COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0315

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

BERTIE G. TOLLEY,

PETITIONER-RESPONDENT,

v.

BARBARA E. TOLLEY,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Barbara Tolley appeals from a divorce judgment. The issues relate to division of a personal injury award to her former husband, Bertie Tolley, and to maintenance. We affirm.

The first issue concerns division of an award Bertie received for an injury in 1988. Bertie received approximately $300,000 for his injury claim, while Barbara received approximately $21,000 for her loss of consortium claim. Both amounts were then deposited into, and continued to exist in, accounts that were in both spouses' names.[1]

In ***Richardson v. Richardson***, 139 Wis.2d 778, 407 N.W.2d 231 (1987), the court addressed how to deal with a personal injury claim that was filed before a divorce, but not yet settled or reduced to judgment. The court held that the claim is property subject to division under § 767.255, STATS. ***Id.*** at 783-84, 407 N.W.2d at 234-35. However, the court further held that the usual presumption of equal distribution of such property must be altered due to the unique nature of a personal injury claim, and that a court should presume the injured party is entitled to all of the compensation for pain, suffering, bodily injury and future earnings. ***Id.*** at 785-86, 407 N.W.2d at 234. "Just as each spouse is entitled to leave the marriage with his or her body, so the presumption should be that each spouse is entitled to leave the marriage with that which is designed to replace or compensate for a healthy body." ***Id.*** at 786, 407 N.W.2d at 234-35. We have held that this logic is equally applicable to a claim that is not inchoate, but has already been awarded. *See* ***Weberg v. Weberg***, 158 Wis.2d 540, 548-49, 463 N.W.2d 382, 385 (Ct. App. 1990).

In the case before us, approximately $122,000 remained in the fund from the injury awards. In making its property division, the trial court concluded that Barbara had not overcome the ***Richardson*** presumption. However, the court

[1] Bertie later converted the account to one with solely his name, but that fact does not appear relevant to the issues on appeal.

then concluded that this meant approximately eighty-four percent of the funds were solely the property of Bertie, with the remainder being Barbara's, and that these funds were not part of the marital estate to be divided. This conclusion is contrary to ***Richardson***, which holds that the award *is* part of the marital estate subject to division, but is presumed to be divided unequally. However, on appeal, Barbara does not focus on this conceptual error, and it is not clear that the error had any practical effect on the ultimate dollar outcome.

Barbara argues that the ***Richardson*** presumption was overcome by the commingling of their awards in the one fund, and the use of that fund to pay various household and family expenses, which converted the property to marital property that should be divided equally. This argument misses the point. Under ***Richardson***, the award is already presumed to be marital property subject to division, albeit an unequal division. Therefore, the case law Barbara cites relating to "transmutation" of individual property into marital property is irrelevant. We see no reason in this case why the way money has been deposited or used should prevent the rationale behind ***Richardson*** from applying. As for the alleged commingling, Barbara points to no evidence that other income or funds were placed into this account that would make the injury awards no longer separable from other marital property.

Barbara also argues that the court erred by not awarding her more than $400 in monthly maintenance. In setting maintenance, the trial court calculated what would be necessary to make the parties' incomes equal, which would be for Bertie to pay monthly maintenance of approximately $320. The court then increased that amount to compensate for an expected decline in Barbara's earning capacity with age, for a total of $400.

One of the factors the court is to consider in setting maintenance under § 767.26, STATS., is the property division that was made. In the case before us, the court stated that the marital property was being divided equally, but, as we discussed above, that statement was contrary to the analysis of ***Richardson***. What actually occurred was that the injury award was marital property, unequally divided. As a result, the property division in this case was not equal. However, as Bertie notes, it would be contrary to ***Richardson*** for the maintenance award to be increased because of this unequal division. The result of doing so would be to diminish, on a monthly basis, the benefit that the injured spouse is supposed to retain.

Barbara argues that maintenance should be adjusted to compensate for what she claims was the trial court's erroneous division of the injury award. We have already held that the division was not erroneous. Furthermore, the interest Bertie can earn from the injury award was included in the court's income figures, and therefore Barbara does indirectly receive some benefit from those funds in the maintenance calculation.

Barbara also argues that the court erred in calculating the parties' incomes because it assumed a six percent return on the injury award money, rather than the 8.4% that the mutual fund has earned over the last four years. This had the effect, she argues, of holding down Bertie's predicted income. We reject the argument. Bertie is not obliged to keep the money in a mutual fund; he may well decide to move some or all of it into less risky investments that bring lower returns. Indeed, he is not obliged to save the money at all. Six percent is a reasonable figure to use.

Barbara argues that the court erred in setting her earning capacity. However, the figure the court used was the lowest one provided by her own expert. She also argues that the trial court erred by assuming that Barbara, now in her early sixties, will continue to have that capacity for the foreseeable future. We reject this argument for two reasons. First, the trial court expressly added an additional eighty dollars per month to adjust for what it assumed would be her declining earning capacity. Second, we are not aware of any reason that would prevent Barbara from seeking a modification of maintenance when her earning capacity decreases.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.