COURT OF APPEAL FOR ONTARIO

CITATION: Fraser v. Fraser, 2013 ONCA 715
DATE: 20131125
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Simmons, Hoy and Strathy JJ.A.

BETWEEN

Julia Fraser

Applicant (Respondent)

and

David Fraser

Respondent (Appellant)

Stephen Grant and Sarah Young, for the appellant

Melanie Manchee, for the respondent

Heard: May 13, 2013

On appeal from the order of Justice Lorna Lee Snowie of the Superior Court of Justice, dated February 1, 2012, with reasons reported at 2012 ONSC 685.

Simmons J.A.:

A. OVERVIEW

[1] The appellant father appeals from an order requiring that he pay lump sum child support to the respondent mother. The issues on appeal concern the motion judge's findings that the father, who had been experiencing mental health problems, was capable of returning to work and of earning an income equal to the amounts of capital the motion judge found he had been spending annually.

[2] After several years of litigation, the father and the mother resolved various issues in matrimonial proceedings between them by way of a consent order dated May 7, 2007.

[3] Prior to the consent order, the father began experiencing mental health problems and his licence to practise psychiatry was suspended. Among other things, the consent order:

i) terminated the father's obligation to pay child support under an interim order;

ii) fixed the father's child support obligation for the period from January 1, 2007 to September 1, 2007 at nil; and

iii) established a mechanism for reviewing the father's child support obligations in the future.

[4] Importantly, the consent order required that the father place $200,000 from his share of the proceeds of sale of the matrimonial home in trust and provided that those funds would be returned to him if he satisfied his child support obligations between September 1, 2007 and September 1, 2010. If the father did not satisfy his child support obligations, the mother could apply for payments from the funds held in trust as child support.

[5] As of September 1, 2010, the father's licence to practice medicine had not been reinstated. However, during the period between January 1, 2008 and January 1, 2012, he received monies totalling about $800,000 – consisting of some capital; some income (including RRSP income); the proceeds of a motor vehicle accident settlement, and CPP disability payments. The father did not disclose these receipts to the mother and paid no child support during this period.

[6] On a motion by the father for the return of the $200,000 placed in trust, the motion judge concluded that the father had not satisfied his child support obligations between September 1, 2007 and September 1, 2010.

[7] Although the motion judge accepted that the father had an illness, she was "not satisfied he is totally disabled and the victim of his illness." Instead, the motion judge found that the father had chosen not to follow any active treatment plan and she accepted the mother's submission that the father could have gotten better.

[8] Taking account of the father's long history of failing to pay support orders, the motion judge concluded that a lump sum award of child support was appropriate.

[9] In addition, after noting that the father had chosen to live off capital of about $80,000 per year, the motion judge found that he could probably return to work and earn at least that amount. Holding that the $80,000 figure should be grossed up for income tax, she imputed to the father a before tax income of $118,000. Based on her estimate that child support arrears and future child support using that income would exceed $200,000 by a significant amount, the motion judge awarded the balance[1] of the trust fund to the mother and dismissed all other claims for relief.

[10] The father raises two main issues on appeal:

i) Did the motion judge err by artificially conflating capital with income for child support purposes?

ii) Did the motion judge err by imputing employment income to the father when he is under a disability and cannot work?

[11] In relation to the first issue, the father submits that, in stating that the father had chosen to live off capital of about $80,000 per year, the motion judge failed to distinguish between income and capital and improperly imputed income to him based largely on his capital expenditures.

[12] I agree that in calculating the figure of $80,000 per year, the motion judge failed to distinguish between income and capital receipts[2]. I also agree that it is not generally appropriate to impute income to a spouse for child support purposes on the basis of the spouse's expenditure of non-recurring capital receipts that are not treated as income for income tax purposes[3].

[13] That said, I do not consider the motion judge's reference to the father living off capital of $80,000 per year as being determinative of the appeal. As I read the motion judge's reasons, she imputed an $80,000 annual income to the father, not because she found he had been living on capital of $80,000 per year and treated his capital as the equivalent of income, but rather because she found he could get better, return to work and earn an annual after tax income of at least $80,000. The father's second issue addresses these core findings. I will therefore focus on the father's second issue.

[14] For the reasons that follow, I conclude that the motion judge erred in rejecting, without giving reasons, the father's medical evidence concerning the nature of his illness and its impact on his ability to work. Further, on my review of the record, it does not support the motion judge's findings that the father could get better, return to work and generate an after tax income of at least $80,000 per year and that he failed to follow an active treatment plan.

[15] These conclusions raise the following additional issues: i) what is the father's annual income for child support purposes?; ii) is the father entitled to the return of the balance of the funds held in trust?; and iii) what are the father's retroactive and ongoing child support obligations?

[16] In the result, I would set aside the motion judge's order and award past and future child support based on income figures I have determined for the father. Given that funds are being held in trust to satisfy child support payments, I would not make an order for lump sum ongoing child support. Instead, I would direct that the ongoing child support payments I have calculated be made on an annual basis from the trust fund. I would also direct that the father make ongoing disclosure to the mother of his health situation and his income.

B. BACKGROUND

(1) The Parties

[17] The parties were married in 1994 and separated in 2002. They have two children, a daughter born in 1995 (now 18 years old) and a son born in 1998 (now 15 years old).

[18] According to the motion judge, prior to the separation, the parties enjoyed a lavish lifestyle. They lived in a two million dollar home and the children attended private school. The father was a successful psychiatrist earning more than $300,000 per year[4].

[19] Following the separation, the children continued to live with their mother. At least by the time of the consent order, the mother was operating a lighting store. In 2011, she purchased a home for $678,000 that is subject to a $200,000 mortgage. Apart from this, the record contains little information about the mother's current financial situation[5].

[20] The father has since remarried. Until about mid to late 2011, he lived in a home registered in his new wife's name that was purchased for $391,000 in 2008 with his money. Since about mid to late 2011, the father has lived, at least intermittently, in a long-term care facility. I will say more about the father's current financial situation later in these reasons.

(2) The Consent Order

[21] As the father's motion for the return of the monies held in trust was made pursuant to the consent order, I will review the relevant provisions of the order in some detail.

[22] Paragraph 10 of the consent order terminated the father's support obligation under an interim order, acknowledged his inability to work and stipulated that he would have no obligation to pay support from January 1, 2007, to August 31, 2007:

> 10. THIS COURT ORDERS AND ADJUDGES THAT the [father's] obligation to pay interim child support pursuant to paragraphs 8, 11 and 12 of the Interim Order of Van Melle, J., dated February 26, 2003, is terminated. Arrears are hereby fixed at $0.00 as any amounts owing are satisfied with the payment to the [mother] in paragraph 13(c) of this Order. The [father] is currently unable to work and his current child support obligation for the period January 1, 2007 to August 31, 2007, is therefore nil.

[23] Paragraphs 11 and 13 of the consent order required a solicitor to hold $200,000 from the father's share of the proceeds of sale of the matrimonial home in trust; to invest the funds in short term interest bearing securities; and to pay any interest to the father. The funds were not to be disbursed without the written

consent of both parties or further court order, except in the event of the father's death – in which case the funds were to be paid to the mother as a fund for the future support of the children.

[24] Paragraph 11 of the consent order also specified that the father would be entitled to the return of the $200,000 if he satisfied his child support obligations between September 1, 2007 and September 1, 2010 – but that the mother could apply for payments from the fund on account of child support if he did not:

> If the [father], after three years, has met his child support obligations from September 1, 2007 to September 1, 2010, and is then meeting his reasonable child support obligations, such funds, or the balance then remaining, shall be returned to him. In the interim, if the [father] has failed to meet his reasonable child support obligations, the [mother] may apply to the Court for an Order directing payment of such funds, at any time, for child support to cover any period following September 1, 2007, or costs awarded to her in any future litigation with the [father]. After September 1, 2010, if any part of the fund remains in trust, the [mother] may apply to the Court for an Order directing payment of such funds, at any time, for child support, or costs awarded to her in any future litigation with [the father] relating to the fund. In the event of a dispute in regard to the release of such funds, either party may apply to the Court for directions

[25] Paragraph 12 of the consent order is important because it creates a review mechanism for the father's child support obligations after September 1, 2007 and specifies the parties' disclosure obligations:

> 12. THIS COURT ORDERS AND ADJUDGES THAT at any time after September 1, 2007, and once per year thereafter, either party may request in writing to review the child support arrangements, including the table amount and amounts then incurred for extraordinary expenses. Within 30 days of the making of such request and upon receipt of such a request, the party shall disclose the documents required in Section 21 of the *Child Support Guidelines*, information about the amount incurred for the extraordinary expenses for the previous period, current information about the children's extraordinary expenses and any other information needed to review child support. The [father's] disclosure obligation will include a year to date summary, to the then most recent month end, of his OHIP billings as well as all

> other income. The [mother's] disclosure obligation will include production of Watts Current Inc. Financial Statements to the most recent fiscal year end, and evidence of revenue and expenses since the most recent fiscal year end Financial Statement. The parties will thereafter attempt to resolve the issue but if they are unable, either party is at liberty to bring a Motion before the Court for the determination of child support.

