Focus FAMILY LAW

A new look at intergenerational generosity

Ontario ruling classifies annual gift as income for child support purposes

Andrew Feldstein

The Jan. 9 Ontario Superior Court of Justice judgment, in *Horowitz v. Nightingale* [2015] O.J. No. 99, ought to serve as a warning bell to baby boomer parents helping to support adult children and grandchildren with annual gifts of money.

Given that Canadians are in the midst of the biggest transfer of intergenerational wealth in history as baby boomers pass down their assets, I believe this decision may send shockwaves through the legal community and the general public. In the event of divorce, those providing annual gifts of money to family members may find such gifts will be shared with family member's estranged spouse.

The issue before the court in this matter was the determination of the respondent's income for support purposes. The court ruled that the $50,000 per year gift the respondent had been receiving from his parents for at least eight years was to be imputed as income for spousal and child support purposes. In addition, the gift was also grossed up to account for the fact that it was received on a tax-free basis.

The spouses were married on Jan. 19, 1997 and separated on June 25, 2013 — 16 years. There were three children of the marriage and all had special needs. The applicant was a chiropractic doctor, but earned a minimal income. The respondent, however, was a lawyer and partner of a law firm which practised in collections for financial institutions.

The court began its analysis of the determination of the respondent's income by considering whether the gifts received from his parents are considered income for support purposes. The court found that "for child support purposes, gifts received are not included in a spouse's presumptive annual income as defined in s. 16 of the *Child Support Guidelines*; however, s. 19(1) of the *Child Support Guidelines* does provide the court with the discretion to impute income to a party as it considers appropriate in the circumstances. Section 19(1) goes on to list, non-exhaustively, circumstances where it may be appropriate to impute income to a spouse. The receipt of 'gifts' is not included in this non-exhaustive list."

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The court then referenced *Bak v. Dobell* [2007] O.J. No. 1489, which held that although it seemed as though the legislature intentionally did not include the receipt of gifts for the purposes of imputing income for support purposes, a court may consider whether the "circumstances surrounding the particular gift are so unusual that they constitute an appropriate circumstance in which to impute income." The Court of Appeal for Ontario continued its analysis by citing the following factors to be considered in such a scenario:

- The regularity of the gifts;
- The duration of their receipts;
- Whether the gifts were part of the family's income during cohabitation that entrenched a particular lifestyle;
- The circumstances of the gifts that earmarked them as exceptional;
- Whether the gifts do more than provide a basic standard of living;
- The income generated by the gifts in proportion to the payor's entire income;
- Whether the gifts are paid to support an adult child through a crisis or period of disability and whether the gifts are likely to continue; and
- The true purpose and nature of the gifts.

After considering the above factors, the court held that the sum of $50,000 per year ought to be imputed to the respondent for the purposes of child and spousal support.

The court then turned to the respondent's income earned from his law practice. The court accepted the respondent's submissions on this issue and attributed an annual income of $216,000 to the respondent from said source. The court further attributed an income of $93,744 as a result of the respondent's RRSP withdrawals. Including the $50,000 annual gift received from the respondent's parents, the respondent's income was determined to be in the amount of $403,044 for child and spousal support purposes.

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The reasoning of the court in its decision is in my opinion flawed. Gifts received, especially from family members, ought not to be considered as income for the purposes of support. At any time, the family may stop giving large amounts of money.

Further, it is my opinion that the reasoning of the court is fully inconsistent with the intent of the drafters of such legislation. If the parents providing such a gift understood that their child's estranged spouse would be entitled to support from such a gift, the presumption would be that the parents would not provide it.

In my opinion, a gift should only be included in exceptional circumstances. For example, it would be appropriate when one of the parties chooses not to work because they receive a large annual gift or when the gift is a form of compensation for work in a family business and it is being structured as a gift to avoid support obligations.

Andrew Feldstein is managing partner of Feldstein Family Law Group, one of the largest family law firms in greater Toronto.

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Once in a blue moon, big beer gets sued

They might not have the refined taste of wine connoisseurs, but beer aficionados like San Diego home brewer Evan Parent say they don't like being fooled. Parent's class action suit against MillerCoors accuses the giant brewing company of misleading customers into thinking its Blue Moon product is a craft beer by using the tag line "artfully crafted," reports the New York Daily News. Brewers Association guidelines define a craft brewery as producing less than six million barrels of beer annually and under 25 per cent owned or controlled by a non-craft brewer. MillerCoors brews Blue Moon along with 76 million barrels of other beer. The lawsuit alleges, the company violates California consumer protection law prohibiting deceptive sales tactics. The lawsuit states that: "Defendant [MillerCoors] goes to great lengths to disassociate Blue Moon beer from the MillerCoors name." As Parent's lawyer Jim Treglio explains, "What this case is really about is people think they're buying craft beer and they're actually buying crafty marketing." A spokesperson for MillerCoors company says the lawsuit lacks merit. – **STAFF**