses carried on while father continued with education — Father was aware that his choice to continue education beyond this point would have effect of reducing support to children at time when they need it most — Father was found to be intentionally underemployed, father's income was imputed at $45,000 per annum following completion of degree — Father ordered to pay child support according to guidelines, and extraordinary expenses in sum of $7,600 per annum.

Family law --- Support — Child support under federal and provincial guidelines — Variation or termination of

award — General principles

Parties separated in 1999 and were divorced in 2001 — Parties had three children of marriage — At divorce proceedings, father's income was set at $18,564 per year with child support payments of $375 per month plus $125 per month for extraordinary expenses — Prior to separation, father had been working at bank, earning $30,000 per year — After separation, husband was terminated due to drug use — In 2001, he entered rehabilitation program for two years — In 2003, he enrolled full time in university — Husband will complete degree in 2007, and had intentions to pursue graduate studies — Mother had stable employment with income of $90,000 per annum — Mother brought application to vary divorce judgment with respect to child support — Application granted — It had been eight years since parties separated, while father had been paying support since divorce, he had been doing so at significantly reduced income level — There was no evidence to suggest that father could not have gone back to employment once dependency issues were dealt with — Children's day-to-day care and expenses carried on while father continued with education — Father was aware that his choice to continue education beyond this point would have effect of reducing support to children at time when they need it most — Father was found to be intentionally underemployed, father's income was imputed at $45,000 per annum following completion of degree — Father ordered to pay child support according to guidelines, and extraordinary expenses in sum of $7,600 per annum.

Cases considered by *C.L. Kenny J.*:

D. (D.R.) v. M. (J.) (2004), 2004 ABCA 380, 2004 CarswellAlta 1580, 247 D.L.R. (4th) 569, 361 A.R. 214, 339 W.A.C. 214, 6 R.F.L. (6th) 240, 36 Alta. L.R. (4th) 221 (Alta. C.A.) — referred to

Donovan v. Donovan (2000), 2000 CarswellMan 440, 190 D.L.R. (4th) 696, [2000] 10 W.W.R. 214, 9 R.F.L. (5th) 306, 2000 MBCA 80, 150 Man. R. (2d) 116, 230 W.A.C. 116 (Man. C.A.) — referred to

Drygala v. Pauli (2002), 29 R.F.L. (5th) 293, 2002 CarswellOnt 3228, 61 O.R. (3d) 711, 219 D.L.R. (4th) 319, 164 O.A.C. 241 (Ont. C.A.) — considered

Hunt v. Smolis-Hunt (2001), 286 A.R. 248, 253 W.A.C. 248, [2001] 11 W.W.R. 233, 205 D.L.R. (4th) 712, 2001 ABCA 229, 2001 CarswellAlta 1357, 20 R.F.L. (5th) 409, 97 Alta. L.R. (3d) 238 (Alta. C.A.) — followed

Mercer v. Mercer (2004), 45 Alta. L.R. (4th) 188, 2004 ABQB 551, 2004 CarswellAlta 962, 7 R.F.L. (6th) 160 (Alta. Q.B.) — followed

Montgomery v. Montgomery (2000), 2000 NSCA 2, 2000 CarswellNS 1, 3 R.F.L. (5th) 126, 181 D.L.R. (4th) 415, 182 N.S.R. (2d) 184, 563 A.P.R. 184 (N.S. C.A.) — considered

Schindle v. Schindle (2001), 2001 CarswellMan 621, 2001 MBCA 185, 21 R.F.L. (5th) 188, 160 Man. R. (2d) 309, 262 W.A.C. 309 (Man. C.A.) — considered

Scott v. Scott (2006), 2006 ABCA 296, 2006 CarswellAlta 1844, 34 R.F.L. (6th) 319 (Alta. C.A.) — referred to

Steele v. Koppanyi (2002), 29 R.F.L. (5th) 217, 2002 MBCA 60, 2002 CarswellMan 217, 163 Man. R. (2d) 268, 269 W.A.C. 268, [2002] 9 W.W.R. 424 (Man. C.A.) — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally — referred to

s. 7 — considered

s. 19 — considered

s. 19(1)(a) — considered

Sched. I, s. 4(f) — referred to

Family Law Act, S.A. 2003, c. F-4.5

Alberta Child Support Guidelines, Alta. Reg. 147/2005

Generally — referred to

APPLICATION by mother to vary divorce judgment with respect to child support payment and extraordinary expenses.