(3) Monies Received by the Father following the Consent Order

[26] The motion that resulted in the award of lump sum child support was heard in late January 2012. As I have said, between January 2008 and January 2012, the father received monies totalling about $800,000, consisting of the following:

2008

- $6,505 – interest income
- -$6,334 – self-employment income[6]
- $1343 – social assistance payments
- $152,946– RRSP income
- $299,608 – proceeds of sale of portion of wine collection[7]

2009

- $6,000 – interest income
- $512.03 – net professional income[8]
- $42,167 – proceeds of sale of portion of wine collection

2010

- $400 – interest income
- -$8,911.44 – net professional income
- $25,052.10 – CPPD benefits[9]
- $269,441.08 – proceeds of settlement of a 2005 motor vehicle accident claim received in August 2010

2011

- $1600 – estimated interest income[10]
- $12,264 – CPP benefits[11]

2012 Estimated (as of January 2012)

- $1600 – estimated interest income
- $1,022.23 – monthly CPPD benefits.

[27] The father disclosed his RRSP income, interest income, professional income and CPP disability benefits in his initial affidavit filed in support of his motion for payment of the trust funds. He did not disclose the monies received from the sale of his wine collection or the settlement proceeds from his 2005 motor vehicle accident until pressed by the mother for additional information.

[28] A schedule attached to the consent order indicates that the father's wine collection was valued at $512,075 at the time of the consent order.

[29] The father claims that the settlement proceeds for his 2005 motor vehicle accident relate exclusively to pain and suffering. However, the record does not include any information from his counsel in that proceeding or any other material to verify the father's claim.

(4) The Evidence Concerning the Father's Illness

[30] The evidence concerning the father's illness is contained in a series of affidavits sworn by the father, the mother and the father's new wife, in support of the relief sought in this motion, as well as the exhibits to those affidavits. The exhibits consist primarily of a series of medical reports and progress notes authored by the father's psychiatrist. It is not clear on what basis these reports and progress notes were admitted into evidence. However, no issue was raised on appeal concerning the propriety of their admission and, in their submissions, both parties relied on their contents.

[31] That said, the reports and progress notes include some statements and opinions that appear to be based at least in part on self-reports by the father and reports by his new wife; in some instances they also include hearsay statements from other doctors. I will return to these issues later. For the moment, suffice it to say that the hearsay character of some of the underlying material may affect the weight to be given to some of the statements and opinions expressed.

(a) The father's initial affidavit

[32] In his initial affidavit sworn May 3, 2011, the father asserted that he was unable to work due to his mental health condition. He attached to his affidavit a handwritten letter dated October 6, 2010 from Dr. Kofi Ofosu[12], whom he described as his psychiatrist. In the October 6, 2010 letter, Dr. Ofosu said that the father had been under his care at a hospital since July 29, 2010; that the father suffers from bipolar disorder; and that the father "will not be able to return to his work as a psychiatrist for the foreseeable future."

(b) The mother's responding affidavit

[33] The mother filed a responding affidavit sworn May 18, 2011. She stated that, prior to the consent order the father had been under treatment from at least five different psychiatrists "with a focus on treatment from Dr. Hoffman of Sunnybrook

Hospital." She noted that the father's material does not mention Dr. Hoffman and does not disclose what course of treatment, if any, the father had been following. She expressed the view that "[m]any patients with bipolar disorder are able to lead normal lives, and work productively, by following a prescribed medication regime." She observed that the father's material did not disclose his proposed treatment plan nor indicate whether he was following it.

(c) The father's second affidavit

[34] In a further affidavit sworn May 20, 2011, the father said "Dr. Ofosu" had been his treating psychiatrist. He also stated that he was in hospital during a four-month period, between June and October 2010[13], where he was an in-patient. After being released from hospital, the father returned to the care of Dr. Turner. The father said that, except when he was an in-patient in hospital, Dr. Turner had been his treating psychiatrist since 2007; that Dr. Turner had provided an extensive report to the court in 2007; and that he (the father) was seeking an update of Dr. Turner's report.

[35] The father attached to his May 20, 2011 affidavit a medical report form Dr. Turner completed on November 5, 2009 to support the father's application for CPP disability payments. Portions of the photocopied form are illegible, but the diagnosis section reads as follows:

> **Diagnosis**
>
> Mood disorder NOS [Not Otherwise Specified], depressed
>
> ADHD [Attention deficit hyperactivity disorder] Adult type
>
> Marital Separation
>
> Concussions 2005, 1991[14]

In the CPP medical report form, Dr. Turner indicated that the father had 15 to 20 hospital admissions between 2007 and 2009 for depression and suicidal thoughts. He described the father's treatment as: "[p]sychotherapy monthly" and "[m]eds supervision". Under prognosis, he stated: "poor, appears to be chronically and severely depressed at times, has cognitive problems, ADHD symptoms." He set out relevant physical findings and functional limitations as follows:

> 1. Depression, hopeless, despondency (Mood Dis.) mood lability, irritability, thought disorder.
>
> 2. Disorganized, scattered (ADHD)
>
> 3. Mild organic brain symptoms (concussion).

(d) The disclosure brief attached to the father's new wife's affidavit

(i) Dr. Turner's Summary Report

[36] Following an order made on May 26, 2011 requiring, among other things, that all medical reports from Dr. Turner be produced, the father's new wife[15] delivered an affidavit sworn January 11, 2012, attaching a disclosure brief as an exhibit. The disclosure brief included a Summary Report from Dr. Turner dated December 9, 2011.

[37] In his Summary Report, Dr. Turner stated that the father had been a patient under his care since he first saw the father in the emergency room of a hospital on January 5, 2007 (which was a few months prior to the May 2007 consent order). The father presented in an agitated state with suicidal ideation, symptoms of depression and emotional upset. He was initially admitted to the in-patient psychiatric unit of the hospital. Following the father's discharge from the hospital, Dr. Turner continued to see him as an office patient on what Dr. Turner described as regular intervals – however, Dr. Turner also noted that the father had had numerous emergency room visits and several hospitalizations in the interim.

[38] Dr. Turner's key opinions as set out in his Summary Report are as follows:

- despite "adequate and reasonable psychiatric treatment and improvement with regards to his support system" the father's "psychiatric condition, his mental state, his personal functioning and his cognitive functioning has not significantly improved" since January 2007;
- the father "has become unable to function in organizing his daily routines", he "continues to have significant psychiatric symptoms", he "appears to have cognitive decline and is unable to function in his regular daily routines to the extent that now he is residing in a nursing home";
- the specific areas where the father had continued difficulty in functioning were:
    - mood disorder – alternating with periods of depression (which led the father to negotiate with funeral homes and present himself in hospital emergency rooms all over the province), the father was agitated, energized, restless, irritable and appeared to have unrealistic and grandiose plans;
    - attention deficit disorder symptoms – the father tended to be disjointed and ruminative in his thinking, and he had difficulty in sustained concentration and attention in ordinary conversation and in treatment sessions; and
    - cognitive impairment.

- the Summary Report's diagnosis by reference to DSM categories reads as follows:

> Axis I Mood Disorder NOS [Not Otherwise Specified] depressive features
>
> Axis II Exclude Personality Disorder
>
> ADHD Traits
>
> Axis III Organic Brain Impairment
>
> Ischemic Heart Disease
>
> Axis IV Psychosocial Stressors severe related to disease factors, marital, profession and financial difficulties
>
> Axis V GAF 45—50 current[16]

[39] As an appendix to his Summary Report, Dr. Turner attached "relevant" documents from what Dr. Turner described as the father's "complex and lengthy" file. These documents related primarily to Dr. Turner's dealings with the father between January 2007 and December 2011 and included several consultation and medical legal reports prepared by Dr. Turner as well as Dr. Turner's progress notes detailing the father's 45 visits to Dr. Turner's office between January 18, 2007[17] and December 9, 2011.

