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THE SUPREME COURT OF NEW HAMPSHIRE

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9th Circuit Court-Nashua Family Division

Case No. 2024-0155

Citation: In the Matter of Whitehead & Whitehead, 2026 N.H. 13

IN THE MATTER OF KERRI WHITEHEAD AND MICHAEL WHITEHEAD

Argued: September 30, 2025

Opinion Issued: April 2, 2026

Atwood & Cherny, P.C., of Newton, Massachusetts (Mary Beth Sweeney on the brief and orally), for the petitioner.

Shaheen & Gordon, P.A., of Nashua (Andrew J. Piela on the brief and orally), for the respondent.

DONOVAN, J.

[¶1] The respondent, Michael Whitehead (Husband), appeals a final divorce decree issued by the Circuit Court (Curran, J.). Husband challenges the trial court's award of a portion of his Canadian structured settlement annuity payments to the petitioner, Kerri Whitehead (Wife), and its denial of his request for alimony.

[¶2] We conclude that the trial court properly applied New Hampshire, rather than Ontario, law in ruling that Husband's annuity payments were

divisible property. However, the court erred when it denied Husband alimony by failing to consider the effect of the annuity's division on the parties' income or the impact that Husband's health needs may have on his earning capacity. Accordingly, we affirm in part, vacate in part, and remand.

## I. Facts

[¶3] The following facts were found by the trial court or are otherwise supported by the record. In 1999, while living in Ontario, Canada, Husband suffered a spinal cord injury during a car accident there. The injury left him a partial quadriplegic. Husband began playing wheelchair rugby for the Canadian Paralympic team. While traveling for rugby, he met Wife in Maine, and they married in 2004.

[¶4] Before he met Wife, Husband filed two lawsuits related to the 1999 car accident. He settled the first lawsuit before the parties' marriage and the second several years after they wed. Rather than accepting lump sum payments of the settlement proceeds, Husband negotiated a "structured settlement," under which he currently receives monthly payments from two annuities.

[¶5] The annuity established before the marriage (first annuity) provides Husband with monthly payments that increase in connection with the Consumer Price Index each year and continue for his lifetime. Husband obtained this annuity in 2003, using settlement proceeds from the first lawsuit. The annuity established in 2010 (second annuity), after the marriage, supplies monthly payments that increase at a set rate yearly but end in 2035.<sup>1</sup> A Canadian insurer owns each annuity policy. The annuity contracts' terms provide that Husband's only right is to receive payments and that he may not sell the contracts or use them as collateral.

[¶6] The parties moved to New Hampshire in 2014. In 2021, Wife initiated divorce proceedings. She requested, among other things, an equitable share of the annuities. Husband sought to preclude the division of the annuities or to receive alimony to offset any division of the annuities.

[¶7] Following a final hearing, the trial court issued a narrative order and final decree. The court determined that because the first annuity vested before the parties wed, equitable considerations counseled that Husband should retain it in full. See RSA 458:16-a, I, II (2018 & Supp. 2024). By contrast, the court awarded the parties equal shares of the second annuity. See id. The parties appear to agree, and the record reflects, that the second annuity's monthly payments began at \$3,452.02 Canadian dollars in 2010,

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<sup>1</sup> A third annuity, not at issue in this case, will begin monthly payments in 2035. Husband secured this annuity in 2010. The trial court did not consider or divide the third annuity.

and that these payments have increased yearly and will continue to do so until they cease in 2035. In addition, the court denied both parties' requests for alimony.

[¶8] Following the trial court's order, both parties moved to reconsider. As relevant to this appeal, Husband's motion for reconsideration argued that the court erred by: (1) dividing the second annuity between the parties, because Ontario law would not classify the annuity as divisible property; and (2) denying him alimony. The court denied these aspects of Husband's motion to reconsider. It also denied Wife's motion.

[¶9] This appeal followed. After oral argument, this court asked the parties to submit supplemental briefing on the issue of whether Ontario or New Hampshire law determines the second annuity's status as divisible marital property.

## II. Analysis

### A. Choice of Law Regarding Division of Second Annuity

[¶10] On appeal, Husband first argues that the trial court erred by applying New Hampshire, rather than Ontario, law to determine whether the second annuity is property subject to equitable division at divorce. He posits that Ontario law proscribes the division of personal injury settlement funds — such as this annuity — at divorce. Because the parties agree that none of the facts relevant to the choice-of-law issue are disputed, our review is de novo. See In the Matter of Geraghty & Geraghty, 169 N.H. 404, 408 (2016).

