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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

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,

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 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.