[40] My review of Dr. Turner's progress notes and reports reveals that Dr. Turner's assessment of the nature of the father's illness evolved somewhat over time and that, while he was cautiously optimistic at some points concerning the father's chances for improvement, he eventually concluded that any significant improvement was unlikely:

- in a January 2007 Consultation Report, Dr. Turner described the father as suffering from an adjustment disorder with depressive features relating to the father's marital, professional and financial problems;
- in an April 2007 Medical-Legal Report, Dr. Turner described the father as "persistently and seriously depressed, beyond that of an adjustment reaction";
- by September 2007, Dr. Turner was describing the father as having "Major Depression, marked severity" – in particular, Dr. Turner noted that at their August 20, 2007 session, the father had more severe psychiatric symptoms – including depression and suicidal thoughts and difficulty in attention and concentration – and in addition the father appeared to be developing cognitive difficulties, impairment of memory and inappropriateness;

- on November 29, 2007, while saying that the father had been co-operative with prescribed psychiatric treatments and was improving, Dr. Turner described the father as suffering from: moderate to severe psychiatric symptoms that caused significant anxiety and distress, and at times contributes to inappropriate behaviours, particularly when he becomes depressed and suicidal." Dr. Turner continued to diagnose the father with "Major Depression, marked severity" and described prior diagnoses of Bipolar Mood disorder and Narcissistic Personality Disorder as "deferred";
- in a December 12, 2007 progress note, Dr. Turner said:

  > "[The father] remains chronically para-suicidal. There is a risk that he may complete suicide, which remains chronic and unchanged from before. I do not think much else can be done other than being as supportive as possible and optimizing his various medications … and continuing to see him as regularly as possible. There is no value in repeated certification and involuntary commitments. This may be harmful in increasing his sense of being a victim and be traumatizing him further";

- in a December 31, 2007 Consultation Report, Dr. Turner again described the father as suffering from an "Adjustment reaction, depressed features" along with "ADHD – post traumatic stress disorder";
- in June 2008, Dr. Turner noted that although the father had been somewhat more stable in the last six months, his "psychiatric condition was reemerging and that he presented with similar clinical symptoms of depression, hopelessness, suicidality and thought disorder" as had been present in the past. Dr. Turner identified a treatment plan impasse as between himself and a psychologist the father had been seeing and noted that the father would have to decide what plan he wanted to go with as he could not continue with both practitioners in the circumstances. Following this visit, Dr. Turner did not see the father again until March 2009, at which time the father resumed his visits to Dr. Turner;
- Dr. Turner's eventual conclusion that the father was unlikely to improve is best summed up in the following excerpts from a follow-up letter dated December 30, 2009 responding to questions from Canada Pension Plan Disability ("CPPD") Benefits concerning Dr. Turner's earlier, November 5, 2009, report to CPPD:

  > When I saw [the father] originally in the emergency department … he was in an acute state of distress with unstable symptoms of depression and episodic suicidal plans and gestures. Since that time I have continued to follow [the father] for regular follow up visits in my office.

> At the time of this writing he has continued to experience unstable mood symptoms particularly episodes of depression, despondency and expressed suicidal ideation. He has been tried on various mood stabilizers, antidepressants and mood stimulants…
>
> Current mental status examination indicated the presence of unstable mood symptoms as noted above. He has somewhat reduced energy. His concentration and attention was rated as very poor. He was inconsistent in giving his history, has difficulty in understanding complex issues, and has the tendency to perseverate and repeat himself… He gets periods of partial mood elevation in conjunction with poor judgment and impulsive behaviours including inappropriate spending if given the opportunity.
>
> … I understand that [the father] has not been working sometime prior to my first contact with him in January of 2007. His medical license has been under suspension for the same period of time. At one point there was the question of whether he could potentially be reinstated but given the continuation of his current symptoms I do not see any chance of that happening at this time.
>
> [The father] self reported that he is doing some counselling with clients at his current wife's office, which helps him to feel better about himself but is limited to a few hours each week. Notwithstanding that, I do think that [the father] is clearly totally disabled from his former profession and from any competitive alternative employment related to the severity of his continuing psychiatric symptoms and cognitive symptoms. I do not foresee any significant improvement in his psychiatric symptoms given my experience with his treatment over the last 3 years.
>
> I am continuing to follow [the father] as an outpatient in my office. He has generally been very compliant with his attendance at the office…

- subsequent progress notes include the following observations by Dr. Turner:

> April 30, 2010 – [the father] continues to present as somewhat agitated. At times his conversation appeared slightly bizarre, disjointed and inappropriate … It is not

> clear to me … whether [his] lack of insight and inappropriateness is representative of fairly severe attention deficit symptoms … and he may have some degree of thought disorder related to bipolar features, or alternatively that this is representative of a developing organic brain syndrome;
>
> January 7, 2011: [the father] remains unchanged essentially with some mood lability, talking inappropriately of events past particularly owing $18,000 a month to the FRO, some suicidal thoughts, planning for his funeral and getting ready to organize his funeral plots and arrangements
>
> April 15, 2011: [the father] overall continues to show significant thought disorder, thought disorganization and inappropriateness … He continues to be very stressed out. He has had frequent hospital visits and his overall functional rating is GAF of 50 or less … Certainly I cannot see [the father] ever returning to work at present with what appears to be a somewhat deteriorating course…
>
> June 10, 2011: In the office [the father] continues to show significant thought disorganization and inappropriateness … At this time I see no chance of [the father] working either in his original profession as a psychiatrist or in any other profession because I continue to have serious concerns about his prognosis due to his deteriorating clinical course currently.

[41] Dr. Turner's reports also note that, following a ten-day hospitalization in January 2010, the father was in a residential placement for an unspecified period, until a decision was reached on how to best manage the father's current situation.[18] They also suggest, based on the father's self-reporting, that subsequently, in July 2010, the father was hospitalized for about four months. It was this hospitalization that led to Dr. Ofosu's handwritten report. However, as I have noted in a footnote above, the OHIP records suggest a two-month hospitalization from June to early August 2010. According to Dr. Turner's progress notes, after the father returned home from hospital, his new wife arranged for him to be supervised while she was working either through attendance at a senior's centre or by a hired supervisor. In his July 29, 2011 progress note, Dr. Turner expressed concern about whether the father was developing a degree of dementia.

[42] Subsequently, in his August 29, 2011 progress note, Dr. Turner noted that the father had been on a respite placement for five days and was to go to a similar

placement for a further five days. He described the father's mental state as having worsened overall compared to when he first saw the father in January 2007. He said, "[c]ertainly there has been an increase in his bizarreness, his obsessive ruminations and disorganization of thought. He requires frequent supervision of his activities of daily living now." In a September 2, 2011 progress note, Dr. Turner noted that the father was asked to leave the respite program because he was too agitated and restless and required more supervision than the program could provide.

[43] Dr. Turner's final progress note in the record is dated December 9, 2011. In it, he states that the father was continuing in respite treatment on a semi-permanent basis. He described the father as having "delusional preoccupation" and a tendency to be "disjointed and tangential" in his conversation.

(ii) Discharge summaries

[44] The attachments to Dr. Turner's Summary Report also include two discharge summaries from other psychiatrists relating to hospital visits by the father. I set these out in detail because the motion judge relied heavily on their contents.

[45] The first discharge summary was prepared by Dr. Gagan Gaind. It is dated May 21, 2007, and relates to a hospitalization from May 8, 2007, to May 16, 2007. Dr. Gaind discharge diagnosis was:

> Axis I: malingering
>
> Axis II: narcissistic personality disorder

[46] In his report, Dr. Gaind explained that his diagnosis of malingering arose from the circumstances around the father's admission to hospital. Prior to being admitted to the hospital, the father was apparently charged with mischief for pulling a fire alarm at a hotel. After he was charged, he apparently told the police that he had been mugged in a garage and that he had injected himself with potassium chloride earlier in the day. In Dr. Gaind's view, the father pulled the fire alarm because he was angry with the hotel staff and concocted these stories in order to be taken for a psychiatric assessment rather than jail. In his view, that conduct fulfilled the criteria for malingering.

