Canadian Family Law Matters

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GIFTS AND SUPPORT ORDERS

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The Ontario guidelines for child support are the same as the *Federal Child Support Guidelines*. In Ontario, an order for child support can be made under the *Family Law Act* if the parents are separated or were never married. Such an order can also be made under the federal *Divorce Act*. In either case, the same guidelines apply. The courts have also applied the same principles for the purpose of calculating spousal support.

A spouse's income is based on line 150 ("Total Income") of his or her T1 general return. However, under section 19 of the *Federal Child Support Guidelines*, a court may impute income to the spouse "as it considers appropriate in the circumstances." Nine circumstances are listed in which income imputation may be appropriate. Because these circumstances are intended merely as examples, the court retains discretion to impute income in other circumstances as well. One listed circumstance involves a situation in which a spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust. The case of a gift is not included among the nine listed circumstances.

Recent Ontario cases have confirmed the court's discretion to include gifts in the calculation of income for support purposes. Such an inclusion of gifts derives from the 2007 Ontario Court of Appeal's decision in *Bak v. Dobell*, 2007 ONCA 304. The court enumerated the following factors that are to be considered in determining whether it is appropriate to include gifts in income: (1) the regularity of the gifts, (2) the duration of their receipt, (3) whether the gifts were part of the family's income during cohabitation that entrenched a particular lifestyle, (4) any circumstances that mark the gifts as being unusual, (5) whether the gifts did more than provide a basic standard of living, (6) the income generated by the gifts in proportion to the payer's income, (7) whether the gifts were made to support an adult child through a period of crisis, (8) whether the gifts are likely to continue, and (9) the true nature and purpose of the gifts.

Horowitz v. Nightingale, 2015 ONSC 190, was a motion for temporary child support in which *Bak v. Dobell* was applied. The amount of $50,000 was imputed to a husband's income for the purpose of calculating child and spousal support. The husband had been receiving a gift in this amount from his parents in each of the preceding eight years. The court concluded that the funds were treated as part of the family's income and supported the family's lifestyle. The annual gift amounted to approximately 25 percent of the husband's business income for the year. The court simply stated that it was "safe to conclude" that the gifts would continue without further elaboration.

Bak v. Dobell was also applied by the Ontario Court of Appeal in *Korman v. Korman*, 2015 ONCA 578. An amount was imputed to the husband's income on the basis of "neither irregular nor infrequent" gifts received from his parents. The court found that there was a

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settled pattern of parental gifts to finance private school tuition or camp expenses for the children, to assist the husband in maintaining the family's lifestyle, or to underwrite the husband's various business ventures. The amount of the gifts appeared to approximate the husband's annual employment income in each of the three years preceding trial. Although the husband had objected to the imputation on the basis that it shifted the onus of providing support to his mother (who had no legal obligation to provide support to either the wife or the children), the Court of Appeal rejected this argument. It held that the trial judge had made a finding about the husband's likely source of revenues and noted that the husband could apply for an adjustment to any support order if the situation changed in the future.

In Ontario, estate planning is sometimes focused on a gift after marriage because such a gift and the income that flows from it is excluded from net family property under section 4(2) of the *Family Law Act*. As a result, the gift is not subject to equalization in the event of a marital breakdown. A parent implementing an estate freeze might take steps to ensure that the common shares of a corporation (in a corporate estate freeze) or the growth units of a partnership (in a partnership estate freeze) pass to a married child by way of gift. While this may protect the property from an equalization claim, parents should also be advised that monetary gifts to a married child may ultimately factor into a support claim in the event of a marital breakdown.

LEGISLATION UPDATE

British Columbia

Sections 4 to 11, 13(*a*), (*c*), and (*d*), 14 to 21, 24, 28, and 30 of Bill 9, the *Pooled Registered Pension Plans Act*, are proclaimed in force effective May 4, 2016. These sections amend the *Family Law Act*, SBC 2011, c. 25, sections 110, 113 (3)(*c*), 139, and 145; and the *Family Maintenance Enforcement Act*, RSBC 1996, c. 127, sections 15(9), 16(10), 24(10), and 25(1) and (2). The amendments incorporate the *Pooled Registered Pension Plans Act*.

