COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP83 **Cir. Ct. No. 2011FA44**

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

IN RE THE MARRIAGE OF:

BARBARA A. SINGERHOUSE,

PETITIONER-RESPONDENT,

V.

CHARLES K. SINGERHOUSE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Charles Singerhouse appeals from a judgment of divorce. He contends the circuit court erroneously exercised its discretion by awarding his former wife, Barbara Singerhouse, forty percent of an annuity

payment Charles is due to receive in October 2014 as part of a personal injury settlement. At divorce, there is a presumption against dividing personal injury awards, but that presumption may be rebutted based on the "special circumstances" of the personal injury claim and of the parties. We conclude the circuit court properly exercised its discretion by determining the special circumstances of this case warranted a division of the annuity payment. We therefore affirm.

BACKGROUND

¶2 Charles was injured in 1981 while working as a truck driver for a company that transported chemicals. He sustained burns over ninety percent of his body and lost an eye. He subsequently filed a personal injury lawsuit, which was settled in September 1984. Under the settlement, Charles agreed to an annuity that would pay him $500 per month from November 1984 until October 2014. In addition, Charles was to receive the following lump sum payments: $25,000 in October 1989; $10,000 in October 1994; $20,000 in October 1999; $80,000 in October 2004; $160,000 in October 2009; and $320,000 in October 2014.

¶3 Charles and Barbara began dating in early 1986 and were married later that year. It was the first marriage for both parties. At the time of divorce in 2012, they had been married for over twenty-five years and had two daughters, ages seventeen and fifteen.

¶4 In the early years of the marriage, both Charles and Barbara worked outside the home. However, after their first child was born in 1995, the parties agreed Barbara "would stay home and take care of the children, be there to take care of the home, and [Charles] would work and earn the income." Barbara

occasionally took part-time jobs outside the home, but her employment was sporadic. She testified at the contested divorce hearing that Charles was "always the primary breadwinner" and her income was "supplemental[.]" Charles similarly described himself as the "sole breadwinner" in the marriage.

¶5 Charles was fifty-four at the time of divorce and was employed as a plant manager by J & L Wire Cloth in St. Paul. His annual salary as of 2012 was $85,000. He also received a $10,000 bonus in 2008, a $5,000 bonus in 2010, and a $20,000 bonus in 2011.

¶6 Barbara was forty-five at the time of divorce. After separating from Charles, she obtained a cashier position at Walmart, earning $7.65 per hour. Barbara testified her decision to stay home and care for the children had negatively affected her ability to find work because "when an employer is looking to hire somebody at their place of business, they want somebody who has a consistent work history[.]"

¶7 Barbara conceded she worked full-time as a dental assistant during the early years of the marriage, but she did not apply for any dental assistant jobs after separating from Charles. She explained her dental assistant certification was no longer current, and she was not aware of any full-time dental assistant positions within a twenty-mile radius of her home. She testified she was unwilling to commute more than twenty miles to work because Charles had an hour-long commute, and she believed it was important for the children that one of their parents work nearby in case they were needed. Charles typically left for work at 4:30 or 5:00 in the morning and did not return until 6:30 or 7:00 at night.

¶8 Barbara testified she was in good health at the time of divorce, although she had completed an inpatient treatment program for alcohol abuse

within the last few years. Charles also testified to being in good health, aside from a "slight" case of chronic obstructive pulmonary disease. He admitted his 1981 injuries do not limit his ability to perform his current job or work in his chosen field. Although his injuries prevent him from participating in some sports, he is still able to play golf. He testified he has flashbacks to the 1981 accident almost daily, but admitted he has not sought treatment for any psychological symptoms since 1982. He testified he spends "a couple of hundred dollars" per year treating the loss of his eye, and he has to replace the lens of his prosthetic eye every three or four years at a cost of $2,000 to $3,000.

¶9 The annuity payments Charles received during the marriage were deposited into a joint account he shared with Barbara. Over the course of the marriage, Charles and Barbara spent virtually all of money Charles received from the annuity, using it to finance a "very comfortable" lifestyle. Barbara testified, "Our lifestyle was very good. We would take vacations. We would provide our children with—they wanted for nothing. … We would shop for whatever we needed. Our bills were always paid. Our cars were always in excellent condition." Charles regularly bought jewelry for Barbara, and he purchased a Cadillac for himself on his forty-fifth birthday. In 2005, Charles and Barbara spent over $100,000 to build an addition to their home.

¶10 In addition to the annuity payments, Barbara testified she and Charles "liberally used credit cards and loans" to support their lifestyle. For instance, when Charles received his October 2009 annuity payment of $160,000, about half of that amount was used to pay off credit card debt. Barbara testified, however, that she and Charles had a different plan for the final $320,000 annuity payment that was scheduled for October 2014. She stated they envisioned that payment as their "nest egg" or retirement fund. They agreed they would use the

final annuity payment to "secure" their retirement. Specifically, they would use the money to pay off the mortgage on their residence and buy a house on the beach. Charles would then retire, but Barbara "would still be able to work full-time." Barbara stated, "The grand plan for us was to use the monies like any other people that were retired." She testified that, in reliance on the final annuity payment, Charles chose not to participate in his previous employer's 401(k) plan. The parties' only retirement account was a pension from Charles' former employer that was worth $969.73 per month.

¶11 Charles did not dispute Barbara's testimony that the parties agreed to use the final annuity payment to finance their retirement. Nor did he deny that he chose not to participate in his former employer's 401(k) plan because he anticipated using the final annuity payment as a retirement fund. He also conceded he did not participate in his current employer's 401(k) plan, even though he had been eligible to do so for five years. He asserted, however, that he "did not have any money to participate in any retirement plan whatsoever."