[47] Dr. Gaind also described the father's narcissistic personality disorder as being severe and a problem that would make it difficult for him to get any help:

> Everything that [hospital staff] observed … pointed very much to a severe narcissistic personality disorder who had decompensated increasingly since his marriage broke up five years ago. It was clear that in many ways he is the architect of his own misfortune in the various things he has done and the lies he has told lead him to greater and greater ruin. It was also clear that he had a great deal of difficulty engaging in any meaningful

> therapy with anyone and was simply going from person to person until perhaps he hears what he wants to hear … However, the larger picture does suggest a narcissistic personality disorder in quite an advanced stage of decompensation. Whether he has bipolar disorder type I or type II or attention deficit disorder, I cannot say for sure, but my general impression would be that his personality disorder explains his behaviours. Unfortunately, this personality includes a very marked tendency towards lying and exaggeration, and this will make it very difficult for [the father] to get any meaningful help.

[48] The second discharge summary was prepared by Dr. Janet Patterson. It is dated July 20, 2011, and relates to a hospitalization on June 30, 2011. Dr. Patterson also diagnosed the father on Axis I as malingering and on Axis II as narcissistic personality disorder. Following "an interview [with the father] that was quite difficult to sort out", Dr. Patterson spoke to the father's new wife who explained that the father called the police and told them he tried to kill himself because she had gotten angry with him. Concerning the father's mental status, Dr. Patterson said, "there is no current suicidal ideation or evidence of mood disorder or psychosis."

[49] Dr. Turner's progress notes include a reference to one other hospital discharge summary, but that summary was not included as one of the attachments to his Summary Report. The discharge summary relates to a hospitalization from January 10 to 20, 2010. In a progress note dated February 5, 2010, Dr. Turner describes the discharge summary as follows:

> I did review the extensive report produced by Dr. Adam and she did not really have any new findings. She did comment on his inconsistency of presentation, felt him to be possibly malingering and have behavioural and personality disorder features. She did not identify any of the underlying possible mood disorder features or ADHD features.

[50] The motion judge relied on excerpts from some of these discharge summaries indicating that the father is a malingerer and a compulsive liar, as well as medical records indicating that the father had consulted with multiple psychiatrists, to reach her conclusion that the father could return to work. However, in doing so, the motion judge did not refer to the indications in the material that these characteristics were part of the father's illness, nor did she consider that no report contained an opinion indicating that the father could return to work. I will return to these issues in the analysis section of these reasons.

C. THE MOTION JUDGE'S REASONS

[51] In reaching her conclusion that the father should pay the balance of the trust fund to the mother as lump sum child support, the motion judge took account of several factors:

- the father had a history of non-payment of child support both in relation to his two children of this marriage and a child of a prior marriage;
- the father had been using capital as opposed to income to support his lifestyle since 2007 but had not paid any child support or s. 7 expenses for the benefit of the two children during that period;
- the father failed to meet his child support obligations between September 1, 2007 and September 1, 2010;
- although the father had an illness, he had been diagnosed as malingering, as having a narcissistic personality and as a habitual liar;
- the father had made repeated false statements that he was paying $18,000 per month in child support;
- rather than following an active treatment plan as he had been expected to do at the time of the consent order, the father had chosen not to do so – instead, he chose to "doctor-shop". In this regard, the motion judge noted that, as a psychiatrist, the father knew the system and that he had consulted 209 different doctors between April 2004 and June 2011.

[52] In the following key passages of her reasons the motion judge concluded that the father could get better and that he was capable of earning an income equal to what he had been spending in capital, which would translate into a before-tax income of $118,000 per year:

> I am satisfied that [the father] has an illness. I am not satisfied that he is totally disabled and the victim of his illness.
>
> The respondent father is a chronic liar. His doctors have diagnosed him as a "habitual liar". (See the medical reports dated August 20, 2007 December 30, 2007; August 7, 2009, April 30, 2010 and January 7, 2011.)[19] He makes repeated false statements such as:
>
> –he pays $18,000/month child support to FRO
>
> –his father and uncles all committed suicide

> –the judge ordered $400,000.00 held in trust in case he killed himself

He has been diagnosed as:

> (1) malingering
>
> (2) dramatic
>
> (3) a narcissistic personality
>
> (4) having a propensity towards lying disorder.

…

Dr. Gaind, M.D., described [the father] in 2007 as “the architect of his own misfortunes”:

> “It was clear that in many ways, he is the architect of his own misfortune and the various things he has done and the lies he has told lead him to greater and greater ruin. It is also clear that he had a great deal of difficulty engaging in any meaningful therapy with anyone and was simply going from person to person until perhaps he hears what he wants to hear…”
>
> (from the report of Dr. Gaind, M.D., dated May 17, 2007).

The [father’s] diagnosis on discharge was:

> Axis I: malingering
>
> Axis II: narcissistic personality disorder

It is clear from the evidence that the respondent father has chosen not to follow any ‘active treatment’ plan. He has gone from place to place to ‘doctor shop’.

As a psychiatrist, [the father] knows “the system”. The evidence before this court shows that [the father] saw 209 <u>different</u> doctors from April 2004 to June 2011 (OHIP records) in various locations all across southern Ontario.

Is he ill? Yes, he is ill.

> Is he able to get better? I agree with [the wife's] counsel that on the balance of probabilities [the father] could get better except he has chosen to focus on not paying child support and, as a result, his illness has taken on a life of its own. He has gone to extraordinary lengths to avoid paying child support to [the mother].
>
> This is an exceptional case. For all of the above reasons, I am content to impute income to [the father] in the amount of $80,000.00 This is a far cry from the $300,000.00 – $600,000.00 that he claims that he earned prior to the separation. The $80,000 (before taxes) is the approximate amount of capital that he has chosen to live on. I believe that if the respondent father would accept his responsibility to pay child support he could probably (balance of) return to work and earn at least $80,000.00/year. This amount then must be grossed up for tax – being approximately $118,000.00/year.

[53] Using an annual income of $118,000, the motion judge went on to estimate the father's total past and future child support obligation at $281,370 calculated as follows:

- $97,534 on account of child support arrears from August 2007 to January 2012;
- $133,836 on account of future child support (the children were 16 and 13 years of age at the time of the motion. The motion judge assumed five additional years of child support for two children, and three additional years of child support for one child);
- $60,000 on account of the father's share of post-secondary education expenses.

[54] After noting that her estimate of $281,370 provided nothing for retroactive s. 7 expenses, the motion judge concluded that a lump sum award for child support equivalent to the balance of the trust fund would be appropriate.

D. RELEVANT STATUTORY PROVISIONS

[55] The issues on appeal relate to the quantum of child support payable by the father. Under s. 15.1(3) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), a court making an order for child support shall do so in accordance with the applicable guidelines. Because the father and the mother obtained a divorce, and because no order has been made under s. 2(5) of the *Divorce Act* designating Ontario as a province in which the provincial child support guidelines apply, the Federal Child Support Guidelines, S.O.R./97-175, are the applicable guidelines within the meaning of s. 1 of the *Divorce Act*.

[56] Section 3 of the *Guidelines* creates a presumptive rule that, unless otherwise provided, the amount of support payable for a child is to be determined based on the income of the spouse against whom the order is sought.

[57] "Income" is defined in s. 2 of the *Guidelines* as meaning "the annual income determined under sections 15 to 20." Sections 15, 16, 17 and 19 of the *Guidelines* are relevant to the calculation of the father's income in the circumstances of this case.

[58] Section 15 of the *Guidelines* provides that, subject to any written agreement between the parties, a spouse's annual income is determined in accordance with sections 16 to 20 of the *Guidelines*.

[59] Section 16 establishes the basic rule that a spouse's income should be determined based on the spouse's "Total Income" on line 150 of the T1 General tax return:

> 16. **Calculation of annual income** – Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[60] Under s. 17, if a court is of the opinion that s. 16 would not provide "the fairest determination" of a spouse's annual income, the court may have regard to the spouse's income over the last three years and determine an amount that is "fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years."

[61] Section 19 provides that the court may impute to a spouse "such amount of income … as it considers appropriate" and provides a non-exhaustive list of such circumstances. The relevant portions of s. 19 read as follows:

> 19.(1) **Imputing Income** – The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include,
>
> > (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the spouse;
> >
> > …
> >
> > (e) the spouse's property is not reasonably utilized to generate income;

> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> …
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax.