***C.L. Kenny J.*:**

Introduction

1 This is an application by Ms. V.L.W. (the mother) to vary the Divorce Judgment with respect to child support payments.

Background

2 There are 3 children of the marriage. They are currently 14, 12 and almost 7 years of age. The parties separated in 1999 and were divorced in October of 2001. At that time Mr. J.E.W.'s (the father's) income was set at $18,564 per year with child support payments of $375 per month plus an additional $125 per month for section 7 expenses under the Child Support Guidelines.

3 The father's activities since the separation have been somewhat varied. Prior to the separation, he had been working for a major bank for a number of years earning approximately $30,000 per year. In March of 2000, just after the separation, his employment was terminated due to his use of illicit drugs. He received a one year severance payment and did some part-time work thereafter. In October of 2001 he entered a drug and alcohol rehabilitation program for a period of 2 years. He finished the program in September of 2003. He then decided to move to Victoria B.C. to live with his mother and enroll full time in university. He will complete his joint degree in psychology and anthropology in September of 2007 with an honors level grade point average. He is not sure what he will do with this degree once he finishes and believes it will be necessary for him to complete his Masters degree and perhaps his Doctorate degree in order to reach his greatest earning potential.

4 The mother on the other hand has been employed with the same employer for some time and has very stable employment with a good income. While working full time she completed an extra course of self study over a period of 2 years which provided her with additional professional certification thereby further enhancing her career prospects.

5 The father has continued to make the support payments in the sum of $500 per month even though his income has been nominal since the Divorce Judgment. While there was some difficulty in getting these payments in a timely fashion, they have recently been paid on a regular basis and there are no arrears outstanding.

Parties' Positions

6 The mother takes the position that 8 years is long enough for the father to get his affairs in order so that he can earn a regular income and contribute his fair share to the support of the children. Her view is that the children come before the father's lifestyle choices and that as the full-time care giver to the children, she does not have the choice of changing careers or deferring child support as the father has. She is seeking some equity in these obligations before the children reach the age of majority and no longer require support. Other than the $500 per month that she has received from the father, the mother has carried the entire load herself for the care of the children including full time child care costs for the youngest child until she started school full time. In addition to the financial burden, she also carries most of the load with respect to child care and activities as the father lives in B.C. and is not in a position to assist on a regular basis. While he does come to Calgary for a visit from time to time and to work in the summers, that does not provide her with regular breaks from her parenting responsibilities.

7 The mother asks that the court impute income to the father of $45,000 per year and set child support accordingly. She says that the father is intentionally unemployed or underemployed and should be earning significantly more income to help support his children. She wants the change to be effective as at May 1, 2006. She has picked that date for two reasons: first, that is the date the Child Support Guidelines were amended with respect to quantum and secondly, the father had initially indicated to her that he would be finished his degree in three years rather than four years. He originally thought he would take extra courses in the spring and summer so he could finish in the spring of 2006 however he later decided to work odd jobs in the summer to help pay some of the ongoing child support rather than take courses which extended his degree by a year.

8 The $45,000 is calculated by the mother in two different ways. First of all, she says that the father was earning $30,000 in 1999 when the parties separated and had he continued in that job or a similar one, his income surely would have increased to somewhere between $40,000 and $45,000 by now. Her second calculation looks at profiles of jobs that the father might be able to do with his degree. Such profiles show that he would earn an income in excess of $45,000 per year and as such, the $45,000 figure is more than fair to the father.

9 The mother also has section 7 expenses of $7,600 per year for the 3 children. She seeks to have the father pay his pro rata share of those expenses.

10 The mother was criticized by the father for the job profiles she produced as some required work experience or a Master's degree neither of which the father has. In fairness however to the mother, the father has provided no evidence of what type of work he is interested in or expects to get with his education. He simply opines that he plans to continue his education for another 3 years to write a Masters and PHD thesis in the hope of a more promising income earning potential.

11 The father's position is that he has lived up to the Order that was granted for child support in accordance with his income at the time of the Divorce and that in fact his income has decreased substantially since then yet he has continued to make the monthly payments as required. He did bring an application in early 2005 to decrease the child support payments but later abandoned that application.