Manitoba

Bill 11, *The Domestic Violence and Stalking Amendment Act*, received third reading on March 7, 2016 and received Royal Assent and was proclaimed in force on March 15, 2016. Bill 11 amends *The Domestic Violence and Stalking Act*, CCSM c. D93. The test for obtaining a protection order is changed to remove a requirement that the victim needed imminent and immediate protection before an order would be made. Further, if a protection order is made and the justice of the peace is satisfied that the person against whom the order is made possesses firearms, the protection order must require that person to surrender the firearms. The definition of "stalking" is also expanded to include threats or harassment made over the Internet.

Newfoundland and Labrador

Bill 8, *An Act to Amend the Change of Name Act, 2009*, received Royal Assent and was proclaimed in force April 13, 2016. Bill 8 amends the age limit of persons who may apply for a change of name under the *Change of Name Act, 2009*, SNL 2009, c. C-8.1, from a person who is the age of majority or older to a person who is 16 years of age or older.

Ontario

Bill 195, *An Act to amend the Child Care and Early Years Act, 2014*, received first reading on May 5, 2016. Bill 195 amends the *Child Care and Early Years Act, 2014*, SO 2014, c. 11, Sch. 1, to require every person that maintains a waiting list in respect of child care to prepare a written policy setting out how the waiting list is administered. The policy and waiting list must be made available to the public. The Bill prohibits persons from charging or accepting a fee or deposit before a child is admitted for child care.

RECENT CASES

Separation Agreement Summarily Set Aside

Ontario Superior Court of Justice, December 22, 2015

The parties married in 1982 and separated in 2013. They had two adult children. The parties had a traditional marriage. The husband worked for Honda Canada on the automotive assembly line. The wife remained home to care for the children and household. Two weeks after the wife announced she was leaving the marriage, the husband's lawyer sent her a separation agreement and two post-dated cheques for $10,000. The agreement was prepared on the husband's instructions. The wife did not obtain independent legal advice. The wife claimed that the husband told her she was not entitled to anything because she did not contribute financially to the household. The wife claimed she had no reason to distrust the husband and went ahead and signed the agreement. Under the agreement, the wife waived spousal support in exchange for $25,000; agreed to transfer her half interest in the matrimonial home to the husband; waived her entitlement to share in the husband's pension and her entitlement to an equalization payment. Relying on the recently expanded rule 16 of the *Family Law Rules*, the wife moved for summary judgment setting aside the agreement.

The motion was allowed. The wife was not precluded from bringing a motion for summary judgment with respect to the present claim on the basis that she was also claiming a divorce. Rule 16(3) provides two procedures where an applicant seeks dissolution of a marriage without trial. What is prohibited under rule 16(2) is using the summary judgment procedure to obtain a divorce.

Turning to the *Family Law Act* provisions for setting aside a domestic contract, the Court found that the husband exerted his will over the wife and was in a demonstrably stronger position, which resulted in a disadvantage to the wife. Considering her trust in him, the husband's representation to the wife amounted to a pressure on her will and left her without an ability to freely make a decision. The lack of independent legal advice also created an "unsurmountable obstacle" for the wife's assuming any effective bargaining power. The contract was obviously unfair, as the wife gave up a number of claims she was entitled to, including what would have been a substantial compensatory spousal support claim. Considering the above, the Court ordered the agreement to be set aside.