E. ANALYSIS

(1) The motion judge's reasons

[62] In her endorsement, the motion judge accepted that the father had an illness. She did not specify what illness and did not explain the chain of reasoning that led to her finding that he could get better, return to work and generate an after tax income of $80,000 per year. On my reading of her reasons, these findings appear to be based on the evidence that the father had been diagnosed as a habitual liar, as a malingerer and as having a narcissistic personality disorder along with her conclusion that the father failed to follow an "active treatment" plan. In addition, she relied on findings that the father had intentionally evaded child support obligations in the past, that he was focused on not paying child support and that he had chosen to live off capital at the rate of about $80,000 per year.

[63] Assuming that was her chain of reasoning, in my view, the motion judge made two errors. The first error was rejecting, without giving reasons, the father's medical evidence concerning the nature of his illness and its impact on his ability to work. The second error was making findings – that the father could get better, return to work and earn an after tax income of $80,000 per year, and that he failed to follow an active treatment plan – that are not supported by the record.

[64] The motion judge's errors require that this court set aside both her rejection of the father's medical evidence, and her central findings: that the father could get better, return to work and earn an after tax income of $80,000 and that he failed to follow an active treatment plan. However, because of the costs that would be involved in remitting this matter to the Superior Court, I consider this to be an appropriate case in which to make the necessary findings to dispose of this matter on the merits.

(a) The motion judge failed to give reasons for rejecting Dr. Turner's medical evidence concerning the nature of the father's illness and its impact on the father's ability to return to work

[65] In characterizing the father's illness as essentially malingering and narcissistic personality disorder and in holding that the father could get better and

return to work, the motion judge implicitly rejected Dr. Turner's evidence opining that the father's illness is of a broader character and that, because of this illness, the father is disabled from working as a psychiatrist or at any form of competitive alternative employment. In doing so, the motion judge relied on evidence that was either dated or that was of a very limited character – and she did so without explaining why. In the circumstances of this case, in my view, the motion judge's failure to give reasons for rejecting these aspects of Dr. Turner's evidence constitutes reversible error.

[66] In her reasons, the motion judge relied heavily on Dr. Gaind's discharge summary, which is dated May 21, 2007, and which relates to a hospitalization earlier that month. Given that the motion was heard in early 2012, Dr. Gaind's evidence was significantly dated. Moreover, subsequent reports by Dr. Turner describe the diagnoses of narcissistic personality disorder and possible bi-polar disorder referred to by Dr. Gaind as "deferred" and proffer alternate diagnoses – including Mood Disorder [Not Otherwise Specified] and ADHD Traits.

[67] The motion judge's conclusions about the nature of the father's illness are also consistent with evidence provided in discharge summaries prepared by Dr. Adam and Dr. Patterson. However, the evidence provided by these discharge summaries was of a limited character. In one of his progress notes, Dr. Turner gave a very brief account of Dr. Adam's 2010 discharge summary without reproducing it. Dr. Patterson's discharge summary related to a one-day hospitalization.

[68] In contrast to the evidence relied on by the motion judge, Dr. Turner's evidence provides far more extensive and detailed observations of the course of the father's illness.

[69] Although Dr. Turner's opinions and progress notes are premised, to a certain extent, on self-reports by the father and reports by his new wife, Dr. Turner's reports and progress notes also include Dr. Turner's observations of the father's state of mind over a lengthy course of treatment. Dr. Turner's first-hand observations support his conclusions that the father does and has suffered from a psychiatric illness for a considerable period of time and that, despite Dr. Turner's efforts, the father's condition had not improved.

[70] Given the nature of Dr. Turner's evidence – evidence arising from first hand observations made over a lengthy period of time – in contrast to the nature of the evidence relied on by the motion judge – significantly dated evidence and evidence of a limited character – no obvious explanation arises from the record for rejecting the evidence of Dr. Turner and relying instead on the evidence of Drs. Gaind, Adam and Patterson. If the motion judge had a basis for rejecting the evidence provided by Dr. Turner's ongoing observations, in my view, it was necessary that she state it.

[71] However, even if the motion judge's failure to give reasons for rejecting Dr. Turner's evidence does not constitute reversible error, on my review of the record,

it contains no evidence capable of supporting the motion judge's finding, premised on her more limited characterization of the father's illness, that the father could get better, return to work and generate an annual after tax income of $80,000. I will turn to that issue in the next section.

(b) The motion judge made findings that are not supported by the record

(i) No evidence that the father could get better, return to work and generate an after tax income of $80,000 per year

[72] Assuming, as the motion judge seems to have found, that the father's illness is restricted to malingering and narcissistic personality disorder, the motion judge referred to no medical evidence that would support her finding that the father could get better and return to a form of work that would allow him to generate an after tax annual income of $80,000 – a level of income that implies some level of professional or equivalent competency. On my review of the record, there is no such evidence.

[73] The only evidence that addressed the severity of and prognosis for this limited understanding of the father's illness is Dr. Gaind's evidence. Even his evidence does not support the motion judge's conclusion that the father could get better and return to a form of work that could generate an after tax annual income of $80,000.

[74] Dr. Gaind explained his diagnosis of malingering in terms of the father's concocting a story about a suicide attempt to avoid the consequences of pulling a hotel fire alarm. However, he described the father's narcissistic personality disorder as "severe" and also described the father as having "decompensated increasingly" in the past five years since his marriage broke up.

[75] Dr. Gaind also noted that persons with a narcissistic personality have a "very marked tendency towards lying and exaggeration" and said "this will make it very difficult for [the father] to get any meaningful help."

[76] Significantly, Dr. Gaind gave no opinion concerning whether and how the father's condition might improve, concerning how long that might take – and if the father's condition did improve, concerning the likelihood that the father could return to significant gainful employment.

[77] As I have said, in contrast to the evidence of Dr. Gaind, Dr. Turner's evidence suggests that the father's illness is of a broader scope. Moreover, he did not foresee the father getting better. In particular, in a letter dated December 30, 2009, Dr. Turner reached the conclusion that the father was:

> [C]learly totally disabled from his former profession and from any competitive alternate employment related to the severity of his continuing psychiatric symptoms and cognitive symptoms. I do not foresee any significant improvement in his psychiatric symptoms …

[78] The premise of the consent order was that the father was disabled by his illness from practising psychiatry. However one characterizes the father's illness, the record contains no medical evidence to support a finding that it was likely that he could get better and return to work as a psychiatrist or in a competitive alternative field of employment.

[79] Similarly, the record contains no medical evidence to support a finding that the father's condition was likely to improve such that he could return to any identifiable form of employment that would generate an annual after tax income of $80,000.

[80] The motion judge did not specify what she meant by "get[ting] better". If she meant simply that the father's condition was likely to improve enough that he could work in some lesser, but still well-paying, form of employment, again the record does not support this finding. As I have said, there was simply no evidence that the father's condition was likely to improve.

[81] Moreover, the motion judge failed to refer to any specific evidence that would support her finding that the father could earn an annual after tax income of $80,000 if his condition did improve to some extent.

[82] Contrary to the motion judge's finding, the fact that the father chose to spend, on average, $80,000 per year, does not support a finding that he could generate an after tax income equivalent to that amount.

[83] Although s. 19 of the *Guidelines* provides the court with a broad discretion to impute income, in *Drygala v. Pauli* (2002), 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711 (C.A.), at para. 44, this court confirmed that a rational basis must exist for the amount that is chosen:

> Section 19 of the Guidelines is not an invitation to the court to arbitrarily select an amount as imputed income. There must be a rational basis underlying the selection of any such figure. The amount selected as an exercise of the court's discretion must be grounded in the evidence.

[84] Had there been some basis for concluding that the father's condition was likely to improve, in my view, the motion judge erred in failing to identify a proper basis for imputing to him an annual after tax income of $80,000.

(ii) Finding that the father failed to follow an active treatment plan is not supported by the record

[85] In finding that the father had chosen not to follow an "active treatment" plan, the motion judge relied on the fact that he had "doctor-shop[ped]" and that he saw 209 different doctors between April 2004 and June 2011.