12 His position is that it is reasonable for him to increase his education to provide better financial opportunities for himself and the children. He is asking that the court not change his child support obligations until such time as he has completed his education and obtained full-time employment.

Law

13 Section 19 of the Child Support Guidelines deals with imputing income. The father relies on Section 19(1)(a) which reads as follows:

> 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 the child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

14 The father says that his educational needs have been reasonable, therefore he has not been under-employed or unemployed and the Court cannot impute income to him.

15 Two lines of cases have developed for the interpretation of s. 19(1)(a) of the Guidelines. Firstly, the "bad faith" cases have interpreted the word "intentionally" as requiring deliberate avoidance of child support obligations by the payor parent through a course of conduct which does not maximize their income potential, such as choosing to take a lower-paying job. In order to impute income on the part of a payor parent, there is a requirement that they specifically attempt to evade child support payments with their actions.

16 Secondly, the "reasonableness" cases have interpreted "intentional" to mean a voluntary act of the payor parent. This merely requires them to make a career choice, such as education or a lower-paying job, which does not maximize their potential income from employment. As long as there has been a voluntary act which has the effect of reducing a parent's income, s. 19(1)(a) can operate to impute income.

17 Alberta is currently the only appellate court which supports the "bad faith" reasoning. The "reasonableness" test has become the more popular approach across the country.

The Bad Faith Test (Alberta)

18 In *Hunt v. Smolis-Hunt*, 2001 ABCA 229 (Alta. C.A.), the Alberta Court of Appeal established that the "bad faith" approach to imputing income is the correct interpretation of s. 19(1)(a). The Court found that there must be a specific intent to evade child support obligations before income can be imputed, however, they also note that *mala fides* is not specifically required. The rationale for creating this "bad faith" rule includes the following:

> 1. The wording of s. 19, and the statutory circumstances in which income can be imputed, "permit the

court to rectify a situation where the [payor parent] is subverting or taking advantage of the general provisions in the Guidelines to the detriment of the child." (para. 48).

2. The requirement for parents to maximize their employment income has the potential to be an unreasonable obligation on the parent.

3. The objective of the Guidelines is to provide children with a fair standard of support and not the maximum standard of support that the parents are capable of contributing.

4. There is a "fundamental importance of work to a person's life and...freedom to choose work which fulfills needs and interests extending beyond the receipt of an income." (para. 64).

19 In the *Hunt* decision, the father was found to have "stubbornly adhered to a career path that did not permit him to earn enough to adequately support his children...he chose to continue in a legal practice where he was unsuccessful and where there was no reasonable prospect of future improvement." [para. 95.]

20 Justice Picard wrote a strong dissent to the *Hunt* decision. She based her decision on the golden rule that "a child has the right to be supported and both parents have the responsibility to provide that support" and that the best interests of the child are always dominant if a conflict arises between the rights of a parent and the rights of a child. (para. 104). She promotes a test of reasonableness over one of bad faith.

The Reasonableness Test (Ontario, Manitoba, Nova Scotia)

21 The Ontario Court of Appeal, in *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.), determined that section 19(1)(a), in the context of a spouse pursuing educational goals, requires an analysis of the reasonableness of their education decision. In this case, the father enrolled in university as a full-time student and was not employed. The Court of Appeal confirmed that he was intentionally unemployed. Upon noting that he had 9 hours of classroom time per week and after taking into account an appropriate time period for study and preparation, they imputed income to him for 17 to 20 hours of work per week.

22 The Court of Appeal found that the onus is on the payor parent to demonstrate that section 19(1)(a) is met such that income should not be imputed. There are three steps to the test.

1. Is the payor parent intentionally unemployed or underemployed?

a.. The Court interprets the word "intentionally" in section 19(1)(a) as meaning a voluntary act that occurs when a parent "chooses not to work when capable of earning an income." (para 28). They find that this provision does not require bad faith on the part of the payor parent.

2. If so, are the educational needs of the payor parent reasonable?

a. This involves a consideration of the course of study. A spouse is not to be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

3. If so, is the unemployment or underemployment required by virtue of those reasonable educational needs?

23 In *Drygala*, the father acted intentionally when he chose to pursue his educational goals rather than

work. His unemployment was a voluntary choice. It was not due to market forces such as a lay-off, termination or reduced hours of work. The Court found that the payor parent must always consider their familial obligations first when making their employment decisions. An intention to avoid child support is not required.