[¶11] Although “[t]his court has respected choice of law provisions” in financial instruments, Flaherty v. Flaherty, 138 N.H. 337, 339 (1994), Husband does not point to any choice-of-law term in the annuity contract expressly favoring Ontario law. Cf. id. at 339-41 (considering whether Massachusetts law allowed division at divorce of a spendthrift trust whose choice-of-law term directed that Massachusetts law governed the trust's administration). Rather, he contends that Ontario law should determine the second annuity's status as divisible property because of Ontario's interests in the annuity. In support of this assertion, Husband argues that: (1) an Ontario insurer administers the annuity; (2) the annuity forms part of Husband's settlement of an Ontario lawsuit that he filed while residing in that province; and (3) the underlying injury occurred in Ontario.

[¶12] “When New Hampshire is the forum for a suit in which one or more other states also have an interest,” we must inquire into choice of law.<sup>2</sup>

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<sup>2</sup> We have previously applied our existing choice-of-law framework for conflicting state laws to analyze a conflict between New Hampshire and Ontario law, as is presented here. See Lessard v.

Bartlett v. Commerce Ins. Co., 167 N.H. 521, 526 (2015). In doing so, “we first decide whether a relevant law is substantive or procedural.” Id. “[A] substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress.” In re M.M., 174 N.H. 281, 289 (2021). The annuity payments’ classification as marital property determines whether Wife may be awarded a portion of these payments. See RSA 458:16-a, I, II. Thus, this question presents an issue of substantive law.

[¶13] When faced with a choice between conflicting substantive laws, we have previously “conduct[ed] an analysis based upon five choice-of-law influencing considerations.” Bartlett, 167 N.H. at 526; see Clark v. Clark, 107 N.H. 351, 353-55 (1966) (setting forth the five considerations). At our request, the parties’ supplemental briefs applied the five “choice-influencing considerations” that we adopted in Clark. Clark, 107 N.H. at 353.

[¶14] As we recognized in Glowski v. Allstate Insurance Company, however, our post-Clark decisions, “particularly in contract cases, have relied upon the approach taken by the Restatement (Second) of Conflict of Laws.” Glowski v. Allstate Ins. Co., 134 N.H. 196, 197-98 (1991). Under this approach, “in the absence of an express choice of law validly made by the parties, the contract is to be governed, both as to validity and performance, by the law of the State with which the contract has its most significant relationship.” Consolidated Mut. Cas. Co. v. Radio Foods Co., 108 N.H. 494, 496 (1968); see Restatement (Second) of Conflict of Laws § 188, at 575 (1971). In bypassing the Clark test in contracts cases, we have reasoned that the “choice-influencing considerations” do not “provide enough guidance to reach the correct result.” Glowski, 134 N.H. at 198. Instead, the mechanical analysis of the Second Restatement is more appropriate, particularly in contracts cases, which focus, in part, on the predictability aspect of the Clark test and the objective of giving effect to the parties’ intentions. See id.; Consolidated Mut. Cas. Co., 108 N.H. at 496-97.

[¶15] The issue before us concerns the parties’ marital relationship. Specifically, Husband argues that Wife may not claim a right, arising from the marriage, to a portion of the second annuity’s payments. This appeal does not concern the insurer’s relationship with Husband under the annuity contract. Indeed, the trial court’s divorce decree — which instructed “[c]ounsel and the parties [to] work to effect this mandated division of the second annuity” — did not, by its express terms, impose new obligations on the insurer. Rather, the court’s order contemplated the possibility that Husband could direct a portion of each annuity payment to Wife upon receipt from the insurer. Accordingly, the subject of our choice-of-law inquiry is the parties’ marital contract, which gives rise to Wife’s equitable claim to a portion of the annuity payments. See

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Clark, 143 N.H. 555, 556-59 (1999).

Black's Law Dictionary 1160 (12th ed. 2024) (defining “marriage” as “[t]he legal union of a couple as spouses,” the validity of which requires “parties legally capable of contracting to marry”).

[¶16] Our choice-of-law analysis in In the Matter of Geraghty & Geraghty, another dissolution of marriage case, supports using the Second Restatement’s approach here. See In the Matter of Geraghty & Geraghty, 169 N.H. at 408-10. In that case, we assumed, without deciding, that Clark applied because the parties did not challenge the trial court’s reliance on the test. Id. at 408. We also recognized marriage as a kind of contract, however, by analyzing the parties’ expectations when they wed under the Clark test’s “predictability of results” factor. See id. at 409-10. This factor “is usually implicated only in suits involving contractual or similar consensual transactions.” Id. at 409.

