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Not Every Gift is Free: the Impact of Gifting on Child Support

FALL 2015

As many parents who pay child support already know, the determination of income is of critical importance. Until recently, gifts received by a payor parent did not normally impact child support payable. However, a recent decision by the Ontario Court of Appeal ("ONCA") indicates that gifts will now be increasingly assessed as part of the income determination process.

The Child Support Guidelines ("Guidelines") were adopted by Parliament in order to establish a fair standard of support for children. Prior to the implementation of the Guidelines, child support orders varied widely, which made it difficult for family law lawyers to provide advice with respect to child support payable. Not surprisingly, this often contributed to costly and protracted litigation.

As a result, Parliament decided that child support for minor children would be based, in part, on the number of children and on the income of the parent. As the ONCA observed in Bak v Dobell ("Bak"), Parliament sought to use fair and objective criteria to promote sustainability and consistency so that parties would be able to resolve the issue of child support expeditiously while minimizing the financial and emotional costs of litigation.

However, sometimes a payor's income cannot be easily ascertained. Often, this is because a parent has not disclosed his or her income or because a parent has remained intentionally under-employed or unemployed. Frequently, it becomes apparent from the lifestyle of a payor that he or she is receiving undeclared income because the payor's work history, lifestyle, and declared income do not match up. In these situations, it is appropriate to apply provisions within the Guidelines which give the Courts the discretion to impute – or assign - income to a payor parent for the purposes of determining child support payable.

At s.19 of the Guidelines, the Courts are permitted to impute income where a parent or spouse is intentionally under-employed or un-employed; except where under-employment or unemployment is in connection with the needs of a child, or where the reasonable educational or health needs of the parent necessitate. The Guidelines also provide latitude for imputing income where a parent is unfairly benefiting from legitimate tax or investment opportunities at the expense of child support payable.

The list of enumerated grounds found at s.19 of the Guidelines, while not exhaustive, do not anticipate those situations where a payor is receiving, or has received, gifts which allow the payor to live a lifestyle which is not commensurate with his or her declared income. Until recently, the Courts have been hesitant to impute income to a payor on the basis of gifts received from parents for a number of reasons.

For example, in Bak, the ONCA considered whether or not to impute income based on gifts received by the payor parent from his father. The payor's father had historically supported the payor's educational and vocational ambitions; and prior to litigation, had even purchased a condominium for his son so that he would 'experience a sense of ownership' and begin to live 'like an adult'. The ONCA noted that the legislature had an opportunity to include gifts as presumptive income when it adopted the Guidelines; and yet, it chose not to do so.

The ONCA also pointed to a number of previous decisions where the Court did not impute income, despite substantial gifts being received by the payor on a temporary basis from a supportive parent. In cases like these, the Courts have stated that the support of an adult child should not be discouraged by imputing income based on that support.

In the end, the ONCA in Bak declined to impute income because this would have resulted in an indirect imposition of child support on the payor's parent. Since Bak, the ONCA has shifted its position and now appears ready and willing to impute income where a payor receives a gift from his or her parent.

In Korman v Korman ("Korman"), the trial judge had imputed annual income to the husband in the amount of $120,000 on the basis of financial assistance which was received from his parents over the course of the marriage and following the date of separation. Specifically, the husband received funds to

start a business; he was the recipient of dividend income; and he had received assistance with the cost of the matrimonial litigation. Essentially, the trial judge found that, as gifts to the husband were likely to continue to be made in a substantially consistent fashion, an imputed income in the amount of $120,000 would be appropriate in the circumstances.

The ONCA in Korman recognized that s.19 of the Guidelines is not exhaustive and that imputation of income is fact-specific and dependant on the circumstances of the family. As a result, the determination of income for child support purposes should not be limited to income which is subject to taxation. Therefore, the Courts are able to retain their discretion to impute income – on the basis of gifts received – where that imputed income is supported by the evidence and is consistent with the objective of establishing fair support based on the means of the parties in an objective manner that reduces conflict, ensures consistency, and encourages resolution.

In Korman, the Court observed that the gifts received by the husband – over many years - had enabled him to establish a lifestyle well in excess of a basic standard of living for himself and his family during the marriage, and following separation. For these reasons, the ONCA did not disturb the trial judge's discretionary imputation of income to the husband. As the Korman decision demonstrates, payors should exercise caution when receiving gifts of considerable value from their parents, as there could be a significant impact on child support payable.

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