FAMILY COURT OF NOVA SCOTIA
Citation: *J.K. v. H.K.*, 2018 NSFC 3

Date: 20180202
Docket: Pictou No. FPICISOS-98983
Registry: Pictou

Between:

J.K.

Applicant

v.

H.K.

Respondent

Editorial Note: **Identifying Information has been removed from this electronic version of the judgment.**

Judge: The Honourable Judge Timothy G. Daley

Heard August 3, 2017 in Pictou, Nova Scotia

Final Written Submissions: August 21, 2017

Counsel: J.K., Applicant, not appearing, not represented
Daniel Boyle for the Respondent

Introduction

[1] This decision arises out of an application by J.K. seeking spousal support from H.K. As with all cases of spousal support claims, I am called upon to determine whether J.K. is entitled to spousal support and if so, what amount and for what period should spousal support be paid. In answering this latter question, an important issue arises respecting the characterization of H.K.'s income from an annuity and whether that income should be considered in determining spousal support.

Background

[2] The parties were married on July 3, 1999 and separated in April 2011. They had no children.

[3] At the time of the marriage, H.K. was working as a laborer for a transportation company based in Ajax, Ontario and was earning an income of approximately $14,000 per year. H.K. said J.K. was working as a legal secretary and managed event planning for a local bar.

[4] After they were married, H.K. continued his employment and he said that J.K. did not work outside the home during the marriage but she did operate a home-based business selling Avon products.

[5] Unfortunately, less than a year after they were married, H.K. was involved in a serious motor vehicle accident in which he suffered significant injuries to his frontal lobe, which affected his cognitive abilities. He suffered other injuries including a broken spinal vertebrae, broken ankle, injured wrist and hearing difficulties. He was and remains completely disabled from any employment because of these injuries.

[6] After H.K.'s motor vehicle accident, he did not return to work. J.K. remained at home. Although neither party expressly sets out in their evidence how the care arrangements for H.K. evolved since the accident and prior to separation, I find it reasonable to assume that J.K. provided some assistance to H.K. throughout the years they remained together until their separation in 2011. H.K. does say that during the marriage J.K. managed the family finances including, as set out below, managing a structured settlement annuity paid to him as damages from the motor vehicle accident. Other than this reference, the evidence is thin with respect to the roles played by the parties in the marriage.

[7] H.K. did say that he did not discourage J.K. from seeking or applying for work and was unaware of any disability that would prevent her from working.

[8] J.K. now says that she is disabled because of conditions that predate their separation and I will set out further detail of that evidence below.

[9] About four years after the motor vehicle accident, and prior to separation, H.K. received a settlement from his accident. He first received $304,200.74 of which $221,000 was put towards the purchase of a new home and legal fees related to estate planning for both parties. H.K. said that home was sold in and around 2006. The remaining funds, totaling $68,190.02, were paid to H.K. which were in part used to purchase a vehicle.

[10] H.K. also received the sum of $400,000 which was used to fund a structured settlement by the purchase of an annuity. Since 2004, that annuity has generated a non-taxable monthly payment to H.K. of $1,815.98.

[11] H.K. also receives a Canada Pension Plan disability benefit payment of $658.46 per month.

[12] H.K. said the annuity does not generate interest income and is scheduled to terminate on May 15, 2024. He said that he has no other significant assets, investments or retirement savings and at that time he will only receive his CPP disability benefits.

[13] J.K. provided evidence by way of tax returns and notices of assessment establishing that her income in 2014 was $7,230. She had total income in 2015 of $14,722.10 and the supporting documents confirm this was from social assistance payments.

[14] J.K. said that in 2010 her father passed away and her mother moved in with her and H.K. Her mother needed 24-hour care, which cost more than the parties imagined. This appears to have led to their separation and H.K. said that he wanted a divorce in May 2011. H.K. moved out during the fall of 2011.

[15] As noted earlier, during the marriage, J.K. managed the family's finances, a reasonable arrangement given H.K.'s diminished cognitive abilities. After separation, both parties said they agreed that J.K. was to continue to manage his finances, particularly the annuity. He said the plan was for J.K. to cover various small debts held jointly and invest the remainder of the funds for his benefit. He

said that after separation, J.K. collected his structured settlement annuity payment and he lived exclusively on his CPP disability benefits. He said that his rent and expenses were minimal, though he was unable to save any funds after expenses were paid.

[16] It appears from this uncontroverted evidence that J.K. was in receipt of the annuity payment from separation in April of 2011 until early in 2014 when he directed that the structured settlement annuity payment be made directly to him. He said that he reviewed the bank account in the spring of 2013 into which the payment had been made and from which expenses were paid and said that he discovered J.K. was using the annuity payment to cover her own expenses rather than investing or managing it for his benefit.

[17] As a result of that change, J.K. said she declared bankruptcy, she didn't have sufficient funds to pay her expenses. She applied for social assistance benefits and disability benefits in February of 2014.