[¶17] To determine whether New Hampshire or Ontario law governs the annuity payments’ status as divisible marital property, we thus apply the Second Restatement’s approach to the parties’ contract: their marriage agreement. Under this approach, we consider whether New Hampshire or Ontario has “the most significant relationship” with the marriage. Glowski, 134 N.H. at 198. The parties moved to New Hampshire in 2014 and built a home in this state. During this time, they used the annuity to support the family and considered it in long-term financial planning. Until Husband indicated in 2020 that he wanted a divorce, the parties and their children lived together in New Hampshire, subject to Husband’s absences for work-related travel.

[¶18] By contrast, despite Husband’s individual connection to the province, Ontario has a minimal relationship to the parties’ marriage. The parties did not wed in Ontario, nor did they live there together before or during their marriage. Consequently, New Hampshire has a more significant relationship with the parties’ marriage than Ontario.

[¶19] Husband claims that because the parties married in Maine, they could not have specifically expected New Hampshire law to control the annuity’s division in the event of a divorce. Jurisdiction over a divorce is governed by the place of filing, however, and in practice, the forum state’s law generally controls equitable distribution issues. 24 Am. Jur. 2d Divorce and Separation § 172 (2008); B. Turner, 1 Equitable Distribution of Property § 3:13, Westlaw (4th ed., database updated Dec. 2025). Further, “[t]he essence of the marriage contract is that the parties should engage to live with each other for life.” Powell v. Powell, 97 N.H. 301, 302 (1952). Due to “the mobility of modern life,” Potter v. Rosas, 111 N.H. 169, 171 (1971), relocating across state borders is common. When they wed, the parties could therefore expect that certain aspects of their marriage — including classification of their intangible property if they divorced — would be subject to the laws of a future state of shared residence. But cf. In the Matter of Geraghty & Geraghty, 169 N.H. at 407, 409-

10 (concluding, in the context of a fraud-based annulment petition, that parties would expect the law of the state where they wed and lived at the marriage's outset to decide whether their marriage was valid at its inception).

[¶20] On the other hand, the parties would not reasonably expect that the law of a jurisdiction in which they had neither married nor resided together would apply during their divorce proceeding. The fact that, when the parties married, Husband had obtained one annuity owned by a Canadian insurer and had a second lawsuit still pending in Ontario does not alter our conclusion. Indeed, by the time he finished negotiating the second annuity's terms in 2010 — several years into the parties' marriage — Husband no longer lived full-time in Ontario and had instead lived in multiple states with Wife. Applying a foreign jurisdiction's law to classify a personal injury settlement, due merely to that jurisdiction's connections with the insurer and the underlying lawsuit, would inject uncertainty into New Hampshire divorce proceedings. This concern countervails Husband's argument that applying Ontario law would promote uniformity of decisions by guaranteeing consistent treatment of Canadian annuities.

[¶21] Finally, contrary to Husband's argument, Boucher v. Boucher is inapposite. See Boucher v. Boucher, 131 N.H. 377 (1988). There, we held that Vermont law should apply when deciding whether the parties had acquired an equitable real property interest in a building in Vermont that was divisible in their New Hampshire divorce proceeding. Id. at 378, 381-82. We reasoned that applying Vermont law would “most likely serve the parties' expectations” because “the property is located in Vermont, and any money advanced served to improve the Vermont property.” Id. at 381. We explained that “[t]he place where the property is to be kept and used . . . is the place to whose law the parties . . . would normally look.” Id. (quotation omitted). By definition, the real property in Boucher would permanently “be kept and used” in Vermont. Id. (quotation omitted). Here, in contrast, the annuity's funds supported the parties' household in New Hampshire during much of their marriage. The Canada-based insurer owning the annuity is merely a vehicle to distribute the funds to Husband. Indeed, the choice-of-law determination in probate proceedings follows a similar logic: a decedent's “real property passes according to the law of the state where it lies,” whereas “a decedent's personal property passes according to the law of the state of domicile.” In re Estate of Rubert, 139 N.H. 273, 276 (1994).

[¶22] Thus, the trial court correctly applied New Hampshire law in determining whether Husband's annuity payments were divisible marital property. In New Hampshire, a personal injury award or settlement obtained by one spouse prior to divorce is divisible “regardless of the underlying purpose of the award or the loss it is meant to replace.” In the Matter of Preston and Preston, 147 N.H. 48, 49 (2001) (affirming the distribution at divorce of a personal injury settlement annuity); see also RSA 458:16-a, I (providing that

the property subject to division at divorce “include[s] all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties”). Accordingly, because Husband secured the second annuity before the parties divorced, New Hampshire law deems it divisible.<sup>3</sup> See In the Matter of Preston and Preston, 147 N.H. at 49.