24 The Manitoba Court of Appeal, in *Schindle v. Schindle*, 2001 MBCA 185 (Man. C.A.), found that income could be imputed any time a person could earn more income, unless the decision to remain underemployed was reasonable after taking into account their support obligations.

25 In Manitoba, the Court of Appeal has used the following six considerations when considering whether to impute income in accordance with s. 19(1)(a). See: *Donovan v. Donovan*, 2000 MBCA 80 (Man. C.A.); *Schindle v. Schindle*, 2001 MBCA 185 (Man. C.A.); and *Steele v. Koppanyi*, 2002 MBCA 60 (Man. C.A.). Although *Steele* involves a consideration of the provincial child support guidelines, the sections are virtually identical in wording. The six considerations are:

> 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor.
>
> 2. When imputing income on the basis of intentional underemployment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
>
> 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job will be at the lower end of the pay scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from their child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

26 The Manitoba courts have also held that the onus is on the person who has changed their income to show that the career, and resulting income change, was reasonable as the knowledge of their earning capabilities lies within their control.

27 The Nova Scotia Court of Appeal has also interpreted s. 19(1)(a) in a similar manner to *Drygala*. At paragraphs 35-37 of *Montgomery v. Montgomery*, 2000 NSCA 2 (N.S. C.A.), the Court states that the Guidelines do not "establish any restriction on the court to imputing income only in those situations where the applicant has intended to evade child support obligations, or alternatively, recklessly disregarded the needs of his children in furtherance of his own career aspirations." The Court found that the critical term in s. 19(1)(a) is the word "reasonable" and that this should involve an examination of all circumstances, including the financial circumstances

of the children and the applicant.

28 It appears that the general balance of appellate courts across the country, except for Alberta, have adopted a rule that is analogous to that in *Drygala.* James Mcleod, in his Annotation to *Drygala* found the considerations in that case to be more in line with the Guideline objectives. He states the following:

> That the Alberta Court of Appeal split over the meaning of the same words confirms that the meaning of "intentionally underemployed" is not as clear cut as Gillese J.A.'s comments suggest, although the proviso to s. 19(1)(a) [referring to the exception for reasonable educational and health needs of the spouse] suggest that her interpretation is more in keeping with the general tenor of the Guidelines. (James Mcleod, Annotation to *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 at 296.)

Analysis

29 The facts in this case are very similar to *Drygala*. Both deal with a voluntary decision to pursue further education rather than employment. On a "reasonableness" standard I would need to decide whether this decision was reasonable in all of the circumstances. I am however bound by the "bad faith" approach taken by the majority in *Smolis-Hunt* where there must be a specific intent to evade child support. Although the facts in *Smolis-Hunt* relate to a decision by a payor parent to remain in an unsuccessful career, as opposed to the issue of further education, it appears that *Smolis-Hunt* is intended to operate as an interpretive precedent for all cases in Alberta involving s. 19(1)(a) (*Scott v. Scott*, 2006 ABCA 296 (Alta. C.A.); *D. (D.R.) v. M. (J.)*, 2004 ABCA 380 (Alta. C.A.)).

30 In *Mercer v. Mercer*, 2004 ABQB 551 (Alta. Q.B.), Justice Watson determined that the intent to avoid the payment of child support could be inferred as the logical consequence of a father's lack of motivation in seeking employment. In the *Mercer* case the father did not provide the Court with a proper explanation for his unemployment or provide evidence of his attempts to find employment.

31 Justice Watson states that it is clear that the majority of the Court of Appeal in *Smolis-Hunt* indicated that *mala fides* were not specifically required, but they used the terms: Subverting or taking advantage of the general provision in the guidelines to the detriment of the child. (para. 20). In his opinion, the Court of Appeal did not require a specific bad faith intent but rather a parent who conducted themselves in a way that took advantage of the system such that their child support payments were lower than they should be. He explains this rationale by using a "statutory interpretation of reasoning" and relying on "the notion that in fact when something is done intentionally, it is sufficient that it be established that the person who does it intentionally, with the desire to effect a certain consequence, knows that that consequence is substantially likely to happen as a result of the conduct and proceeds with the conduct in any event." (para.23).

