

Is a life insurance policy's cash surrender value a matrimonial asset?

Sanjana Bhatia, B.B.A., LL.B., LL.M. (Tax), TEP
Director, Tax and Insurance Planning
Insurance Tax Solutions
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Questions often arise as to what happens to the cash surrender value (CSV) of a life insurance policy on marital or relationship breakdown. Is the whole CSV a matrimonial asset – the value of which is subject to equal division? Or is it just the increase in the CSV that is subject to equal division? Does it matter if the couple was married or were living in a common law relationship?

*Annand v. Annand*¹ dealt with whether the pre-marriage CSV of a life insurance policy was a matrimonial asset subject to equal division under the *Nova Scotia Matrimonial Property Act* (NSMPA).² The court concluded that the insurance policy's entire CSV, including the pre-marriage portion, was a matrimonial asset. This article discusses this case, and how the result may be different in other provinces and territories.

Facts

Krystle Annand (Krystle) and Jason Annand (Jason) married in 2010, and had two children together. Krystle and Jason separated in 2018. They disagreed about parental issues and child and spousal support. They also disagreed about the division of matrimonial assets. Jason wished to exclude from equal division:

- a shareholder loan,
- the balance in a corporate bank account, and

¹ 2022 NSSC 70. (*Annand*)

² RSNS 1989, c 275.

- the pre-marriage CSV of a life insurance policy.

This article discusses the issue of whether the insurance policy's pre-marriage CSV is a matrimonial asset. Jason's parents originally bought the insurance policy. They transferred ownership of the insurance policy to Jason prior to his marriage to Krystle.³

The parties' positions

Jason's arguments

Jason wanted to exclude the pre-marriage portion of the CSV from his matrimonial property. He argued that the insurance policy was a personal gift from his parents and accrued without any contribution from Krystle. Jason's alternative argument (if the court found the pre-marriage portion to be a matrimonial asset) was to seek an unequal division. He argued that an equal division would be unfair or unconscionable given that his parents had gifted the insurance policy to him.

Krystle's arguments

Krystle argued that the CSV pre-marriage portion was not exempt because:

- all pre-marriage assets are presumptively matrimonial under the NSMPA,
- she and Jason intended to use the CSV for retirement, and
- family income paid the insurance policy premiums.

³ The case does not indicate the insurance policy's pre-marriage CSV or the insurance policy's CSV increase during marriage. It also does not state the insurance policy's face amount, the life insured, or the beneficiary.

Krystle also argued that the evidence did not support a finding of unfairness or unconscionability. Therefore, Jason's unequal division claim must fail.

The court's decision

The court concluded that the entire CSV of the insurance policy, including the pre-marriage portion, was a marital asset. Therefore, the court included the sum of \$15,185 as a marital asset to be divided equally between the parties. Since Jason owned the insurance policy when he married Krystle, the NSMPA presumed the insurance policy to be a marital asset.

The court accepted Krystle's evidence that the insurance policy be part of the family's overall retirement fund. The court also accepted Krystle's testimony that family income paid the insurance policy premiums after Jason became the policyowner. This is an important finding because if family income is used to pay premiums:

- the life insurance policy becomes commingled with family property,
- loses its status as a gift, and
- becomes part of the couple's marital property subject to equal division.

The court also concluded that Jason did not prove that an unequal division of the life insurance policy would be unfair or unconscionable. Instead, the evidence confirmed that an equal division was warranted because Krystle:

- did not impoverish the assets,
- did not unreasonably increase the family debt,
- made significant non-economic contributions to the marriage by:
 - assuming the role of primary caregiver,
 - postponing her career development and advancement for the sake of the family,

- allowing Jason to concentrate on his career, and
- made financial sacrifices for the benefit of the family unit.

The court also noted that the marriage was neither a short marriage nor a second marriage.

What about other provinces and territories?

It's important to note that all provinces and territories may not have the same matrimonial property regime. A court in New Brunswick, Newfoundland and Labrador, and the Yukon⁴ would likely reach a similar result as the court in *Annand*. This is because those provinces and the Yukon do not exclude the value of pre-marriage assets on marriage breakdown. However, there would likely be a different result in the remaining provinces and territories. This is because pre-marriage assets (including the pre-marriage CSV of a life insurance policy) are generally excluded from property division.⁵

Key takeaways

Key takeaways from *Annand* include:

- All provinces and territories may not have the same matrimonial property regime.
- How assets, including the CSV of insurance policies, are divided on relationship breakdown depends on many factors such as:
 - the jurisdiction the parties live in,

⁴ See also *C.B. v. C.B.*, 2020 YKSC 19 (CanLII). In this case, the court found that the entire CSV of a life insurance policy was a family asset because a policy loan was used in building of the family home, helped provide family shelter for twelve years, and was "ordinarily used or enjoyed" by both spouses and children for shelter while they were residing together.

⁵ These provinces and territories are Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island, Quebec, Saskatchewan, Northwest Territories and Nunavut.

- whether they are married or living common law,
- whether they have a domestic contract (and its terms), and
- how the parties treated their assets during their marriage.

It is therefore best to consult with a family law practitioner where the Client lives.

- Generally, a life insurance policy's CSV is included in property division.
- Some provinces and territories will include the pre-marriage CSV, and some will not.
- A life insurance policy's CSV can be excluded from equal division if it is a gift. Proper documentation of the gift is important. It's also important that exclusion from property division could be denied if the recipient had commingled their gift with other family property.
- A life insurance policy's CSV can also be excluded from property division by a domestic contract. However, courts can overturn domestic contracts if they are found to be unfair, unconscionable, unjust or inequitable.

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