

●●● Focus: Case considers effect of family law issues on structured settlements

Brief: Structured Settlements

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A judge has rejected a mother's claim to have her paralyzed ex-husband's support payments based on the entire damages award received through a structured settlement.

The Superior Court of Justice decision confirms that damages awarded for medical costs don't count as income for the purpose of calculating spousal and child support payments.

Daniel Mason and Jennifer Mason separated in February 2012 and have joint custody of their two young daughters, according to Justice Helen Pierce's decision this fall in [Jennifer Lyn Mason v. Daniel Mark Mason](#).

Daniel suffered a severe injury in a motor vehicle accident when he was 17 that left him paralyzed from the waist down and with compromised functioning of his upper arms and hands.

The court issued a damages assessment of which roughly a third, or \$600,000, was for his loss of earning capacity.

The rest of the award was mainly for the costs of his ongoing care.

For family support purposes, he put his annual income as \$117,415, nearly all of which was from the settlement.

However, his ex-wife argued his actual income should be \$187,000 to account for the fact that structured settlements are tax free and to include a lump sum he receives every five years.

"The family relied on the whole of the father's income from the structured settlement to support their lifestyle and thus, his income should not be reduced for purposes of calculating support," according to the decision's summary of one of the ex-wife's arguments.

The father submitted that annuity payments didn't count for the purposes of calculating child support payments. The 2004 case of [M.K. v. R.A.S.](#) had confirmed that fact, he suggested.

M.K. also underscored that "the portion of the damages award attributable to loss of earning capacity is properly considered to be income within the meaning of the [child support] guidelines," wrote Pierce.

By contrast, Pierce added: "The court also held that costs for future care related to his needs arising from the accident are personal to the recipient and should not be imputed to him as income."

The court in that case also declined to "gross up the income" to reflect the tax-free element, Pierce noted.

Daniel, who was 48 at the time of the decision, "will never work," according to Pierce.

His expenses include an elevator; a nanny; drugs; medical supplies and equipment, including \$500 a month for wheelchair replacement; and capital costs such as a specialized van with a lift.

He also needs income to support the children when they're in his care, Pierce pointed out.

Pierce concluded the father's income for the purposes of child support was a third of \$117,415 or \$39,099 stemming from the proportion of his settlement aimed at replacing his lost earning capacity.

Grossed up by 18 per cent to allow for tax, this became \$46,137.

Personal injury lawyer Alfred Kwinter, a founding partner at Singer Kwinter, says the case shows the importance of considering how much is due to loss of earnings in any costs breakdown drafted during settlement negotiations.

"If you think you might be in a position where you will have to pay support down the road, think about the costs you're responsible [for] paying," he says in summarizing what he tells clients.

It might be wise to err on the side of caution when it comes to calculating lost future earnings, he advises.

"This is a very interesting topic and one that is not completely black and white with respect to how the structured settlement is considered in a family law scenario," says Kyla Baxter, president of Baxter Structures.

"We counsel all our clients that should they find themselves in a separation or divorce situation that it is imperative that they have their family law lawyer contact us immediately so we may fully explain to them what a structured settlement is

and how it should be treated when it comes to assessment of income," she adds, citing the differences between family and personal injury law.

Barry Chobotar, managing partner at Henderson Structured Settlements LP, says the potential for support payment calculations to include settlements is something his firm always mentions to clients.

Mason is "consistent with previous court decisions where they looked at the amount of either loss of earning capacity or future loss of income," he says.

In most cases resulting in a large settlement, the largest component of the award is for costs associated with care, he adds.

There are a variety of reasons why clients may be wise to avoid attributing too much of their settlement to future earnings, says Jim Moore, head of the legal department at McKellar Structured Settlements Inc.

The situations include clients later declared bankrupt or who go through a divorce or want to claim disability payments.

But these possibilities are often "off the radar screen" of clients, says Moore.

And in any event, it's not always clear at the time of putting together the settlement how the costs break down.

"There are all sorts of cases where there never, ever is that kind of breakdown, especially for capable adult clients who don't require court approval," says Moore.

In cases where there was a breakdown at the time of the settlement, it may still be possible for someone to claim their situation has changed and for a court to take that into account in support payment calculations, says Kwinter.

"If after a couple of years you can show [the client's care needs] are costing \$9,000 a month instead of \$2,000 . . . if the evidence is there, a court can do that," he says.