[18] J.K. said that in the fall of 2011 H.K. moved to Ottawa, where he rented a room. Just before Christmas in 2011 he wanted to return home with J.K. and she obliged. She said that not long after he returned home, they decided they would be roommates, indicating to me that she understood that the relationship was ended on separation despite these new living arrangements. She said that she would drive him and his girlfriend to her home, further reinforcing that she considered the relationship to be at an end.

[19] Ultimately, H.K. decided to move to Nova Scotia to live with his father and stepmother. After some challenges arose in Nova Scotia, she said that he moved back to Ottawa and into her apartment, as her roommate. She said a few months later H.K. decided to move to Nova Scotia again.

[20] At that time, J.K. said that they agreed that she would pay off their joint credit cards, his telecom bill and other joint accounts with his annuity payment and they would continue to be friends, as usual.

[21] J.K. describes her experience with H.K. and his then-girlfriend, claiming that H.K. was under the girlfriend’s influence and that communication with H.K. was limited. She called to ask for money as she had none to pay her bills and heard little from him.

Entitlement

[22] The starting point for analysis for spousal support is whether the party seeking support is entitled to that relief. The governing legislation in the circumstances of the *Parenting and Support Act* 1989 RSNS c.160 as amended (the *Act*) which provides this Court with the authority to order spousal support under section 3 as follows:

> **3 (1)** The Court may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the Court thinks reasonable
> for the support of the other spouse.
> **…**
> **(3)** The Court may make an order pursuant to subsection (1) … for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as the Court thinks fit and just.

[23] In deciding the issue of entitlement, that legislation directs me to consider certain factors set out under section 4, not all of which are applicable in each case. For example, in this circumstance there are no children, therefore, I will only consider the relevant sections as set out below:

> **4** In determining whether to order a person to pay support to that person's spouse and the amount of any support to be paid, the Court shall consider
>
> (a) the division of function in their relationship;
> (b) the express or tacit agreement of the spouses that one will maintain the other;
> …
>
> (f) the physical or mental disability of either spouse;
> (g) the inability of a spouse to obtain gainful employment;
> (h) the contribution of a spouse to the education or career potential of the other;
> (i) the reasonable needs of the spouse with a right to support;
> (j) the reasonable needs of the spouse obliged to pay support;
> (k) the separate property of each spouse;
> …
> (m) the ability of the spouse with the right to support to contribute to the spouse's own support.

[24] As well, there is a requirement under section 5 for me to consider as follows:

> **5** A supported spouse has an obligation to assume responsibility for his or her own support unless, considering the ages of the spouses, the duration of the relationship, the nature of the needs of the supported spouse and the origin of those needs, it would be unreasonable to require the supported spouse to assume responsibility for his or her own support and it would be reasonable to require the other spouse to continue to bear this responsibility.

[25] As well, I must also consider the direction of the Supreme Court of Canada. The two very well-known cases are those of *Moge v. Moge* [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow* [1999] 1 S.C.R. 420.

[26] To briefly summarize the principles which arise from these decisions, the Court found that there are three grounds on which spousal support can be founded. They are contractual, compensatory and non-compensatory.

[27] I will first rule out the contractual grounds. These deal with circumstances where there is an existing marriage contract, cohabitation agreement or other agreement which may set out limits, rights and obligations respecting spousal support. Contractual grounds are simply not applicable in this particular case.

[28] Compensatory spousal support may be payable in circumstances where one spouse has contributed significantly to the marriage by way of unpaid work, often found in child care and rearing or in care of the home and housekeeping. It may also be found where one spouse has compromised a career, education or other financial opportunities in maintenance of the other spouse's career or the family in general. It may also be found in the care and support provided by one spouse to the other spouse, who may be disabled. There are other circumstances in which compensatory spousal support may apply but those are some of the more common ones.

[29] In the case of compensatory support, need is not the primary focus of the analysis. The entitlement arises over the course of many years of unpaid contribution to the family, sacrifice in terms of career and other factors which create an entitlement based, not upon current circumstance necessarily, but upon past sacrifice and support within the family.

[30] In contrast, in the case of non-compensatory support, this is often based on need. It may arise, for example, where a spouse is disabled and unable to improve their financial circumstances and might be left in a financially difficult situation

after a separation. It might also arise where there is an otherwise healthy spouse that has limited means to increased income and has significant and material financial need that cannot be satisfied, other than through a spousal support award.

[31] In the case of non-compensatory spousal support, the analysis of the needs of the spouse seeking the support is often more detailed and material but in either event, both in compensatory and non-compensatory circumstances, the need and ability to pay do play into the analysis.

[32] As to duration, it is more common that compensatory awards are for lengthier periods, often indefinite, whereas non-compensatory awards may more often be limited in time, though not necessarily so.

Ground for Spousal Support

[33] Considering these factors, I find that the evidence in support of a compensatory spousal support award is lacking. While it is true that the parties were married for almost 12 years, there is virtually no evidence before me of the division of the functioning of that relationship. The burden rests with J.K., as the party seeking spousal support, to establish the grounds of entitlement.