[86] This reasoning ignores, or rejects without explanation, important elements of the evidence:

- it ignores the fact that the relevant time period is January 2007 to December 2011;
- it ignores or rejects the fact that Dr. Turner accepted the father's many visits to emergency departments as an element of his illness without explaining the basis for this rejection;
- it ignores the fact that, when not in hospital between January 2007 to December 2011, the father saw Dr. Turner on 45 occasions – a course of visits and hospitalizations that Dr. Turner described as constituting "adequate and reasonable" psychiatric treatment.

[87] In any event, even if the evidence supported a finding that the father failed to follow an "active treatment" plan, there was no evidence demonstrating on a balance of probabilities that the father would have recovered had he done so. As I have said, Dr. Gaind did not give that evidence; nor is any such evidence to be found in Dr. Patterson's discharge summary or in Dr. Turner's account of Dr. Adam's discharge summary. Dr. Turner's evidence is explicitly to the contrary.

[88] In her affidavit, the mother relies on the father's alleged failure to follow through with treatment with Dr. Hoffman, which she understood he was receiving at the time of the consent order.

[89] OHIP records forming part of the record disclose that the father saw Dr. Hoffman about once a month between January and September 2007 – and that the father did not see Dr. Hoffman after that. In the light of the fact that Dr. Turner's treatment of the appellant as described in his November 2009 report to CPP was "monthly psychotherapy", I am unable to understand how the father's termination of monthly psychotherapy with Dr. Hoffman could support a finding that the father failed to follow an active treatment plan.[20]

[90] For all of the foregoing reasons, I conclude that the motion judge made a palpable and overriding error in holding that the father could have gotten better, returned to work commencing in August 2007, and earned an after tax income of $80,000 per year. It follows that the motion judge also erred in holding that the father's annual income for child support purposes is $118,000. I would set these findings aside.

(2) What is the father's annual income for child support purposes?

[91] The father submits that he is totally disabled by his illness from working and that, apart from his annual CPP disability payments totalling $12,266 per year, he has had essentially no income for child support purposes since January 2007.

[92] In particular, the father submits that his 2008 RRSP income should not be treated as income for child support purposes and that all the proceeds of the motor vehicle accident settlement he received were on account of pain and suffering and therefore are not income for child support purposes. In addition, the father relies on the fact that the motion judge made no finding that his property has not been

reasonably used to generate income that would justify imputing income to the father under s. 19(1)(e) of the *Guidelines*.

[93] I would not accept these submissions. For reasons that I will explain, I conclude that the father's 2008 RRSP income should be treated as income for child support purposes. Further, while I consider that it would be open to this court to treat some portion of the proceeds of the father's motor vehicle accident settlement as income for child support purposes and to impute some modest employment income to him based on underemployment, I conclude that the better course is to impute income to the father under s. 19(1)(e) of the *Guidelines*.

(a) The father's RRSP income

[94] The father submits that the motion judge treated his 2008 RRSP income as capital and not as income because, when imputing income to him, she described his 2008 RRSP income as part of the capital he chose to live on. Relying on s. 17 of the *Guidelines* and *P.(J.M.) v. K.(T.L.)*, [2008] W.D.F.L. 2803 (Ont. S.C.), the father contends that the motion judge's characterization is correct and that his 2008 RRSP income should not be treated as income for child support purposes.

[95] In *P.(J.M.) v. K.(T.L*.), the trial judge expressed the view that "the treatment of RRSP receipts as income for child support purposes is discretionary under the express terms of the [*Guidelines*]." The trial judge in *P.(J.M.)* also said that if the RRSP has been subject to equalization, "that will be an important factor militating against inclusion of the receipts in calculating income for child support purposes."

[96] In this case, the father relies on his assertion that his RRSPs were equalized as part of the settlement effected by the consent order, as well as the fact that the RRSP withdrawal was a non-recurring event and was used to assist in the purchase of a home to argue that it should not be treated as income for child support purposes.

[97] I would not accept these submissions. Subject to ss. 17-20 of the *Guidelines*, s. 16 provides that a spouse's annual income for child support purposes is determined using the sources of income set out under the heading "Total income" on the T1 tax form. RRSP income is included as part of Total income on the T1 tax form. Accordingly, subject to ss. 17-20 of the *Guidelines*, RRSP income received in a particular year is presumptively part of a spouse's income for child support purposes.

[98] Section 17 of the *Guidelines* permits a court to depart from the income determination made under s. 16 where it is satisfied that would not be the fairest determination of income. In such a case, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable "in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years."

[99] To begin with, I am not persuaded that the father has demonstrated that treating his RRSP withdrawal as income "would not lead to the fairest determination of … income".

[100] In *Stevens v. Boulerice*, 1999 CanLII 14995 (ON SC), [1999] O.J. No. 1568, 49 R.F.L. (4th) 425 (S.C.), Aitken J. declined for two reasons to exclude RRSP withdrawals from income simply because the RRSP had been the subject of an equalization calculation.

[101] First, she noted that s. 16 of the *Guidelines* requires that RRSP withdrawals be included as income for child support purposes. Further, Schedule III to the *Guidelines*, which provides some special rules for adjustments to income for child support purposes in certain cases, does not make any special provision for RRSP income.

[102] Second, Aitken J. observed that the equalization was a matter between the parents while the issue before her was a question of child support. She could see no reason why an available source of income to fund child support should be excluded because of dealings between the parents. The child support was not being paid to increase the mother's lifestyle.

[103] I find this reasoning persuasive. The clear wording of the *Guidelines* includes RRSP withdrawals as income and no special exception for RRSP withdrawals has been provided in Schedule III. Although I would acknowledge the possibility that the facts of a particular equalization could in theory reach the threshold of unfairness, I have no evidence about the specifics of the equalization calculation that occurred in this case and cannot so conclude.

[104] Similarly, I do not consider the fact that the father may have used some or all of the RRSP on account of his house purchase as a factor creating unfairness in terms of characterizing the RRSP. Particularly in circumstances where he was not working, the father's first obligation was to ensure that his children were properly supported. The fact that the father chose instead to buy a four bedroom house should not deprive his children of an available source of child support.

[105] Finally, I am of the opinion, that some of the early cases relied on by the trial judge in *P.(J.M.) v. K.(T.L.)*, at para. 161, which adopted the view that non-recurring withdrawals from RRSPs should essentially be automatically excluded from income for child support purposes, have been superseded by amendments to s. 17[21] and by subsequent case law such as *Stevens v. Boulerice*.

[106] In any event, the father's material does not disclose his income for the three years preceding 2008 – the year that he reported $152,946 in RRSP income. Absent such disclosure, I cannot perform the steps required under s. 17. If the father wished to invoke s. 17 of the *Guidelines*, he should have made proper disclosure.

[107] Based on the foregoing reasons, I would hold that the father's 2008 RRSP income is income for that year for child support purposes.

(b) The proceeds of the motor vehicle accident settlement and imputing income

[108] As I have said, in my view, it would be open to this court to treat a portion of the proceeds of the motor vehicle accident settlement the father received as income for child support purposes and to impute a modest amount of employment income to the father based on undermployment. Nonetheless, I conclude that the better course is to impute income to the father under s. 19(1)(e) of the *Guidelines*.

(i) The Proceeds of the Motor Vehicle Accident Settlement

[109] In August 2010, the father received $269,441.08 to settle his claim for damages arising from a 2005 motor vehicle accident. The father maintains that the entire amount of the award was for pain and suffering and thus he did not report any portion of the settlement proceeds as lost income for income tax purposes.[22] For the same reason, he submits that none of the settlement proceeds should be treated as income for child support purposes. In that regard, he relies on *Rivard v. Hankiewicz*, 2007 ONCJ 180, 38 R.F.L. (6th) 189, at paras. 32-33, which he submits stands for the proposition that only the portion of personal injury settlement funds attributable to lost income will be treated as income for child support purposes.

[110] I do not find these submissions persuasive. As I have said, the father provided no documentary evidence, and no evidence from his counsel in the personal injury action, to support his claim that the entire amount of the settlement proceeds represents damages for pain and suffering. Although I consider it possible that a settlement was reached without allocating amounts to specific heads of damages, I find it unlikely that the father received such a significant settlement without any portion of it being attributable to past or future loss of income. If the father contends that *Rivard v. Hankiewicz* stands for the proposition that only funds specifically designated in a settlement as being on account of wage loss should be treated as income for child support purposes, I reject that proposition. In addition to the case cited in *Rivard v. Hankiewicz* that the father relies on, that decision also refers to cases in which courts treated all or a portion of settlement proceeds as being attributable to lost income even though no specific allocation of the damages had been made.