Butler v. Butler, 2016 CFLG ¶ 27,187

Judge Erred in Finding Respondent Did Not Stand *in Loco Parentis*

British Columbia Court of Appeal, December 22, 2015

The parties began cohabiting in 2003, married in 2007, and separated in 2011. Each had a young child from a previous relationship. The appellant father had sole custody of his daughter, S. S's biological mother only made a few voluntary child support payments. She had access to S on alternate weekends. The respondent mother had *de facto* custody of her daughter, H. H's biological father paid $104 in child support until she was a year and a half. The parties lived together with their daughters for eight years. The mother was employed as a residential care aide and the father operated several businesses. Each party sought child support from the other. The father agreed that he stood *in loco parentis* for H. At trial, the judge found that the mother did not stand *in loco parentis* for S. The judge found the mother did not have control over S's discipline and did not contribute financially to her. Accordingly, the mother had no child support obligations to S. The judge also imputed income of $100,000 to the father and deducted from his table child support the biological father's child support quantum. The father appealed.

The appeal was allowed in part. The Court found the trial judge erred in concluding that the mother did not stand in the place of a parent for S. The trial judge did not refer or give weight to the comment in *Chartier v. Chartier*, [1999] 1 SCR 242, that the fact of forming a new family is a key factor in drawing an inference that a step-parent treats the child as his or her family member. The mother's evidence was that her role in the family, in addition to working, was to care for the children; that she would take S to school, attend parent/teacher interviews for both children, vacation with both children, and not differentiate between them in her affection. The trial judge placed undue emphasis on certain facts, with no explanation as to their relevance—specifically, on the fact that S had two biological parents and that S was living with her biological mother at the time of trial. The trial judge misapprehended certain aspects of the mother's

evidence, such as her claim that she had no say in disciplining S, which was ambiguous and unsupported by the remainder of her evidence. The evidence also did not show that the mother used her income differently when it came to paying for S as opposed to H. The Court concluded that the mother stood in the place of a parent to S. There was no error in setting the father's income at $100,000 per year based on his lifestyle and spending patterns. The father failed to provide any reasonable foundation for his claim that his income was $30,000. There was no error in the trial judge attributing only $55,000 in income to the mother. The Court could not quantify the amount of child support payable by the mother and remitted the issue to the lower court.

Sullivan v. Struck, December 22, 2015

Increased Access Costs Not Factor for Reducing Guidelines Income

British Columbia Court of Appeal, January 12, 2016

The parties were married in 1996, separated in 2006, and divorced in 2011. They had two children of the marriage, aged 18 and nine. Post-separation, the children lived with the appellant mother. The 2011 divorce judgment set the mother's income at $28,169 and the respondent father's at $100,000. The father was ordered to pay child support of $1,440 per month for both children and spousal support of $1,200, reviewable one year after the sale of the parties' farm. At the time, it was expected that the children would remain in the mother's care and that she would move to the Lower Mainland after selling the farm. The farm was sold in August 2012. The mother decided to remain where she was living due to financial difficulties. In 2013, the older child moved to the father's residence. In 2014, the mother and younger child moved to Alberta. In October 2014, the father applied to terminate spousal support and adjust child support to reflect the older child's changed residence. A judge reduced the father's imputed income to $80,000 to account for his increased costs of access and increased the mother's imputed income to $35,000. Ongoing child support payable to the mother was $476 per month. Spousal support was terminated retroactive to August 2013. The mother appealed. She did not contest the spousal support termination.

The appeal was allowed. The evidence did not support a retroactive termination of spousal support. Given the mother's financial situation, it was not realistic to expect her to have relocated to Vancouver within a year of the sale of the farm. Accordingly, the one-year review of spousal support should not have been viewed as a deadline for the mother to attain self-sufficiency. The Court ordered that the termination of spousal support be effective November 2014, not August 2013. As the father provided no meaningful income information, there was no basis for the reduction in income to $80,000. The issue of high costs of access is not a factor that results in reduced income under the *Federal Child Support Guidelines*. Instead, it is a matter to be considered under an undue hardship claim, which the father did not bring. Accordingly, the father was to continue paying child support for one child on the basis of a $100,000 income, set-off against the support payable by the mother, which resulted in ongoing child support of $649 per month. There was no error in imputing the mother with income of $35,000. Arrears were to be recalculated using these income figures.