[34] Her evidence is largely focused on the general history of H.K.'s injuries and her role in managing his finances. That work undertaken by her is certainly a factor in her favor in a compensatory analysis. As well, I am tempted to infer from the fact of H.K.'s injuries that J.K. must have been of significant assistance to him in his day-to-day functioning but, unfortunately, there is no evidence before me of this.

[35] Specifically, there is no evidence of the day-to-day routine of the parties, whether J.K. was responsible for physical care of H.K., taking him to and from medical appointments, obtaining and administering prescription medications, providing housekeeping functions or any other evidence from her to support her position respecting the division of function in the relationship. Likewise, there is little to nothing in H.K.'s evidence respecting this issue.

[36] There is, however, evidence that after separation in 2011, the parties agreed that J.K. would manage H.K.'s annuity payments. They disagree as to the intent of doing so. H.K. says the agreement was that J.K. would manage those funds to benefit H.K. in the future and J.K. says that she was to use the funds to pay some joint debts and does not dispute that she also used the funds to pay for personal

expenses. The fact that she declared bankruptcy shortly after those funds were cut off and is now on social assistance reinforces the inference that she did in fact use the annuity payment to pay her own expenses.

[37] I find that, based on the evidence before me, I cannot conclude that there was an express or tacit agreement between the parties that H.K. would maintain J.K. after separation through the mechanism of managing and using the annuity payment to pay her own expenses. H.K.'s evidence is consistent with his action in that he says he did not pay much attention until 2013 and when he reviewed the bank statements, redirected the annuity payment to himself. I find that is consistent with my conclusion that there was no tacit or expressed agreement regarding support.

[38] The other evidence before me respecting the relationship during the marriage is that J.K. was employed before the marriage. She left that work to work from home after the marriage. H.K. continued his employment until his motor vehicle accident. H.K.'s evidence, uncontroverted by J.K., is that he did not discourage her from seeking or applying for work and he was unaware of any basis for her to be off work after the marriage began. On the other hand, there's no evidence that he actively encouraged her to seek employment, only that she chose not to work and he acquiesced.

[39] Given the brevity and paucity of evidence regarding the relationship over those 11 years, I cannot conclude, on the balance of probabilities, that J.K. has established a compensatory ground for spousal support in this case.

[40] With respect to non-compensatory spousal support, I am satisfied that J.K. has established that ground on the balance of probabilities. She has provided medical information, including a letter from her family doctor dated January 20, 2015, in which he described her various medical conditions.

[41] Her doctor said J.K. suffers from migraine headaches, nausea and vomiting. This occurs approximately two times per month and lasts for one to two days. During this time, she is incapacitated.

[42] He said J.K. suffers from bulimia and has for several years. She is seeing a psychiatrist, though she has not been to an eating disorder clinic. He said this condition is usually triggered by stress and anxiety.

[43] The doctor goes on to say that she also suffers from post-traumatic stress disorder which manifests as anxiety, insomnia and fear of leaving her house. She is being seen by a psychiatrist regarding this condition and is medicated for it.

[44] Finally, she suffers from irritable bowel syndrome which has been a condition in her life for over 10 years. The symptoms are constant, alternating between diarrhea and constipation, and intermittent abdominal pain. She is treated for this condition and is followed by a gastroenterologist in her local community.

[45] Her family doctor concludes by saying:

> Given the multitude of medical problems faced by J.K. it is my medical opinion that she is disabled from work. It is unlikely that her medical condition will be resolved. For that reason I believe her disability is permanent.

[46] There are various other consultation reports included in the evidence of J.K. which I will not review. I find it sufficient to say that each of these reinforces the opinion of her family doctor. They set out a lengthy period of medical challenges, treatments and consequences for her. I am satisfied that her constellation of medical conditions renders her disabled from employment.

[47] Being disabled, of course, is not sufficient grounds for a finding of entitlement to spousal support on a non-compensatory basis. I must also look at J.K.'s financial circumstances to determine if she has sufficient need for the Court to make that finding. To put another way, I must examine "the reasonable needs of the spouse" as required under the *Act*.

[48] In this analysis, I will be brief. The evidence before me is that J.K. had earnings in 2015 of $14,722.10, solely from social assistance benefits. She is disabled from working. Though I do not have 2016 or 2017 income evidence before me, it is unlikely that her income has changed significantly since 2015 given her disability.

[49] She did not file a statement of expenses. This is often a key element in conducting the analysis of need, particularly in a non-compensatory claim. That said, given her extremely low income just over $1,200 per month, I find it improbable that she does not have a need for spousal support in those circumstances.

[50] In drawing this conclusion, I consider that the evidence is she had benefit of the monthly annuity payment from separation in 2011 until 2013 which was clearly sufficient to meet her needs. That said, clearly her financial circumstances have deteriorated since then and, given her disability, I find she has established a need.

Respondent's Income

[51] Having found that J.K. has established a non-compensatory ground for spousal support based on need, the difficult question of H.K.'s ability to pay arises. This is due to the nature of the funds that he receives, specifically the payment from his annuity.