[111] That said, because of the father's failure to make proper disclosure, any allocation of the settlement proceeds made by this court would be entirely arbitrary. Moreover, the parties provided us with no authorities concerning the tax treatment of motor vehicle accident settlement proceeds. As noted in footnote 22, our research suggests that no portion of such proceeds is taxable and, accordingly, that any amounts we might attribute to past or future income loss should be grossed up in the father's hands for income tax. However, we have not had the benefit of submissions from the parties concerning this issue.

(ii) Imputing Income to the Father

[112] Although I have concluded that the motion judge made a palpable and overriding error in holding that the father could get better, return to work and earn an after tax income of $80,000 per year, that is not to say that the father should not have attempted to maintain gainful employment of some kind.

[113] While the record makes it clear that the father could not work as a medical doctor or in any capacity likely to generate an after tax annual income of $80,000, in my opinion, it does not support a finding that the father could not have engaged in some form of employment sufficient to generate at least a minimum wage on at least a part-time basis at least until he began living in the retirement home.

[114] In that regard, I note that Dr. Turner never gives an opinion that the father could not work at some form of minimally demanding employment. Particularly where child support is at issue, any assertion that a parent is totally disabled and unable to generate any income should be supported by cogent medical evidence.

[115] That said, taking account of the father's mental health problems and frequent hospitalizations, I am unable to identify anything that the father might have done to generate an income other than to work at some form of minimum wage, likely part-time, type of employment – and even in that form of employment, the father may well have had difficulty maintaining a job.

[116] Taking account of the father's lack of disclosure concerning the details of his motor vehicle accident settlement, the absence of submissions concerning the income tax consequences arising from that settlement, and the difficulties inherent in imputing income to the father due to underemployment in the unique circumstances of this case, it seems to me that the better course is to impute income to the father under s. 19(1)(e) of the *Guidelines*.

[117] Section 19(1)(e) of the *Guidelines* permits a court to impute income to a spouse where the spouse's property is not reasonably utilized to generate income. As I have said, in this case, the father received monies, consisting of both capital and income, in excess of $800,000 during the period between September 1, 2007 and September 1, 2010. Having regard to the father's obligations to support his children and his inability to continue to work at employment that would generate a significant income when he had done so in the past, I consider it unreasonable that he would not have invested some significant portion of those receipts to generate income that could be used in part to help support his children.

[118] In all the circumstances, I find that it was unreasonable for the father not to have invested at least the sale proceeds from his wine collection and the proceeds of his motor vehicle accident settlement to generate an income. These amounts ultimately total $611,216. No evidence was led concerning reasonable prevailing rates of return. I would therefore impute investment income on that sum at the modest rate of 3% per year.

(3) Calculation of Child Support Obligations

[119] I have set out below my calculation of the father's child support obligations for the period from September 1, 2007 to December 31, 2013.

[120] For the year 2008, the father's income for child support purposes is over $150,000. Section 4 of the *Guidelines* provides that where a payor's income is over $150,000 the child support payable will be the table amount for $150,000 plus the table percentage (1.16% in 2008) of any income over $150,000 unless the court considers the total yielded inappropriate. If the court finds the total inappropriate, the court may order the table amount on the first $150,000, plus the amount the court considers appropriate in respect of the balance of the payor's income, having regard to the children's condition, means needs and other circumstances as well as the financial ability of each spouse to contribute to support.

[121] In *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, the Supreme Court concluded that the word "inappropriate" in section 4(b) of the *Guidelines* does not mean "inadequate"; it bears its ordinary dictionary meaning of "unsuitable" or "inadvisable".

[122] On the facts of this case, I am not persuaded that it is inappropriate to require that the father pay the table amount on his 2008 income. Because of the father's illness, the children are in need of whatever support the father can provide for them. In that year, the father had the income to pay the total table amount. Moreover, there are funds in trust to secure the payment.

[123] I calculate the father's annual income and annual child support obligations from September 2007 to December 2013 as follows:

2007

Annual Income

$3000 – interest income on the $200,000 trust fund[23]

$3000 – Total Income for child support purposes

Child Support Obligation

$0 – 2007 Total Child Support Obligation

2008

Annual Income

$152,946 – RRSP Income

$976.72 – CPP disability income

$6,505 – Other interest income

$8,988.24 – Imputed interest on capital [$299,608 from wine sale]

$169,415.96 – Total Income for child support purposes

Child Support Obligation

$2,217.22 per month – for 2 children Jan. to Dec. 2008

$26,606.64 – 2008 Total Child Support Obligation

2009

Annual Income

$12,013.68 – CPP disability benefits

$6,000 – Other interest income

$13,621.26 – Imputed interest on capital [$341,775 January-July from wine sale, $611,216.08 from August-Dec for wine sale and motor vehicle accident settlement]

$31,634.94 – Total Income for child support purposes

Child Support Obligation

$466 per month – for 2 children Jan. to Dec. 2009

$5,592 – 2009 Total Child Support Obligation

2010

Annual Income

$12,061.68 – CPP disability benefits

$400 – Other interest income

$18,336.48 – Imputed interest on capital [$611,216.08]

$30,798.16 – Total Income for child support purposes

Child Support Obligation

$454 per month – for 2 children Jan. to Dec. 2010

$5,448 – 2010 Total Child Support Obligation

2011

Annual Income

$12,264 – CPP disability benefits

$400 – Estimated other interest income

$18,336.48 – Imputed interest on capital [$611,216.08]

$31,000.48 – Total Income for child support purposes

Child Support Obligation

$457 per month – for 2 children Jan. to Dec. 2011

$5,484 – 2011 Total Child Support Obligation

2012

Annual Income

$12,264 – CPP disability benefits

$400 – Estimated interest income

$18,336.48 – Imputed interest on capital [$611,216.08]

$31,000.48 – Total Income for child support purposes

Child Support Obligation

$452 per month – for 2 children Jan. to Dec. 2012

$5,424 – 2012 Total Child Support Obligation

2013

Annual Income

$12,264 – CPP disability benefits

$400 – Estimated other interest income

$18,336.48 – imputed interest on capital [$611,216.08]

$31,000.48 – Total Income for child support purposes

Child Support Obligation

$452 per month – for 2 children Jan. to Dec. 2013

$5,424 – 2013 Total Child Support Obligation

[124] Based on the foregoing calculations, the father's accumulated child support obligations total $53,978.64. As I have said, some payments have already been made to the mother from the trust fund. I leave it to counsel to calculate the balance now owing to her together with any interest on arrears that may be owing.

[125] In accordance with the consent order, the mother will also be entitled to be paid from the trust fund any costs of this appeal and of the proceeding below, which may be awarded to her.

(4) Is the Father Entitled to the Return of the Balance of the Trust Fund?

[126] The father's position is that he is entitled to the return of the balance of the trust fund upon payment of any amounts owing for child support to date.

[127] I would not accept the father's position. On my reading of the consent order, it is clear that the father was entitled to the return of the balance of the trust fund prior to the expiry of his child support obligations only if he satisfied those obligations between September 1, 2007 and September 1, 2010. He did not do so. In these circumstances, the consent order provides that the mother is entitled to "an Order directing payment of such funds [as are remaining in trust], at any time, for child support, or costs awarded to her in any future litigation with the [father]".

F. CONCLUSION

[128] Based on the foregoing reasons, I would allow the appeal in part, set aside the motion judge's order and substitute an order:

i) requiring that the accumulated arrears of child support plus interest be paid to the mother from the trust fund forthwith;

ii) requiring that the father continue to pay child support and contribute to s. 7 expenses for each of the two children so long as each child remains a child within the meaning of the *Divorce Act*;

iii) directing that the mother shall be entitled to receive an annual payment of the estimated annual amount of such support and s. 7 expenses on the first day of January of each year. Subject to further order or the agreement of the parties, the estimated amount of support and s. 7 expenses and extraordinary expenses shall be based on the father having an annual income of $31,000.48 provided that this figure shall be adjusted upward if the father resumes gainful employment or his reported income from other sources increases;

iv) directing that the father provide the mother with a copy of his annual income tax return each year within 10 days of filing it and a copy of his notice of assessment within 10 days of receipt; and

v) directing that the father provide the mother with a medical report from his treating psychiatrist on or before the 1st of February each year so long as either child remains a child of the marriage setting out the psychiatrist's opinion concerning the father's ability to work.