[¶23] We thus affirm the court’s determination that the second annuity constituted property subject to equitable division. See id.; RSA 458:16-a, I. As Husband does not argue that the trial court inequitably divided the annuity, we need not consider whether the court’s award of half of the second annuity to Wife was a proper exercise of its discretion. See RSA 458:16-a, II.

#### B. Alimony

[¶24] Next, Husband asserts that the trial court erroneously denied him alimony, which he conditionally sought in the event the court awarded some of his annuity payments to Wife. “The circuit court has broad discretion to award alimony.” In the Matter of Routhier & Routhier, 175 N.H. at 15. “We review the court’s alimony determination for an unsustainable exercise of discretion, and we will uphold its factual findings unless they are unsupported by the evidence.” Id. “We defer to the trial court’s judgment in resolving conflicts in testimony, measuring the credibility of witnesses, and determining the weight to be given to evidence.” In the Matter of Cohen & Richards, 172 N.H. 78, 93 (2019). “In a contested proceeding, an order denying alimony ‘shall include . . . [f]indings supporting the court’s decision to . . . deny the requested alimony.’” In the Matter of Routhier & Routhier, 175 N.H. at 15 (quoting RSA 458:19-a, VI(b)(1) (2018)).

[¶25] Husband first contends that, in rejecting his alimony request, the court erred by not considering the reduction in his monthly income due to the court’s award of half of the second annuity to Wife. “Alimony determinations are based primarily upon the parties’ income and need.” Id. Where contested, an award of term alimony requires a finding that:

- (a) The party in need lacks sufficient income, property, or both, including property apportioned in accordance with RSA 458:16-a, to provide for his or her own reasonable needs, taking into account the marital lifestyle and the extent to which the parties

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<sup>3</sup> Under RSA 458:16-a, I (2018 & Supp. 2024), the annuity contract’s restriction on Husband’s ability to transfer his rights to annuity payments does not limit a court’s ability to classify the annuity as divisible marital property. Cf. In the Matter of Earley & Earley, 174 N.H. 220, 223 (2021) (reversing trial court’s distribution, during divorce proceeding, of interest in trust with spendthrift clause restraining any transfer of beneficiary’s interest, because relevant statute’s plain text provided that interests in spendthrift trusts are not divisible marital property under RSA 458:16-a, I).

must both fairly adjust their standards of living based on the creation and maintenance of separate households; or

- (b) The party in need is unable to be self-supporting at a standard of living that meets reasonable needs through appropriate employment . . . .

RSA 458:19-a, I (2018 & Supp. 2024). Regarding what constitutes “reasonable needs” under RSA 458:19-a, I(a) and (b), we have clarified that “[t]he supported spouse’s needs are not, however, limited to the barest necessities,” and an alimony determination “should also take into account the standard of living established during the marriage and the financial status of both plaintiff and defendant.” In the Matter of Fowler and Fowler, 145 N.H. 516, 521 (2000) (brackets omitted).

[¶26] Husband conditionally requested \$2,713 per month in alimony if the trial court awarded Wife a portion of his annuities. Husband’s total income, as reported to the trial court, amounted to \$9,647.53 per month.<sup>4</sup> Of this figure, \$5,353.90 came from payments from the first and second annuities. The record does not establish how much of this money derived from each annuity. Meanwhile, Wife’s reported monthly income was \$8,755.

[¶27] The second annuity’s division effectively reduced Husband’s monthly income and commensurately increased Wife’s. The trial court did not acknowledge the annuity’s division when considering the parties’ alimony requests, however. Rather, the court stated only that — based on the parties’ incomes before accounting for the annuity’s division — the parties “enjoy a high standard[] of living based on equally comfortable salaries.”