Witts v. Witts, British Columbia Court of Appeal

Carve-Out Payment Not Income for Spousal Support Purposes

Ontario Superior Court of Justice, January 4, 2016

The parties married in 1978, separated in 2001, and divorced in 2005. They had four children who were now adults. The applicant husband was 59 years old and the respondent wife was 58. The husband worked in the high-tech sector and the wife ran a child care business from home. Post-separation, the wife opened a travel agency. Under 2005 minutes of settlement, the husband was to pay spousal support of $4,500 per month. The husband was the CEO of a company until his employment was terminated in January 2014. He was unsuccessful in finding new employment. His severance pay lasted until October 2014. He also received a carve-out payment in lieu of stock options in the amount of $338,913. This payment was taxed but no other payroll deductions were made. He brought a motion to reduce his spousal support payments as of October 2014. The wife argued that the carve-out payment was income, and thus the husband's income should be presumed to be extended to January 2017.

The motion was allowed. The minutes contemplated a variation in the event of a material change, which included a change in income. The carve-out payment was not employment income. The payment was given to all six executives,

not just those who were terminated; it was subject to a potential clawback; and it was not characterized as employment income by the payers. Accordingly, October 2014 constituted the effective date of the material change. The fact that the wife purchased a second property after learning that the husband brought a motion to change contradicted her claim that without spousal support she would need to dip into her retirement funds. The Court found it difficult to accept that since 2008 the wife's only option was to liquidate or encumber her assets to carry on her travel business. The Court found the wife was able to earn a salary of $37,500 from her business. The Court accepted the husband's income was $1,000 per month, representing interest and investment income. The husband was making reasonable efforts to find a job. It was difficult to imagine his prospects would improve. The Court found it would not be reasonable to impute income to him. Having regard to the above, the Court suspended the husband's support obligations as of November 2014 until and unless he would be able to find employment, with the wife to repay any support paid to her since then.

Laginski v. Paleczny, January 4, 2016

Payers Imprisoned for 75 Days for Non-Payment of Child Support Arrears

Ontario Court of Justice, January 21, 2016

The Court heard two cases together, as the respondents' ability to pay child support arrears was the central issue in both. In the first, the payer was the father of a 22-year-old child. Under a 2001 agreement, he was required to pay $400 in monthly child support, based on an annual income of $46,500. The payer stopped making voluntary payments in February 2008. The child ceased to be entitled to support in April 2011. The payer was presently in arrears of $15,073. The payer never moved to change the agreement or to seek repayment terms. The applicant Family Responsibility Office ("FRO") issued a notice of default hearing in March 2015. The payer in the second case was 50 years old. He claimed he practiced law sporadically and began to operate his own practice out of his home in 2014. He deposed his 2015 net business income was $22,538. He was in child support arrears of approximately $20,000. At the default hearings, the Director of the FRO sought orders that each payer be imprisoned for 90 days, or until such time as the arrears were paid, and that the second payer be imprisoned for three days for each payment in default for ongoing support accruals.

The application was allowed. Pursuant to section 41(10) of the *Family Responsibility and Support Arrears Enforcement Act, 1996*, the payers had to show an inability to pay due to valid reasons. A payer must also show that he or she has placed their children's interests over their own and provided frank disclosure to the Court. The Court noted that imprisonment is a last resort that requires something more than non-payment—a payer must demonstrate a wilful and deliberate disregard for the court orders. The payers were able to only partially rebut the presumption that they had the ability to pay the arrears. The second payer was a sophisticated litigant who knew the importance of following court process and through his actions showed a disdain for that process. Although served with notices of default hearings, the payers did not make any voluntary payments, did not provide reasons for failure to comply, and were late in filing financial statements. The Court did not accept the second payer's business expenses and found he likely earned between $30,000 and $40,000 in 2013 to 2015. The Court stated that it was clear that less aggressive enforcement options failed. The suspension of driver's licences and passports did not result in compliance. The Court ordered that each payer be jailed for 75 days until $3,500 was paid. They were also required to pay $2,500 in July and January of each year until the arrears were fully paid, failing which they would be committed to jail for 75 days for each payment in default. The second payer was to pay $800 per month or be committed to jail for three days for each default.

