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TRUST DISCLOSURE FOR FAMILY LAW

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An interest in a family trust and gifts can be the subject of disclosure orders in family law disputes. This was illustrated in the recent Ontario Superior Court of Justice decision in *Clapp v. Clapp* 2014 ONSC 4591. In this case, Mrs. Clapp had an interest in a non-resident trust named the "Oceana Trust" which apparently had been created by her mother for the benefit of Mrs. Clapp and her siblings and their respective children. In the divorce proceedings, Mr. Clapp sought spousal support from Mrs. Clapp as well as equalization of their net family property. Mr. Clapp sought disclosure of Mrs. Clapp's interest in the Oceana Trust. He wanted her interest to be included among her assets for purposes of equalization and for purposes of determining entitlement to spousal support.

Mr. Clapp alleged that Mrs. Clapp received regular gifts of over

\$100,000 per year from her mother as well as distributions from the Trust. He argued that they relied on these gifts and distributions to maintain their lifestyle which included a home and cottage (each valued at over \$800,000), private school for their son and two cars. Mrs. Clapp denied receiving regular distributions from the Trust other than specific amounts received to renovate the matrimonial home of approximately \$200,000. She acknowledged gifts from her mother which she claimed were made at her mother's discretion and not sourced from the Trust. Mrs. Clapp was not employed outside the home during the marriage.

The court made reference to the Spousal Support Advisory Guidelines and noted that the determination of income under the Federal Child Support Guidelines was equally applicable to claims for spousal support. The latter guidelines provide that the court may impute an amount of income to a spouse in appropriate circumstances including where a spouse is a beneficiary under a trust and will be in receipt of income or other benefits from the trust. The question was whether the gifts received by Mrs. Clapp or the distributions from the Oceana Trust should result in some imputed income to Mrs. Clapp. To determine whether an amount received should be included in income for purposes of calculating spousal support, the court considered seven questions:

- (a) Is the amount included in income for income tax purposes?
- (b) Is the amount capital that generates income?
- (c) Is the amount, if capital, compensation for loss of income?
- (d) Has the amount, if capital, been equalized?
- (e) Is the payment of the amount gratuitous?
- (f) Is the payment of the amount recurrent?

(g) Were the funds typically used to finance a significant portion of the recipient's living expenses?

Based on the materials provided, the court found that the amounts received had not been included in Mrs. Clapp's income for tax purposes. The amounts received were commingled with family property and

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were not used to generate income. The court seemed to suggest without explanation that the amounts received from Oceana Trust were on account of capital. The court found no basis for an order of interim support to Mr. Clapp.

The parties were ordered to disclose all gifts received in excess of \$1000. While Mr. Clapp sought such disclosure for the duration of the marriage, the court order was limited to the three years prior to separation.

Mrs. Clapp disclosed a copy of the Deed of Settlement for the Oceana Trust and a number of years of financial statements and the court noted that the three most recent year's statements were sufficient, denying Mr. Clapp's request for statements for the duration of the marriage. He also sought Oceania Trust's tax returns, disclosure of the Trust's interest in a named limited partnership, and disclosure of any benefits paid on behalf of Mrs. Clapp and any loans to Mrs. Clapp. Mr. Clapp's request was denied on the basis that the materials filed with court did not establish the relevance of such additional information. The court considered that the financial statements should be sufficient as they disclosed the assets of

the Trust and any distributions made.

Limited information was provided in the judgment regarding the terms of the trust or its underlying assets. There was an institutional trustee of the Oceana Trust and the judgement indicated that Mrs. Clapp was "one of several beneficiaries" without indicating whether the Trust was discretionary or otherwise. While gifts and an interest in a trust can be structured so that they may be excluded from "net family property" for equalization purposes under the Family Law Act, these structures do not exclude support obligations. The case serves as a reminder that amounts received could affect imputed income calculations for support and shows that a beneficiary may be faced with disclosure requests.