[¶28] Wife observes that upon the second annuity’s division, Husband’s net income should exceed his monthly expenses, based upon the numbers he provided to the trial court. See RSA 458:19-a, I (stipulating that, where alimony is contested, the court must find that the party requesting alimony “lacks sufficient income, property, or both” to meet that party’s “reasonable needs” or “is unable to be self-supporting”). As the trial court noted, however, the parties “concur[red] that splitting their households [would] increase respective costs.” Thus, given the conditional nature of Husband’s alimony request and the court’s mandate to consider “the financial status of both

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<sup>4</sup> Wife contends that Husband has additional income the trial court likely did not consider, because he testified that he receives travel and volunteer reimbursements that he did not disclose in his financial affidavit provided to the court. However, “[r]eimbursements for business and travel expenses by one’s professional association or employer should not be considered by the court in determining one’s ability to pay alimony and child support” and “are not properly considered as part of [one’s] net accession to wealth.” Thayer v. Thayer, 119 N.H. 871, 873 (1979), superseded by statute on other grounds as stated by In the Matter of Clark & Clark, 154 N.H. 420, 425 (2006). Accordingly, Wife’s argument is without merit.

plaintiff and defendant,” In the Matter of Fowler and Fowler, 145 N.H. at 521, we conclude that the court unsustainably exercised its discretion by failing to consider the second annuity’s division when assessing Husband’s need for alimony. We therefore vacate the portion of the order denying Husband alimony and remand for the court to make factual determinations regarding the effect of the second annuity’s division on Husband’s ability to meet his reasonable needs. See RSA 458:19-a, I(a), (b).

[¶29] Husband also suggests that the trial court improperly disregarded his testimony regarding the effect of his health needs on his earning potential. He testified that because of shoulder pain, he planned to retire from the Canadian Paralympic rugby team, which paid him a salary, following the 2024 Paris Paralympics. In addition, Husband testified that he would likely require full-time nursing assistance as he aged, due to his quadriplegia. In its order, however, the trial court stated that although Husband “points to anticipated retirement after the 2024 Paralympics and speculates on the potential for future ill health,” it “received no expert testimony on any of these aspects.” The court found that “both parties are in peak earning years [and] in relatively good-health.” It noted that if Husband suffered “poor health or other downturn,” he could seek a modification of the alimony order. See RSA 458:19-aa (2018 & Supp. 2024) (discussing alimony modification).

[¶30] Although the court discounted Husband’s description of his intensifying medical needs as unsupported by expert testimony, we have previously reversed a trial court’s alimony order due to the court’s failure to account for the requesting party’s “health and restricted earning ability,” even absent expert evidence. See Murphy v. Murphy, 116 N.H. 672, 674-75 (1976) (reversing alimony order as “paltry and penurious” given wife’s testimony regarding her gallbladder removal, other surgeries, and congenital kidney ailment); see also Marsh v. Marsh, 123 N.H. 448, 451 (1983) (affirming alimony award, over husband’s charge that it was excessive, where wife “testified that . . . her present physical disabilities would prevent her from working on a full-time basis in the future”). Further, we disagree with the trial court’s statement that Husband’s ability to seek an alimony modification sufficiently accounts for any medical concerns, because modification is the available remedy for “a substantial and unforeseeable change of circumstances” occurring after an alimony order’s issuance. See RSA 458:19-aa, I(a)(1) (emphasis added). Here, Husband testified regarding his expected impending retirement and likely healthcare needs. Thus, on remand, the trial court should consider any effect that Husband’s health complications may have on his expenses or ability to earn income.

[¶31] Finally, Husband asserts that the trial court improperly speculated that he could supplement his income through coaching, speaking, and other activities. He argues that In the Matter of Nassar & Nassar, in which we held that the trial court could not consider the husband’s potential to receive money

from his parents in making its alimony determination, restricts a court's ability to speculate regarding parties' future circumstances. See In the Matter of Nassar & Nassar, 156 N.H. 769, 778-79 (2008). In that case, however, we reasoned that gifts from others are unpredictable: a party's "expectancy may never be realized because of diminution of the donor's wealth or a change in the planned disposition of his property." Id. at 779 (quoting Rubin v. Rubin, 527 A.2d 1184, 1189-90 (Conn. 1987)). Here, by contrast, the court assessed Husband's own ability to seek remunerative opportunities due to his athletic career. This assessment is exactly the type of inquiry courts must conduct when evaluating alimony requests. See id. at 777 ("[T]he primary purpose of alimony is rehabilitative. . . . Alimony should, therefore, generally be designed to encourage the recipient to establish an independent source of income." (quotations omitted)). Accordingly, the court did not err by considering this evidence, and it may do so again on remand.

### III. Conclusion

[¶32] In summary, we conclude that the trial court properly determined that Husband's second annuity was divisible property. We also conclude, however, that the court erred by declining to consider the effect of the annuity's division on the parties' income or Husband's testimony regarding the impact of his health on his earning capacity when it made its alimony determination. We therefore affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

Affirmed in part; vacated in part;  
and remanded.

MACDONALD, C.J., and COUNTWAY and GOULD, JJ., concurred.