[52] There are two competing analyses respecting whether a structured settlement annuity payment should be included as income for child or spousal support. Those competing analyses are reflected in decisions from the Ontario Courts. Before reviewing these decisions and lines of reasoning, I note that while they are decisions of Ontario Superior Courts and Court of Appeal, these decisions are not binding upon me but certainly are persuasive. To my knowledge, our Court of Appeal has not weighed in on the issue to date.

[53] The first line of reasoning is found in the decision of *Laurain v Clarke*, 2011 ONSC 7195, a judgment from the Ontario Superior Court which was considering an application for temporary spousal support following the breakdown of a 14 year common-law relationship. In reviewing their financial circumstances the Court noted that the husband received an annuity derived from a structured settlement negotiated after his father's death. Benefits were payable to him as an inheritance. In considering how to treat the annuity payment in relation to child and spousal support, the Court noted at paragraph 35 as follows:

> Neither the *Federal Child Support Guidelines* nor the *Advisory Spousal Support Guidelines* define what forms of receipts are to be included in income, when income is imputed pursuant to section 19 of the *Child Support Guidelines*. Based on the review that follows, I find that the Court has identified the following factors, most of which help distinguish between income and capital, that the Court should consider when deciding whether a given receipt should be included in income for the purposes of calculating child or spousal support:
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> (a) Is the amount included in income for purposes of income tax?
> (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, or is it exempt?
> (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 proportion of the recipient's living expenses?

[54] In determining income for purposes of spousal support, it is now well accepted that the Courts will normally apply the test to determine income under the Federal or Provincial Child Support Guidelines. Under section 16 of Nova Scotia's Provincial Child Support Guidelines, annual income is determined by reference to "Total Income" in the T1 Tax Return (often referred to as "line 150 income") and is adjusted in accordance with schedule III of the Guidelines. In this case, H.K's income from his Canada Pension Plan disability benefits was $7,901.52. His annuity payments are non-taxable and therefore not included.

[55] In making that interim decision, the Ontario Court first noted that in the *Laurain* case, as in this case, the annuity payments were not included as "Total Income" in the father's income tax return.

[56] The Court then considered whether relying solely on taxable income in the presence of an annuity payment would result in an unfair outcome or whether the Court should instead impute income to the extent of the annuity payment pursuant to section 19 of the Guidelines. To do so, the Court found that it had to examine the other factor set out above to determine if that payment was properly characterized as income or capital.

[57] The Court reviewed section 19 which permits imputation of income to a spouse where appropriate, including where "the spouse's property is not reasonably utilized to generate income". This section is identical to that used in the Nova Scotia Guidelines, with the exception that "spouse" is changed to "parent".

[58] After reviewing various cases including *Leskun v. Leskun*, 2006 SCC 25 and *Boston v. Boston* 2001 SCC 43 from the Supreme Court of Canada, the Court concluded:

> Having regard to the *Family Law Act*, the *Divorce Act*, the Guidelines and the case law that has interpreted them, capital amounts themselves should not generally be regarded as income for the purpose of calculating child or spousal support. They are, however, part of Mr. Clarke's means, and the income they can reasonably generate should therefore be imputed to him for purposes of calculating the amount of support he should pay. The annuities themselves may be used both as security for the support, once the amount has been calculated, and as a source from which the support must be made.

[59] The Court next reviewed the issue of whether the payments are capital and compensation for loss of income. It is here that a distinction from the present case arises.

[60] In *Laurain*, the annuity from which payments were generated was purchased as a result of a settlement reached from a claim made by the husband's father, not the husband. Therefore, even if the annuity represents a compensation for lost wages, that loss was suffered by the husband's father, not the husband. It was an inheritance and could not be characterized as payment from an annuity compensating him for his loss of income.

[61] This is a key difference from the present case which, as discussed below, involves an annuity purchased to benefit the husband for losses he suffered personally, not through any inheritance.

[62] The Court in *Laurain* went on to consider whether the annuity payments received were exempt as an inheritance from division of property legislation in Ontario. It concluded that even if they were, the income generated from investing such payments should not be exempt from inclusion in income.

[63] In considering whether the funds are typically used to finance a significant proportion of the recipient's living expenses, the Court reviewed the cases, some of which predated the Guidelines, and held that such funds paid out of capital may constitute income for child support purposes. The Court held:

> 82 I respectfully disagree with the approach taken in these cases of treating draws on a capital asset as indistinguishable from other income for purposes of calculating spousal or child support. This approach overlooks the distinction between property and income, which is evident in the legislation, and the alternative uses that can be made of a capital asset for income generation or for other purposes.
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> 83 While the Court is entitled to take into consideration the means of the parties, including their capital assets, a party should not be required to pay support out of his savings or to deplete his capital for that purpose.

[64] Interestingly, the Court did note the decision of *Boca v. Mendelin* 1989 CanLII 3319 (ONCJ) in which a Court required a father to draw on assets to pay child support, but did so based on the Court's calculation of support on the employment income that he found the father was capable of earning. Put another way, the Court found that if the father chose not to work, but to draw on his

capital, the Court would impute income to him in an amount equal to that capital drawn. In the present case, the evidence is that the husband is completely disabled and has no means of earning income other than through the payments from the annuity and his CPP disability benefit.

