Alert: Gifts are Income in Setting Child Support

By Andrew Eichner

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,[1] it historically had not considered such gifts in calculating child support obligations.[2] 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.[3]

A recent Illinois Supreme Court case seems to have changed all this—and the looming question remains whether the change is only in theory or will truly be a change in practice. In ***Rogers v. Rogers,***[4] 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),[5] his support obligation for his one child was set at 20% 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 Illinois lower courts agreed with the mother, and the father appealed. The Supreme Court of Illinois 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 different purposes than 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 "nonrecurring 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.[6]

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 impact of ***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 ***Rogers'*** new 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,***[7] the 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: (1) the length of time over

which the gift has been received; (2) whether the gift was received at regular intervals, such as on a monthly or yearly basis; and (3) whether the gift has been received in regular amounts.[8] The court may also 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 some specific purpose (such as payment of a grandchild's private school tuition) that has a limited time frame.[9]

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 "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 gifts, since the father in ***Rogers*** was not obligated to repay them. Courts

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.

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[1] 750 ILCS 5/505(a)(3) (West 2002). The Illinois Marriage Act broadly defines "net income" (the basis for calculating child support obligations) to include "the total of all income from all sources," less deductions for items such as taxes, retirement contributions, union dues, and insurance premiums. The Act does not define the term "income," nor does it address whether gifts or loan proceeds are included.

[2] ***See In re Marriage of Bowlby,*** 789 N.E.2d 366 (Ill. App. Ct. 2003); ***In re Marriage of Harmon,*** 568 N.E.2d 948 (Ill. App. Ct. 1991).

[3] Need Illinois Case ***See, e.g., Triggs v. Triggs,*** 920 P.2d 653, 661 (Wyo. 1996) (gifts to wife of $265 per month were voluntary transfers from her parents and were not income); ***Nass v. Seaton,*** 904 P.2d 412, 416 (Alaska 1995) (parents' gift to husband of $20,000 per year over 3 year period should not be considered income); ***True v. True,*** 615 A.2d 252, 253 (Maine 1992) (regular gifts from grandmother to wife were not income to wife, as there was no legal obligation on part of grandmother to pay money); ***Shiveley v. Shiveley,*** 635 So.2d 1021, 1022 (Fla. Dist. Ct. App. 1994) (gifts from parents to wife of approximately $90,000 over 6 years should not be imputed as income to wife; gifts which have not yet been received are purely speculative or mere expectancies, and are not properly included in income to determine need for, or ability to provide, support)

[4] 213 ILL.2d 129, 820N.E.2d 286 (2004).

[5] 750 ILCS 5/505 (West 20002).

[6] 820 N.E.2d 286 (2004), *overruling* ***In re Marriage of Bowlby,*** 789 N.E.2d 366 (Ill. App. Ct. 2003); ***In re Marriage of Harmon,*** 568 N.E.2d 948 (Ill. App. Ct. 1991).

[7] 701 So.2d 663, 666 (Fla. Dist. Ct. App. 1997).

[8] ***See, e.g., Ordini v. Ordini,*** 701 So.2d at 664 - 666 (couple had received approximately $6,500 per month in gifts from husband's parents from the start of their marriage, and husband continued to receive that amount throughout the support trial); ***In re Marriage of Petersen,*** 22 S.W.3d 760, 764 - 766 (Mo. Ct. App. 2000) (wife's parents had given her approximately $20,000 per year during her marriage, and had given her $2,000 per month for seventeen months following parties' separation); ***In re Marriage of Cummings,*** 897 P.2d 685, 689 (Ariz. Ct. App. 1994) (wife's parents regularly paid her mortgage and gave her $1,435 in cash monthly for over eighteen months).

[9] ***See, e.g., Ordini v Ordini,*** 701 So.2d at 664 (husband's mother testified that she would continue to meet her son's needs so long as it was for a proper purpose, which would include that his children and ex-wife be "properly cared for,"); ***In re Marriage of Petersen,*** 22 S.W.3d at 764 (wife's father testified that he intended to continue to help his daughter and her children for as long as he was working and able to do so).

[10] ***See, e.g., Gilbertson v. Graff,*** 477 N.W.2d 771, 773 - 774 (Minn. Ct. App. 1991) (excess student loan proceeds used for daily living after tuition and books were paid for were periodic and reliable source of income, and were therefore included in calculation of husband's support obligation). ***But see Lohstreter v. Lohstreter,*** 623 N.W.2d 350, 356 (N. D. 2001) (North Dakota statute included gifts within definition of income but not loans; money husband received from parents was loan, not gift, and could not be included in his income); ***Milligan v. Addison,*** 582 So.2d 769, 770 (Fla. Dist. Ct. App. 1991) (educational loans cannot be considered income to husband because they represent debts which husband must repay).

[11] ***See, e.g., In re Marriage of Petersen,*** 22 S.W.2d at 764 - 766 (husband's child support obligations based in part upon imputing wife's parents' gifts to wife as part of wife's income); ***In re Marriage of Cummings,*** 897 P.2d at 689 (same); ***Goldhamer v. Cohen,*** 525 S.E.2d 599, 603 (Va. Ct. App. 2000) (same).