Gifts carry a price when it comes to child support

Matrimonial Law

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With housing prices soaring and the cost of living rising, it has become common for parents to provide financial assistance for their adult children, both during their marriages and, if those marriages fail, during the separation and divorce process.

Whether or not such "gifts" are income for the purpose of calculating child support has varied from state to state. Although relevant Illinois statutory law does not explicitly define what is included in "income" for these purposes, it historically had not considered such gifts for calculating child support obligations. Other jurisdictions have agreed, on the basis that donors have no legal duty to continue making the gifts, and they have therefore been considered too speculative to include in a calculation of income for child support purposes.

The Illinois Supreme Court seems to have changed all this, but the looming question remains whether the change is only in theory or will truly be a change in practice.

In *Rogers v. Rogers*, 213 Ill.2d 129, 820 N.E.2d 286 (2004), the Illinois Supreme Court held that significant monetary gifts and loans received by a father from his family during and after his marriage should be considered part of his income, substantially increasing the amount of his required child support payment. If *Rogers* represents a true change in the application of the law, then both child support obligors and obligees had better take another look at the gifts each parent is receiving from external sources.

The divorced father in *Rogers* earned a salary of only $15,000 per year from a teaching position. Under section 505 of the Illinois Marriage and Dissolution of Marriage Act (the Illinois Marriage Act), his support obligation for his one child was set at 20 percent of this income, or $250 per month. On appeal, the mother argued that the father's support obligation should be substantially higher, because the father's family had given him $46,000 in gifts and loans every year of his adult life. With the inclusion of those gifts and loans, the mother claimed, the father had an annual income of $61,000, not $15,000 — resulting in a child support obligation of $1,000 per month, not $250.

The lower courts agreed with the mother, and the father appealed. The Supreme Court held that the gifts and loans to the father were "income" for child support purposes.

Interpreting "income" by its plain meaning, the Illinois Supreme Court found that the gifts received by the father were included, because they were a valuable benefit to him that enhanced his wealth and facilitated his ability to support his child. The fact that they were not subject to federal taxation was of "no consequence," the court said, because the Internal Revenue Code was enacted for purposes different from the child support guidelines.

The court was not persuaded by the father's argument that the gifts were not income because they were voluntarily given by third parties, who might not continue to give them in the future. After all, the court reasoned, few sources of income are certain to continue unchanged, as people can lose jobs, interest rates can fall, and business conditions can wipe out profits and dividends.

Therefore, the court held that when setting support amounts, trial courts must look at a snapshot of a parent's finances — the parent's economic situation at the time the court's child support calculations are made, including "non-recurring income" — rather than try to predict whether a particular income stream will continue. To the extent that prior Illinois cases were inconsistent with this holding, the court specifically overruled them.

The decision, however, did not completely dismiss concerns regarding the speculative nature of gifts. *Rogers* held that while the trial court must include all payments to a parent when it computes his or her net income and applies the statutory support guidelines in the first instance, the trial court still has discretion to deviate from the guidelines, and it may consider evidence that a parent is unlikely to continue receiving some payments when determining whether deviation is proper. In addition, if payments such as gifts should stop earlier than expected, the obligated parent may seek modification of the support order.

Arguably, *Rogers* may have changed the presumptions regarding gift income but, depending on how the ruling is applied, may not bring a significant change in result.

Prior to the decision, Illinois courts presumably could not consider gifts at all in calculating income. *Rogers* has changed the law in so much as gifts now must be included in calculating income and support obligations, but courts may then consider the nature of the gift in deviating from those support calculations. While litigants may now have an extra legal step on their plates, courts can essentially negate the effectof *Rogers* by simply decreasing support in proportion to the gift, as a deviation from the support calculation that included it.

What facts will support a deviation from support calculations based upon the new *Rogers* presumption? The facts of this case were somewhat unusual, in that the gifts given by the father's family were more than three times as much as the father's salary, and the father had received them every year of his adult life, including during his marriage.