Ontario (Family Responsibility Office) v. Adema, 2016 CFLG ¶27,194

Payment under Agreement Characterized as Support

Ontario Superior Court of Justice, January 11, 2016

The parties married in 1980, separated in 2008, and divorced in 2010. Post-mediation in 2009, the parties signed minutes of settlement providing that the respondent husband would pay $3.6 million to the applicant wife in four instalments between 2009 and 2010. The payment was to be in settlement of all claims, but the payments were also described as "support payments" to be "enforceable as incidents of spousal support." The parties signed a separation agreement in 2010 incorporating the $3.6 million payment and payment schedule and other terms. The husband failed to

make the third instalment payment, and owed $1.67 million plus interest. The parties entered into an amending agreement, incorporated into a 2011 final order, providing a new payment schedule. The husband made some payments but still owed $880,000. He brought a motion to change, claiming that he suffered a catastrophic change in circumstance since the 2011 order, as his company was in financial trouble. In 2014, the husband filed for bankruptcy. The wife brought support enforcement proceedings through the Family Responsibility Office ("FRO"). She claimed section 17 of the *Divorce Act* (the "Act") was not available to the husband to change support, as the $3.6 million sum was a settlement of all claims and not a support payment. The husband brought a motion to determine this jurisdictional issue.

The motion was allowed. The Court found it was not open to the wife to suggest that the amount owing was anything other than spousal support. The terms of the orders incorporating the agreements made it clear that the payments were characterized as spousal support. This was shown through the express references to support and to enforceability as incidents of spousal support. This characterization was confirmed by the wife, who (a) commenced enforcement proceedings by the FRO, which only has jurisdiction to enforce support orders; and (b) took the position with the trustee in bankruptcy that the entire amount outstanding ought to be excluded from the bankruptcy discharge under section 178(1) of the *Bankruptcy and Insolvency Act*, which ensures that support payees are not prejudiced by a payer's bankruptcy. Accordingly, the husband could rely on section 17 of the Act to seek a variation in support. The parties were to schedule a case conference in relation to that motion.

Korn v. Korn, January 11, 2016

Wife Entitled to Damages for Breach of Domestic Contract

Court of Queen's Bench of Alberta, February 10, 2016

The plaintiff wife and defendant husband were married for 34 years. Three years post-separation, in 2007, they entered into a "divorce and property contract" (the "agreement") with the aid of counsel. The agreement divided the parties' assets, a large part of which were comprised of corporate entities. The joint assets amounted to approximately $4 million and each party had obtained close to 50 per cent of that asset pool. The agreement required the husband to transfer his one-third share interest in a numbered company to the wife; the defendants G and J each owned another one-third of the shares in the company, and all three were directors. Under a 1992 oral agreement, the three shareholders had agreed that no wives or children were ever to become shareholders of the company. A 1996 shareholders' agreement provided that any share transfer required the shareholders' unanimous approval. G and J did not approve the husband's share transfer to the wife. The husband proceeded to conduct "business as usual" with the company, including completing sales of property and collecting dividends. The wife brought an action, seeking damages for the breached agreement.

The action was allowed. The husband failed to disclose a material and relevant aspect of the company's affairs by failing to disclose the 1992 oral agreement. It was clear that, had the wife known about it, she may have acted differently in negotiating the parties' agreement. The combined actions of the three defendants, in conducting "business as usual" and issuing bonuses and dividends to the husband, fit the definition of the "tort of conspiracy". The three defendants were together liable for conspiring to prevent the wife from achieving the clear economic gain she bargained for in the agreement. The husband was unjustly enriched by retaining his one-third interest. He enjoyed bonuses, dividends, and the benefit of a shareholder's loan to the wife's detriment and without a juristic reason. There was no limitation defence for the husband. G and J were liable for damages within the two-year limit of the wife's filing of the statement of claim. The damages as against the husband were $680,952—this was the value of the shares the wife was to receive, the value of the shareholder's loan, interest, and damages for the misappropriated bonus and dividend payments. The damages as against G and J were $133,908 for the portion of the dividend payments that were within the limitation period.