[65] The Court then considered whether the recipient of the annuity payment customarily used that payment to maintain the parties' lifestyle when they were together. After an extensive review of the case law, the Court concluded:

> 102 Based on the above review of the law, I conclude that periodic payments of capital should generally not be included in income for the purpose of calculating support, although the income they may generate, or are capable of generating, should generally be included. A narrow exception has been made, in some circumstances, where the payor has treated periodic receipts of capital as income. However, most of these are cases in which:
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> (a) the Court has based its calculation of support on the income that the payor was capable of earning, but did not, because he chose to live on his capital instead; or
>
> (b) where it was unfair, in circumstances of temporary economic necessity, to require the recipient to make a sudden adjustment to a significantly lower standard of living by reason of separation from a spouse who is customarily treated such capital receipts as income.

[66] The Court declined to impute to the husband the monthly amount he received as an annuity payment. The Court did impute to him income at the rate of 5% on the amounts received as investment income for purposes of child and spousal support.

[67] In a later decision in the same matter, the Court dealt with a final order respecting spousal support and in the decision of *Laurain v. Clarke*, 2013 ONSC 726 the Court held with respect to the annuity payments received by the husband at paragraph 41:

> I find the annuity income should not be included in the calculation of Brian's income. Price J. gave extensive reasons and analysis based on the jurisprudence for his finding that the annuity should not be included in Brian's income. I agree with that analysis. This annuity is a capital asset paid monthly, an inherited one at that. There is no basis to consider it as income for support purposes. I would go further and say there is no evidence or basis to find that an imputed interest income on this annuity of 5% is reasonable. The best evidence is that Brian uses this annuity to live on. There was no evidence that he puts this money in the bank and earns interest on it. Further, given Brian's current financial circumstances,

> that finding would be unreasonable. Lastly, the interest calculation of 5% is very high and unrealistic in these current economic times. I am not imputing any interest income on the annuity income.

[68] In stark contrast to this is the Ontario Court of Appeal decision in *Hunks v Hunks* 2017 ONCA 24. In that decision, the Ontario Court of Appeal concluded that payments received by a wife from a structured settlement annuity ought to be treated as income. It is helpful to note that the Court refers to structured settlements as "SS". Put simply, at paragraph 49 the Court held:

> I agree with the appellant that the SS annuity payments should be considered as income for the purpose of spousal support and not property under Part 1 of the Act. I reach this conclusion for two reasons: (1) the SS annuity arises from a structured settlement; and (2) the SS annuity is analogous to disability benefits and not to a pension.

[69] The Court went on to explain that a structured settlement is different than the private purchase of an annuity. It must meet particular criteria set out by the Canada Revenue Agency (CRA) to qualify the payments as non-taxable, noted at paragraph 53 as follows:

> [53] The requirements for a structured settlement can most easily be understood by reading para. 5 of the CRA's Interpretation Bulletin (IT-365R2), published May 8, 1987:
>
> > 5. A "structured settlement" is a means of paying or settling a claim for damages, usually against a casualty insurer, in such a way that amounts paid to the claimant as a result of the settlement are free from tax in the claimant's hands. To create such a structured settlement the following conditions must be complied with:
> > (a) a claim for damages must have been made in respect of personal injury or death,
> > (b) the claimant and the casualty insurer must have reached an agreement under which the latter is committed to make at least periodic payments to the claimant for either a fixed term or the life of the claimant,
> > (c) the casualty insurer must
> > (i) purchase a single premium annuity contract which must be non-assignable, non-commutable, non-transferable and designed to produce payments equal to the amounts, and at the times, specified in the agreement referred to in (b),
> > (ii) make an irrevocable direction to the issuer of the annuity contract to make all payments thereunder directly to the claimant, and
> > (iii) remain liable to make the payments as required by the settlement agreement (i.e., the annuity contract payout).

> As a consequence of compliance with the foregoing conditions, *the casualty insurer is the owner of, and annuitant (beneficiary) under, the annuity contract* and must report as income the interest element inherent in the annuity contract while the payments received by the claimant represent, in the Department's view, non-taxable payments for damages. (Emphasis added)

[70] The Court goes on to make an important distinction with respect to structured settlements versus other annuities. It notes that if the person to whom the annuity payments are being made had received the settlement monies and then purchased the structured settlement annuity, it could not qualify as a structured settlement and the payments made would therefore not be exempt from tax because it would fail to meet the qualifying criteria set up by the CRA. Specifically, it must be the casualty insurer who purchases the annuity and makes an irrevocable direction to the issuer of the annuity contract to make all payments to the individual recipient.

[71] Therefore, as the Court notes at paragraph 55:

> Accordingly, while Ms. Hunk's receives payments from the SS annuity, she does not own it nor did she have constructive receipt of the settlement monies used to create it.