While the court was silent as to whether the sheer magnitude of the gifts influenced its holding, this case is factually very similar to a case decided by the Florida District Court of Appeal, in which the court's reasoning appeared to turn at least in part on this point. In *Ordini v. Ordini*, 701 So.2d at 664, the Florida court found that gifts of $6,500 per month from the husband's parents to the couple throughout the marriage had allowed the parties to get used to a high standard of living and had removed any incentive on the part of the husband to work. "If there was ever a case in which gifts should be included in imputing income," the court said, "this is it."

Will Illinois courts follow *Rogers* in cases where the economics are less dramatic? Although *Rogers* would allow a court to deviate from the support guidelines and exclude gift income if it

finds that a parent is unlikely to continue receiving such gifts, the court did not formulate a specific test for making this determination.

Decisions from other jurisdictions that consider regularly occurring gifts as income are instructional. In determining whether to deviate from the support guidelines with respect to gifts, Illinois courts might consider the following factors:

- The length of time over which the gift has been received.

- Whether the gift was received at regular intervals, such as on a monthly or yearly basis.

- Whether the gift has been received in regular amounts.

The court also may look to whether there is some affirmative statement on the part of the donor that the gifts will continue, or, by contrast, if there is evidence that the gift was given only for a specific purpose (such as payment of a grandchild's private school tuition) that has a limited time frame.

Rogers also left open the question of whether Illinois will consider loan proceeds as income. The $46,000 received by the father from his family in *Rogers* included amounts characterized as both gifts and loans. The Appellate Court found that the so-called loans should be included as income, because the act did not specifically authorize deduction of loan proceeds. The Supreme Court did not reach this issue, because it held that the loans were not really loans but were gifts since the father in *Rogers* was not obligated to repay them.

Courts in other states that have considered whether true loan proceeds are income have reached differing conclusions. Given the *Rogers* court's expansive reading of the term "net income," Illinois courts might include third-party loans within the definition of "income" in the future. Again, courts would be free to deviate from support obligations set on that basis, particularly if the loans are not recurring, must be repaid and are for a specific purpose.

Another question is whether *Rogers* could be used to impute gift income not only to parents who must pay child support, but also to parents who are entitled to receive support. While *Rogers* did not address this issue, other states have imputed gift income to child support obligees. One difficulty is that this approach potentially puts the child support recipient in a Catch-22: a spouse may need financial assistance from his or her parents because the child support which he or she is receiving is inadequate, but that assistance could then reduce even further the amount of support that the court will award.

Illinois courts could address this potential inequity by deviating from the support guidelines and decreasing the income calculation if gifts were to redress a genuine need or inadequacy in support; alternatively, the recipient could provide evidence that the gifts should be excluded because they were temporary measures that were designed to address a specific, limited shortfall in funds, and are unlikely to continue in the future.

A final question, from a public policy standpoint, is whether *Rogers* improperly imposes a

child support obligation on grandparents or other third parties. Under well-settled principles of family law, such third parties cannot be ordered to pay child support. It is at least arguable that if those third parties know that their generosity has resulted in an increased child support payment for their relative, they will feel compelled to continue their gift giving so as not to have hardship imposed on that relative. In the final analysis, however, regardless of whatever emotional obligations they may feel, third parties always remain free to discontinue gifts.

There is clearly a compelling public interest in the continuing financial health of children following divorce that is served by ensuring that all payments available to a parent are included in calculation of child support amounts, regardless of the source of such payments. Arguably, *Rogers* protects that interest while protecting the financial interests of the parents by providing a method for courts to deviate from support calculations that include gifts. On the other hand, the uncertainty left by *Rogers* in determining the circumstances and the extent to which those deviations can occur will likely result in increased litigation costs — costs that may very well eat up the dollars available for support.

In the meantime, while we wait to see how Illinois courts will apply *Rogers*, litigants should carefully consider the amount, structure and purpose of any gifts and loans they plan to receive.