32 Justice Watson did not find the father's explanation or attempts to find alternative employment to be reasonable within the meaning of s. 19(1)(a) and found that, when this unreasonableness is added to the awareness of the consequences of his employment actions, it is raised to the level of s. 19(1)(a) in the Guidelines. In his view where a parent is aware that their employment choices have an effect of curbing their child's access to higher levels of support then that "must be found to be a decision which is made intentionally." (para. 24).

33 The interpretation of s. 19(1)(a) in Alberta requires that the payor's choice of employment, or lack of employment, be premised on an intent to evade their child support obligations in order to impute an income. However, the decision in *Mercer* allows this intention to be inferred if it is the natural consequence of the pay-

or's actions. If, in making that choice, the payor realizes that this ultimately has an adverse effect on their child's access to support, then the bad faith test in *Smolis-Hunt* may be made out.

34 In this case the father has made a conscious choice to continue his education to the Masters or Doctorate level with the knowledge that this will have an adverse effect on his children's right to receive appropriate support from him. On application of the reasoning in *Mercer*, it can be inferred that this consequence is as intentional as the decision it arises from. Therefore, the test in *Smolis-Hunt*, that the payor parent be "taking advantage of the general provision in the Guidelines to the detriment of the child." is met. The father is deliberately underemployed to the detriment of his children as they do not receive the benefit of higher payments.

Decision

35 It has now been 8 years since the parties separated. While the father has been paying support since the Divorce in 2001, he has been doing so at a significantly reduced income level. He spent 2 years in rehabilitation and then the last 4 years taking his undergraduate degree at the University of Victoria. He has done very well earning an honours degree. He wishes to continue his education. His affidavit provides no evidence of what he is interested in, what type of work he expects to get once he finishes University and no evidence of any plan to seek employment in the near future. His evidence is that he did his best to obtain sustainable employment but was repeatedly met with rejection. He was frustrated with this "position of inferiority" and so decided to go back to school so that he could support himself and his children in a comfortable fashion. He confirms that he comes to Calgary to work when he is off school as the employment opportunities are significantly better than in Victoria. He asked for time to finish his secondary education which he expects will last at least another three years.

36 There is no evidence before the Court to suggest that the father sought employment after his two-year program of rehabilitation. He moved directly to British Columbia and commenced full-time post-secondary education. He has maintained summer employment throughout which would indicate he does not have difficulty obtaining employment. It would have been reasonable to expect that the father would have sought full-time employment once he finished his rehabilitation program. He certainly had the experience of working for a number of years with a major bank involved in liaison with corporate clients. While his continued use of illicit drugs lead to him negotiating his departure from that employment, there is nothing to suggest that he could not have gone back to that employment once the dependency issues were dealt with.

37 In any event he decided to pursue further education which hopefully will benefit both him and the children in the long run. The difficulty is that the children's day-to-day care and expenses carry on while the father continues with his education. Were this Court to defer to his request to wait an additional three years, which would be the fall of 2010, his oldest child would be 17 years of age and it would have been 11 years of each child's life during which the father has not paid appropriate support.

38 The mother has been most fair throughout this matter. She did not pursue this matter in 2003 when the father completed his rehabilitation course and in fact did not bring the matter forward until the summer of 2006 on the basis that this was the time when the father was to have completed his degree based on his original estimates.

39 The father is certainly aware that his choice to continue his education beyond this point will have the effect of reducing support to his children at a time when they need it most. In spite of that, rather than actively seeking employment at the present time to commence in September of 2007 when he finishes his degree, he chooses to continue on with his education. I find that that decision is an intentional decision to evade adequate

child support. As such I find the father to be intentionally underemployed and with the completion of his degree at the end of August 2007, his unemployment does not relate to reasonable educational needs. I impute income to him in the sum of $45,000.00 per annum commencing September 1, 2007 and I order that he make child support payments based on that income pursuant to the B.C. tables of the Child Support Guidelines. He will also pay his pro rata share of the s. 7 expenses which are in the total sum of $7,600.00 per annum. For the purpose of calculating the pro rata share of s. 7 expenses, the mother's income is set at $90,000.00 per annum. There will also be a provision in the Order with respect to the provision of annual income tax returns by the father to the mother commencing June 1, 2008 for as long as the children or any of them are children of the marriage.

40 Each party shall bear their own costs.

Application granted.

END OF DOCUMENT