D'Agnone v. D'Agnone, February 10, 2016

Landlord and Tenant Board's Finding on Spousal Relationship Determinative

Ontario Superior Court of Justice, February 10, 2016

The parties never cohabited. The applicant claimed they carried on a spousal-like relationship from 1998 until 2013. The respondent disagreed, claiming they had merely dated on and off. A residential property in the respondent's name was

acquired in 2005. The applicant made no contributions to the purchase price. The respondent claimed this was an investment property. The applicant began renting the property from the respondent. In 2014, the respondent wished to move into the property but claimed the applicant refused to vacate it. The applicant claimed the property was purchased together and that the parties had agreed that the respondent would pay the down payment and the applicant would pay the mortgage, taxes, utilities, maintenance, and for renovations. The Landlord and Tenant Board (the "LTB") found the applicant was a tenant and there was no spousal relationship or constructive trust. It terminated the applicant's tenancy. The request to review was denied. The applicant filed a notice of appeal and the respondent obtained an order dismissing the appeal. The applicant commenced a family law proceeding seeking, *inter alia*, a declaration that the parties carried on a spousal-like relationship and that the applicant was the beneficial owner of the property. The respondent moved for summary judgment dismissing the claim.

The motion was allowed. The Court found that the relief the applicant sought and the grounds for appeal in the appeal of the LTB decision were the same as the issues in the present proceeding. The applicant had ample opportunity to commence family law proceedings since the relationship allegedly ended in 2013. The applicant attorned to the jurisdiction of the LTB in participating in those proceedings. The LTB result was final and binding. Accordingly, the parties were in a landlord and tenant relationship. The equitable doctrines of issue estoppel, collateral attack, and abuse of process applied in this case. The same issues and parties were before the LTB, and that decision was final. The Court declined to exercise discretion to decline to apply the above equitable doctrines. The applicant's family law claims were dismissed.

Hanley v. Furlong-Jewer, 2016 CFLG ¶27,203

OTHER NEWS

British Columbia

Continuing Legal Education

On June 22, the Canadian Bar Association will present a webcast replay of the sixth annual "Bread and Butter Issues in Family Law," chaired by Elizabeth Mourao of Ricketts Harris LLP and James Herbert of Chappell Partners LLP. The program originally aired on September 18, 2015. To register for the webcast, visit: http://www.cbapd.org/details_en.aspx?id=ON_16FAM0622X.

Ontario

Public Consultation on Proposed Child Care Regulation

The Ontario government has made its proposed regulation, Bill 195—which would ban licensed child care centres and home child care agencies from charging fees to join a waiting list for child care programs—available for public feedback. The regulation's proposed start date is September 2016. The consultation period will close on July 4, 2016. For further information, visit: http://www.ontariocanada.com/registry/view.do?postingId=21662&language=en.

Legal Aid Ontario Further Expands Eligibility

On April 1, 2016, the Ministry of the Attorney General announced that, effective immediately, Legal Aid Ontario is raising the legal aid eligibility threshold by 6 per cent. This will result in approximately 400,000 more Ontarians being able to access legal services. This is the third 6 per cent increase in the last three years, in accordance with Ontario's 2014 Budget.

Continuing Legal Education

On August 10, the Law Society of Upper Canada will present a live webcast replay (with live chat) of "Bringing Proportionality to Family Law Disputes under the Amended Rules," chaired by the Honourable George Czutrin and the Honourable Debra Paulseth of the Superior Court of Justice and Ontario Court of Justice, respectively. The program focuses on the 2015 amendments to the *Family Law Rules* and how they can facilitate quicker resolution of and cost-efficiency in family law files. For more information or to register, visit: http://ecom.lsuc.on.ca/cpd/product.jsp?id=CLE16-0080100.

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