[72] From this the Court makes clear that the funds which purchase a structured settlement annuity are never owned by or possessed by the recipient of the payments, in this case is H.K. Moreover, the purchase of the annuity must have been made by the casualty insurer, not H.K., to qualify as a structured settlement annuity.

[73] This issue is important in this case, because H.K. takes the position that the annuity payments come from capital, therefore, they are not income. To sustain this, he argues that he had actual or constructive receipt of the annuity or had a vested interest in the damages which constitutes possession. If he is correct, the annuity may be considered capital which might, under the rationale applied in *Laurain*, exempt the payments from the structured settlement annuity from income for purposes of spousal support.

[74] If, on the other hand, the funds which purchase the annuity were never actually or constructively received by him, the Court may consider the payments received as income in his hands for purposes of spousal support.

[75] Counsel for H.K. argues that the Court of Appeal in *Hunks* was in error in its interpretation of the CRA bulletin and its application to the case before it.

[76] Counsel argues that the Court did not consider the entirety of this CRA bulletin and paragraphs 5 (a) and (b). Counsel argues that the funds which were used to purchase the annuity must have vested with H.K. for them to be directed by the casualty insurer to purchase the annuity in the first instance. This argues that there was at least constructive receipt of the funds.

[77] With the greatest respect, I disagree. In the present case, consistent with other injury claims that result in structured settlements, the evidence is that the casualty insurer purchased the structured settlement annuity in the normal course. There is nothing in the evidence to suggest otherwise. In fact, to suggest otherwise would be to say that the structured settlement annuity was off side of the CRA bulletin discussed earlier. Put simply, if the funds have been paid to H.K. and then the annuity was purchased, this would be clearly inconsistent with the CRA bulletin and would render this annuity outside of a structured settlement and the non-taxable framework.

[78] As for the reference to the settlement funds at least vesting with H.K., I draw a clear distinction between the vesting of an interest and receipt of funds, in this case a capital asset. I do not equate vesting with receipt or possession. Rights may well vest with a party long before the property is ever received, whether actually or constructively. I am not aware of any case law, nor was I directed to any such case law, in support of the argument that property, including capital or funds, may be exempt from consideration as income merely by having a vested interest in those funds. I find that it is necessary for the capital to at least be constructively or actually received by the party to qualify.

[79] Respecting constructive receipt, H.K.'s counsel argues that the Court of Appeal has misunderstood to the doctrine of constructive receipt and cites the decision of *Morin v R [1989] 1 CTC 2381* in which a taxpayer alleged that he was not subject to federal income tax on amounts withheld in accordance with the provincial income tax legislation. He argued that because he did not receive the amounts withheld for provincial tax, that he had not actually touched or felt the money or had in in his bank account, he had not received it and was therefore not liable to pay federal tax on it.

[80] The Court held at paragraph 24:

> We regret to say that this proposition seems to us absolutely inadmissible, because the word "receive" obviously means to get or to derive benefit from something, to enjoy its advantages without necessarily having an in one's hands. In other words, the plaintiff can, and must say, "what is left of my salary or income, after taxes, is $14,639.85;" it is not correct to say "my income is only $14,639.85".

[81] Important in this decision is the reference in paragraph 25 as follows:

> In the case at bar it is obvious that by deducting at source the amount of tax fixed by the regulations, his employer was paying the tax that he would have to pay himself if he had received the full amount of his salary.

[82] This decision is easily distinguished. *Morin* was discussing income that had clearly been received by way of compensation through salary and from which taxes were withheld. In the case at bar, the funds which would purchase the annuity, I find, were never received by H.K. but rather, at his direction, they were paid directly by the casualty insurer to the annuity insurance company. As noted earlier, to find otherwise would put the structured settlement annuity outside of the non-taxable framework contemplated by CRA.

[83] Counsel for H.K. refers to the decision of *Mitzner v R* [1998] CTC 2380. In that decision, a taxpayer argued that his Canada Pension Plan benefit for the year should not be included as taxable income because he did not actually receive it. Instead, it was retained and set off against taxes allegedly owed by the taxpayer in previous years.

[84] The Court held at paragraph 6:

> Certain dictionary definitions of "receive" or "receipt" might leave one with the impression that something is not received unless it is actually taken into one's hands or possession. However the case law is clear that an amount may be included in income even when it is only notionally or constructively received.

[85] Again, the same distinction arises from the present case. I will not repeat myself except to say I find H.K. neither actually, nor constructively, received the funds which purchased the annuity.