[129] Although I would allow the appeal in part, I would award costs of the appeal to the mother. The father sought an order that the balance of the trust fund be paid to him and a further order that he pay no support in addition to the funds already

paid. He was not successful in obtaining either order. I would award costs of the appeal to the mother fixed in the amount of $20,000 inclusive of disbursements and applicable taxes. I would not alter the award of costs to the mother made by the motion judge. I would order that both costs awards be paid from the trust fund forthwith following the expiry of the period for applying for leave to appeal from this decision.

Released:

"NOV 25 2013" "J. Simmons J.A."

"GS" "I agree Alexandra Hoy J.A."

"I agree G.R. Strathy J.A."

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[1] Some payments have been made to the mother from the $200,000 trust fund. In an order dated May 26, 2011, van Rensburg J. ordered the father to pay child support and costs totaling $9,385 from the trust fund ($4,385 on account of support and $5,000 on account of costs). In an endorsement dated December 27, 2012, Rosenberg J.A. ordered the father to direct that $50,000 be released to the mother from the trust fund in accordance with the father's agreement to do so.

[2] Contrary to the father's submissions, I am not persuaded that the motion judge relied on the fact that the father was living off capital to impute income to him. However, I do agree that she relied on the amount the father was spending as a basis for determining how much he could earn. Although I do not consider that this was a proper basis for assessing the amount the father could earn, the fact that the motion judge failed to distinguish between income and capital resulted in her grossing up for income tax amounts on which the father had already paid income tax to calculate what he could earn.

[3] This is because the Federal Child Support Guidelines, S.O.R./97-175, which govern child support, provide that subject to certain exceptions, child support is determined based on a payor spouse's income as determined using the sources of income on the T1 tax form. Although s. 19 of the *Guidelines* gives the court discretion to "impute such amount of income to a spouse … as it considers appropriate" and provides a non-exhaustive list of appropriate circumstances, nothing in the *Guidelines* suggests that expenditures of capital in the form of non-recurring capital receipts that are not treated as income for income tax purposes to support a spouse's lifestyle is such a circumstance. On the contrary, s. 19(1)(e), which permits a court to impute income where a spouse's property "is not utilized reasonably to generate income" suggests the contrary.

[4] The motion judge also suggests that the father may have been earning as much as $600,000 per year in some years. I see no documentary evidence in the record to support any of these figures.

[5] In the May 26, 2011 order, van Rensberg J. ordered that the mother's materials responding to the father's motion for payment out under the consent order should be treated as the mother's own application for payment out without the need to commence a separate application. Apart from requiring an accounting of the children's CPP benefits received as a result of the father's application for CPP disability benefits, the May 26, 2011 order did not require financial disclosure by the mother.

[6] The father continued to maintain an office after his license to practise psychiatry was suspended.

[7] The father acknowledges receiving $341,775 on account of the proceeds of sale of his rare wine collection. At para. 11 of her reasons, the motion judge said the father received about $340,000 for the sale of his rare wine collection in 2008. Affidavits filed by and on behalf of the father say the proceeds were received in 2008 and 2009 but the particulars set out do not add up to as much as $341,775. The documents attached to the affidavits indicate that the proceeds may have been received between 2006 and 2010 but do not include an accounting for the full amount of $341,775. In the circumstances, I have simply allocated the total acknowledged proceeds of $341,775 between 2008 and 2009 on the basis of statements in the affidavit material indicating $299,608 was received in 2008 and additional monies in 2009.

[8] Although his license to practice remained suspended, the father attempted to do some private counseling work in 2009 and 2010.

[9] This figure includes retroactive benefits to December 2008, allocated as follows: December 2008 – $976.72; 2009 –$12,013.68; 2010 – $12,061.68.
[10] The father's 2011 income tax return was not included in the record for the January 2012 motion. This figure is based on interest income figures for 2012 disclosed in a joint financial statement dated January 11, 2012 filed by the father and his wife.
[11] This figure is based on the CPP income disclosed in the January 2012 financial statement.
[12] In his initial affidavit, the father described Dr. Ofosu as Dr. "Obsu", which is a plausible interpretation of the signature on the exhibit. OHIP records filed as part of the record do not show a Dr. Obsu as one of the father's treatment providers. In a subsequent affidavit, the father describes his in-hospital treating psychiatrist as "Dr. Ofosu", a person who is identified as one of the father's treatment providers in the OHIP records.
[13] On my review of the OHIP records filed as part of the record, they support a hospital stay from about June 5, 2010 through to about August 3, 2010. Although they show many consultations for psychiatric care during that period, they show only one consultation with Dr. Ofosu – on July 17, 2010.
[14] Dr. Turner's progress notes, which are filed as part of the record, refer to the father having been involved in motor vehicle accidents in 1991 and 2005. They also refer to a heart attack in 2005.
[15] In an affidavit dated January 11, 2012, the father's new wife deposes that she obtained a power of attorney from the father on July 8, 2008. According to the affidavit, the father appointed his new wife as his Attorney for Property in accordance with the *Substitute Decisions Act,* S.O. 1992, c. 30. She deposed that because of her husband (the father's) mental health issues, she had been assisting in the management of his financial affairs.
[16] Under Global Assessment of Functioning (GAF) Scale, the DSM-IV states: 50 Serious symptoms (e.g. suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational or school functioning (e.g. no friends, unable to keep a job).
[17] In his January 18, 2007 progress report, Dr. Turner explained that the father was released from the hospital inpatient psychiatry unit against medical advice.
[18] Based on Dr. Turner's Progress Reports, the father had returned home by April 30, 2010.
[19] These "medical reports" are all progress notes authored by Dr. Turner. Although Dr. Turner gives examples of the father making statements that are untrue in these progress notes, he does not diagnose the father as a habitual liar in any of them.
[20] In a progress note dated January 26, 2007, Dr. Turner says:

> [The father] had initially not been clear as to whether he wanted me to continue with at least the medication aspect of his care and had met with Dr. Brian Hoffman earlier this week. I had made it clear to [the father] that I would be able to manage his psychiatric medication but not necessarily all other aspects, which included psychotherapy, and some of the medical/legal component of his care. Therefore today, I have advised him, and he has agreed that I would continue with his medication treatments and he would continue to see Dr. Hoffman at the usual monthly intervals. Dr. Hoffman was planning to be away over the next month and there was going to be a hiatus in the continuing care, which was a concern for [the father].

In his discharge summary dated May 21, 2007, Dr. Gaind notes that he attempted to contact both Dr. Turner and Dr. Hoffman but was successful in speaking only to Dr. Hoffman. Dr. Gaind says Dr. Hoffman advised him that the father was no longer planning to return to Dr. Hoffman although Dr. Hoffman was willing to have him back. This aspect of Dr. Gaind's report is clearly hearsay.

As I have said, the OHIP records indicate that the father continued to see Dr. Hoffman until September 2007. Further, Dr. Turner's progress notes and CPP report demonstrate that Dr. Turner provided the father with ongoing psychotherapy.

[21] In 1997, s. 17 read as follows:

> 17(1) Pattern of income – Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the

fairest determination of the annual income from that source, the court may determine the annual income from that source

(c) Where the spouse has received a non-recurring amount in any of the three most recent taxation years, to be such portion of the amount as the court considers appropriate, if any.

Section 17 was amended to the version currently in force by S.O.R./2000-337, s. 4 on November 1, 2000.

[22] We were not provided with any evidence or submissions concerning the treatment, for income tax purposes, of the proceeds of a settlement arising from a motor vehicle. Based on our review of the issue, except to the extent that such funds can "reasonably be considered to be income from employment and not an award of damages", no portion of such a settlement would be taxable: see Canada Revenue Agency, Interpretation Bulletin IT-365, "Damages, settlements, and similar receipts" (January 1, 1995).

[23] From 2007-2009, the father's income included approximately $6000/year in interest earned on the $200,000 held in trust. These numbers were reported by the father's new wife in an exhibit in her affidavit. He also reported these amounts in his tax returns. Beginning in 2010, however, based on a Financial Statement, it seems that the interest he earned on the trust funds dropped dramatically. He has since only earned approximately $400/year in interest.