COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP664 **Cir. Ct. No. 2004FA210**

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

IN RE THE MARRIAGE OF:

BARBARA J. HOLLISTER,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

ROBERT HARLEY HOLLISTER,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Barbara Hollister appeals her judgment of divorce and an order on reconsideration. Barbara argues the circuit court erred by refusing to consider the value of a worker's compensation award to Robert Hollister as

income in calculating maintenance. Barbara also contends the court failed to give effect in its calculation of maintenance to a finding that Robert failed to fully disclose assets. Robert cross-appeals, arguing the court erred by considering the income generated from the worker's compensation settlement for purposes of awarding maintenance. We affirm.

¶2 The parties were married for twenty-eight years. Barbara is forty-eight years old and employed with a gross monthly income of $2,251 and after-tax income of $1,900. Robert is permanently disabled with multiple sclerosis, receives social security disability in the amount of $1,045 monthly and is unable to obtain individual health insurance. Beginning in 1987, Robert began suffering from a work injury that resulted in a worker's compensation compromise that included a lump sum payment as well as payments of $1,000 monthly beginning in 1992 and ending June 2005. A portion of the worker's compensation proceeds were used for living expenses during the marriage. Approximately $58,000, solely from worker's compensation proceeds, was placed in certificates of deposit and savings accounts in Robert's name. In addition, a boat valued at $6,800 was purchased with worker's compensation proceeds.

¶3 The parties stipulated to a division of most of the personal property. The circuit court concluded the $58,000 and the boat were nonmarital assets derived from Robert's worker's compensation proceeds and awarded those assets to Robert. The court found a net difference between the parties of $855 monthly and ordered Barbara to pay $427.50 in maintenance to equalize the parties' income. Upon a motion for reconsideration, the court found the interest generated from the $58,000 investment should be included in Robert's gross income. Using an interest rate of 5%, the court concluded the $58,000 could generate $2,900

interest annually. The court therefore reduced the maintenance to $307 monthly. The parties now appeal.

¶4 The division of property and the awarding of maintenance rest within the sound discretion of the circuit court. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We generally look for reasons to sustain the circuit court's discretionary decision, ***Loomans v. Milwaukee Mutual Insurance Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968), and we need not agree with the decision to sustain it. ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis. 2d 1, 12, 298 N.W.2d 102 (Ct. App. 1980). We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).[1] When there is conflicting testimony, the trial court is the ultimate arbiter of the credibility of witnesses. ***Cogswell v. Robertshaw Controls***, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979).

¶5 Barbara argues the funds remaining from the worker's compensation compromise must be factored into the calculation of her maintenance obligation. Barbara insists this is true because the worker's compensation proceeds represent Robert's past and future lost earnings. As such, these funds represent income that Robert would have received were it not for his work-related injury. We are unpersuaded.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶6 The circuit court properly relied upon ***Weberg v. Weberg***, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990). In that case, we concluded that an injured spouse is presumptively entitled to a worker's compensation settlement although the settlement does not distinguish the various elements of damages. We stated:

> *Richardson* limited application of the presumption to compensation for personal injury and future earnings, stating that for other elements of damages, "such as those that compensate for medical or other expenses and lost earnings incurred during the marriage, the court should presume equal distribution." [*Richardson v. Richardson*, 139 Wis. 2d 778, 786, 407 N.W.2d 231 (1987)].
>
> In *Krebs*, however, the court appears to have dropped the qualification, for there the structured settlement did not distinguish among the various elements of damage, yet the court applied the *Richardson* presumption. After quoting the rule–and its limitation–from *Richardson*, the *Krebs* court stated: "In spite of the lack of identification of separate amounts making up the structured settlement, we believe that the logic of *Richardson* applies and the trial court should employ the presumption that the injured [spouse] is entitled to the remainder of the settlement." [*Krebs v. Krebs*, 148 Wis. 2d 51, 57, 435 N.W.2d 240 (1989)].
>
> The same is true here. The record of Weberg's settlement does not disclose any division or separation based on type of damage. Under *Krebs*, that fact is immaterial and the presumption that the settlement remains the property of the injured person is fully applicable.

Weberg, 158 Wis. 2d at 549-50 n.3.

¶7 In the present case, Robert's worker's compensation compromise does not distinguish among the various elements of damages and Barbara submitted no proof to overcome the ***Weberg*** presumption that the settlement remains the property of the injured person. Accordingly, the circuit court

appropriately applied the presumption that Robert is entitled to the proceeds from the worker's compensation compromise and did not err in declining to factor the funds into the maintenance obligation.[2]

¶8 Barbara also argues the circuit court erred by not giving effect in the calculation of maintenance to its finding that Robert failed to fully disclose assets. Contrary to Barbara's perception, the court considered Robert's failure to comply with full disclosure of financial information. As the court stated: "However, it is also clear to the Court that these monies were in accounts held in Mr. Hollister's sole name, and were the proceeds of a Worker's Comp settlement." Significantly, Barbara does not identify the source of these assets as being other than the worker's compensation compromise and she concedes in her brief that "there was no clear evidence as to how much additional assets Mr. Hollister had in his possession that were undisclosed." The record satisfies us that the circuit court properly exercised its discretion.

¶9 Robert cross-appeals, contending the income from the worker's compensation proceeds cannot be considered for purposes of maintenance. Alternatively, Robert insists the court was required to apply the 1.98% to 3.5% interest rates he was actually receiving rather than the market rate of 5%. We disagree.

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[2] The circuit court may, of course, alter the presumed retention of the settlement by the injured spouse after considering the special circumstances of the parties and the statutory factors set forth in WIS. STAT. §§ 767.255 and 767.26. *See* ***Weberg v. Weberg***, 158 Wis. 2d 540, 550, 463 N.W.2d 382 (Ct. App. 1990). Here, the circuit court considered the proper statutory factors in establishing maintenance payments and gave appropriate weight to the factors in this case, including the length of the marriage, the parties' earning capacities, the age and health of the parties, among other factors. The record supports the circuit court's findings and conclusions.

¶10 The assets at issue were awarded solely to Robert and only the interest from those assets was taken into consideration for purposes of maintenance. Therefore, and contrary to Robert's assertion, the assets were not "double counted" for purposes of calculating maintenance. *See* ***Kronforst v. Kronforst***, 21 Wis. 2d 54, 60, 123 N.W.2d 528 (1963). The trial court relied upon essentially two bases for its decision to use a 5% rate of interest. First, the court relied upon the fact that Robert took out his certificates of deposit at a time when rates were at historic lows. At the time of the hearing, the court found that rates of 5% were readily available in conservative certificates of deposit. The court attempted to strike a reasonable balance between the unusually low interest rates at the time Robert invested and the higher rates that might be expected if the funds were invested in riskier stocks. The court found 5% a reasonable rate of return. The court did not err in this regard.

By the Court.—Judgment and order affirmed.

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