[86] The second and equally important finding of the Ontario Court of Appeal in *Hunks* was that the structured settlement annuity payments are akin to disability

benefits and will normally be considered income for purposes of spousal or child support. As set out by the Court:

> [57] The fact that the SS annuity payments arise from a structured settlement does not, however, fully answer the question of whether the SS annuity payments should be treated as property or income for the purposes of the Act. In my view, payments received from a structured settlement annuity are analogous to disability benefits and, therefore, should be treated as income.
>
> [58] At para. 17 of *Lowe*, Sharpe J.A. said the following about disability benefits:
>
> > [page653] I agree with Aitken J. [at para. 113 of *Hamilton*] that "the purpose of the disability payments is to replace in whole or in part the income that the person would have earned had he or she been able to work in the normal course." This makes disability benefits "more comparable to a future income stream based on personal service" than to either a retirement pension plan (explicitly included in family property by s. 4(1)), or to a future stream of payments from a trust (held to constitute property in *Brinkos*). . . . disability benefits replace income during the working life of the employee and therefore are appropriately treated as income for purposes of equalization and spousal support. As Aitken J. put it at para. 115, "a disability pension is simply the flip side of employment or self-employment income."
>
> [59] Like the disability benefits in *Lowe*, the SS annuity payments replace, in whole or in part, the employment income that Ms. Hunks would have earned had she been able to work. The SS annuity payments give her financial support because she cannot work. They are, therefore, of the same nature as the income that she would have earned had she not been injured. Just as disability benefits are more comparable to a future income stream based on personal service than a retirement pension, so too are the SS annuity payments. Annuities are usually purchased with savings. Not so [for] the structured settlement annuity. As we have seen, an individual cannot purchase a structured settlement annuity. Furthermore, structured settlements can only arise from a settlement for a damages claim based on personal injury or death. Clearly, the SS annuity was not purchased from personal savings nor is it a form of savings. The SS annuity, as a structured settlement, is designed to provide income to Ms. Hunks that she would have been able to earn, had she not been injured.
>
> [60] Equally clearly, the SS annuity is not like an employment pension plan, where entitlement accrues with service.

[87] Counsel for H.K. responded in several ways. First, it was argued that the *Hunks* decision should be read narrowly and focused on the unique circumstances of that case. The decision refers to the annuity payments replacing, in whole or in

part, the employment income of Ms. Hunks. Counsel argues that this is not something to be applied widely, nor in the particular circumstances of H.K.

[88] I do not agree. The particulars of the damage claim and payout for H.K. are not before the Court. Despite this, the evidence is clear that prior to his accident, H.K. had income in the range of $14,000 per year and J.K. had some income earned as a legal secretary and managing event planning for a local bar.

[89] After settlement, the annuity pays H.K. non-taxable income of $21,792 per year and he receives taxable CPP benefits of $7,901 per year. These annuity payments and income from CPP exceed H.K.'s pre-injury income and, according to his own financial information, are required to pay his expenses now. It seems clear that the annuity was intended to provide a stream of funds to replace income lost and to provide him with a comfortable life, post-accident.

[90] Moreover, I find that, generally, structured settlements are put in place to replace a lost stream of income for an individual or family and to do so on a non-taxable basis. On the other hand, I do accept the argument of counsel that there may be a narrow window of cases where such structured settlements are entered into for reasons other than replacement of an income stream and it should be open to the Court to consider those facts as they arise.

[91] Counsel argues that there are public policy concerns in finding that all structured settlement annuity payments are income for support purposes. It is argued that rather than purchase such products, parties may choose alternative investment vehicles to avoid having such payments considered income. While an interesting argument, I find it speculative and I do not find that it is so compelling that it supports setting aside the analysis made in *Hunks*.

[92] Counsel also argues that a public policy concern arises where someone like H.K. is permanently unable to change his income through work or career changes and faces having to pay support obligations which were unanticipated at the time of the settlement of the injury claim. While I certainly empathize with H.K., I do not find this to be a compelling public policy issue. Many families face an equally stressful circumstance when they separate. There is never enough money to go around. Most parties, whether they are with or without children, have limited opportunity to significantly increase their incomes after separation and face the same financial pressures as H.K. should spousal or child support be awarded. This, I find, is not a compelling argument either in this case or in general.

[93] While I did direct counsel for H.K. to turn his mind to the decision in *Phelps v Childs*, 2017 ONSC 1443, and he did make written submission on that decision, I find that this case is not helpful in the analysis in the present case. It merely follows the line of reasoning in *Hunks* and adds little to the present matter.

[94] Overall, I adopt the reasoning in *Hunks*, except where otherwise distinguished respecting a possible narrow class of cases where the structured settlement annuity can be shown to be not akin to a disability payment.

Spousal Support Analysis

[95] Having found that H.K.'s structured settlement payments are income for purposes of spousal support, I must now further consider whether spousal support be awarded and if so, in what amount and for what duration. I, therefore, return to the factors set out under the *Act* in sections 4 and 5 and begin with a review of income.

[96] I have already accepted that J.K. is disabled and limited in her ability to earn any income other than that which she receives currently. Her income in 2015 from social assistance benefits was $14,722. In April 2015, she applied for and was approved for disability benefits with the Ontario Disability Support Program and she was to receive a gross benefit of $1057 per month for a total of $12,684 per year. It is unclear on the evidence whether, after approval for disability benefits through the Ontario Disability Assistance Program, she would be receiving the $14,722 in income or the $12,684 in income. For the purpose of this analysis, I will assume the higher amount.

[97] As for H.K., he has non-taxable income from the structured settlement annuity payments of $21,792 per year and taxable Canada Pension Plan disability benefits of $7,901.52 per year. His total income for the year is therefore $29,693.52.

[98] A starting point for analysis of spousal support is the Spousal Support Advisory Guidelines (SSAG). I will first note that the SSAG are not required to be applied in Nova Scotia but they are helpful guide and provide some assistance considering spousal support matters.

[99] When the SSAG are applied to these incomes, I note that J.K.'s benefits, which I assume are social assistance benefits, would not be considered income in

her hands and attributable to her under the SSAG. H.K.'s income would be attributable to him for support purposes.

[100] The calculation under the SSAG suggest a monthly support amount ranging from a low of $445 per month to a high of $594 per month.

[101] That said, I find that this circumstance falls within an exception under the SSAG. Specifically, under Chapter 12 "Non-taxable Pay or Income" the SSAG notes as follows:

> One new exception in the Final Version is the nontaxable pay or income exception (FV 12.8). Both formulas produce a "gross" amount of spousal support, i.e. an amount that is deductible from taxable income for the payor and included in taxable income for the recipient. But some payors have incomes based entirely or mostly on legitimately non-taxable sources…
>
> In these cases the payor is unable to deduct the support paid, contrary to the assumption built into the formula for amount. In most cases, the recipient of spousal support will still have to include the support as income and pay tax on it.
>
> Under this new exception, it will be necessary to balance the tax positions and interests of the spouses.…

[102] In this circumstance, H.K. will not be able to deduct any spousal support paid to J.K. as against his income from the annuity payments. His other income from disability benefits is so low that I doubt there would be any tax relief for him from the spousal support payments at all.

[103] On the other hand, J.K.'s income is so low that she will pay very little tax, if any, on the spousal support she receives within the SSAG range. This, I find, brings their circumstances squarely within the exception set out in the SSAG. I find it necessary therefore to deviate from the SSAG in assessing spousal support.

[104] Further, given I have already found that this is a circumstance of non-compensatory support, need and ability to pay, as reflected in the factors set out in section 4 of the *Act,* must come into play. Unfortunately, as noted earlier, J.K. has not filed a statement of expenses.

[105] On the other hand, H.K. has done so. When I review those expenses, I find that some appear to be high and all are estimates only. It is not unusual that estimates are required, as few keep strict track of their monthly expenses. That

said, he claims rent or mortgage at $600 estimated per month and heating cost at $400 per month, electricity at $100 per month in water at $50 per month. I find these are excessive, but not grossly so. Similarly, his grocery and household supplies budget of $500 per month appears to be somewhat high for one person.

[106] That said, I am satisfied that H.K. has some ability to pay and I have already found that J.K. has a need. Neither has high income and both face financial pressures, regardless of the outcome of this matter. Neither has an ability to increase their income in the future.

[107] Further, they were married for approximately12 years and, through no fault of their own, find themselves unable to work now or in the future.

[108] I've also considered section 5 of the *Act* which recognizes an obligation on J.K. to assume responsibility for her own support, but I also note that given her current circumstances and that at least some of her disabling conditions existed during the relationship, she is unable to support herself fully. Therefore, I find it would be reasonable for H.K. to bear some responsibility for her living costs.

[109] I have considered all the evidence before me as well as the legislative factors, the case law and the unique circumstances of these parties and find that it is appropriate that H.K. be ordered to pay to J.K. spousal support in the amount of $350 per month.

[110] With respect to duration, I note that this is a non-compensatory spousal support claim and the marriage was approximately 12 years in length. The evidence is that H.K.'s structured settlement annuity payments will end on May 15, 2024. I find that, regardless of J.K.'s need, H.K. will not have an ability to pay any spousal support after the annuity payments end in any event.

[111] Of importance is the evidence that, after separation, J.K. retained control of the funds received from the annuity payments and I accept the evidence that she used most of those funds for her own expenses.

[112] I find that she has already received significant support from H.K. through those annuity payments from the separation of April 2011 until those payments were redirected to H.K. in early of 2014, a period of approximately three years. The total of these payments to J.K. was approximately $65,000. It is her evidence that some of this was used to pay joint debt of the parties but I do not have clear

evidence as to the amount employed for that purpose. It was available to her to adduce that evidence but she did not.

[113] Considering the amount already received by J.K. as described, I am satisfied that H.K. has already paid sufficient spousal support to her by way of these annuity payments. If she had been paid $350 per month from the date of separation and received a total of $65,000, that would represent spousal support over a period of 15 1/2 years. I find that a reasonable period for spousal support in this circumstance would be 10 years. I therefore, as noted, find H.K. has already satisfied any spousal support obligation he would owe to J.K.

[114] It is therefore the decision of this Court that an order will be issued confirming J.K.'s entitlement to spousal support on a non-compensatory basis in the amount of $350 per month for a period of 10 years and further confirming that H.K. has already satisfied his obligation for spousal support in its entirety and no further payments are required by him.

[115] I reviewed the matter and no cost will be awarded given the parties' circumstances.

Daley, JFC