¶12 Barbara requested that the circuit court divide the October 2014 annuity payment equally between the parties. Charles asked the court to award him the entire payment. In its oral ruling, the court recognized there is a presumption at divorce that the injured spouse is entitled to the proceeds of his or her personal injury claim. However, the court also observed that presumption can be rebutted by a showing that special circumstances justify dividing the personal injury award. Based on the special circumstances of the Singerhouses' case, the court determined it was appropriate to award sixty percent of the October 2014 payment to Charles and forty percent to Barbara. The court divided the remainder of the parties' property equally and ordered Charles to pay child support and maintenance.

¶13 A judgment of divorce was entered on October 8, 2012. Charles subsequently moved for reconsideration, seeking "an amended judgment granting him 100% of the personal injury annuity he will be receiving on October 10, 2014." The court denied Charles' motion without a hearing "for the reasons previously stated on the record." Charles now appeals, challenging only the court's decision to divide the October 2014 annuity payment.

DISCUSSION

¶14 The division of property at divorce rests within the circuit court's discretion. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will affirm as long as 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." ***Id.*** (quoting ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995)). We generally look for reasons to sustain discretionary decisions. *See* ***Steiner v. Steiner***, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687 N.W.2d 740. In addition, we will not set aside the circuit court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2).[1]

¶15 WISCONSIN STAT. § 767.61(2)(a) provides that, with the exception of property that one spouse acquired by gift or due to the death of another, all of the spouses' property is subject to division at divorce. WISCONSIN STAT. § 767.61(3), in turn, sets forth a presumption that all divisible property should be divided equally between the spouses. A court may, however, order an unequal distribution

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

after considering thirteen factors listed in the statute. *See* WIS. STAT. § 767.61(3)(a)-(m).

¶16 In ***Richardson v. Richardson***, 139 Wis. 2d 778, 780, 407 N.W.2d 231 (1987), our supreme court held that a personal injury claim is "property subject to division upon divorce[.]" However, the court concluded the presumption of equal division set forth in WIS. STAT. § 767.61(3)[2] does not apply to personal injury claims. ***Id.*** Citing ***Amato v. Amato***, 434 A.2d 639 (N.J. Super. Ct. App. Div. 1981), the court reasoned:

> [C]ompensation for loss of bodily function, for pain and suffering and for future earnings replaces what was lost due to a personal injury. 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.

Richardson, 139 Wis. 2d at 786. Consequently, the court held that, when considering a personal injury claim that has not yet resulted in a settlement or a judgment at the time of divorce, a circuit court should

> presume that the injured spouse is entitled to the entire amount recovered for loss of bodily function, future earnings (that is after the date of divorce) and pain and suffering; that the "uninjured" spouse is entitled to the entire amount recovered for loss of consortium; and that the amounts recovered for medical and other expenses and loss of earnings incurred during the marriage are to be distributed equally.

[2] ***Richardson v. Richardson***, 139 Wis. 2d 778, 780, 407 N.W.2d 231 (1987), and other cases cited *infra*, refer to WIS. STAT. § 767.255. That statute was renumbered WIS. STAT. § 767.61 in 2005. *See* 2005 Wis. Act 443, § 109.

Id. The court recognized, though, that circuit courts need "flexibility" to make equitable property divisions. ***Id.*** It therefore stated a circuit court may "alter the presumed distribution after considering the special circumstances of the personal injury claim in that case and of the parties under the statutory factors listed in [WIS. STAT. § 767.61(3)]." ***Id.***

¶17 ***Richardson***'s holding is limited to inchoate personal injury claims—that is, those that have not yet resulted in a judgment or settlement at the time of divorce. *See* ***Weberg v. Weberg***, 158 Wis. 2d 540, 548, 463 N.W.2d 382 (Ct. App. 1990). However, in ***Krebs v. Krebs***, 148 Wis. 2d 51, 57, 435 N.W.2d 240 (1989), the supreme court applied "the logic of ***Richardson***" to future payments one spouse was scheduled to receive under a structured settlement of a personal injury claim. The ***Krebs*** court concluded the injured spouse was presumptively entitled to all future payments under the structured settlement, even though the settlement "did not identify what portion of the future payments was to compensate for pain, suffering, bodily injury, future earnings, past medical and other expenses or lost earnings during the marriage." ***Id.*** As in ***Richardson***, though, the court recognized the presumption could be overcome if, after considering the factors set forth in WIS. STAT. § 767.61(3), the circuit court found that special circumstances warranted dividing the payments. ***Krebs***, 148 Wis. 2d at 58.

¶18 Here, consistent with ***Richardson*** and ***Krebs***, the circuit court began by presuming the October 2014 annuity payment should be awarded to Charles in its entirety. However, the court then concluded the special circumstances of the case warranted awarding forty percent of the payment to Barbara. Charles argues the court erroneously exercised its discretion because it failed to "identify or apply a single WIS. STAT. § 767.61(3) factor relevant to overcoming the presumption" that Charles was entitled to the entire payment. The record belies Charles'

assertion. The court's oral ruling clearly shows that it applied the relevant statutory factors, although it did not specifically relate each factor to the relevant statutory sections as we do below.

¶19 The court began by noting that the parties had been married for over twenty-five years, which constituted a long-term marriage. *See* WIS. STAT. § 767.61(3)(a) (length of the marriage). The court next observed that Charles had brought a substantial asset to the marriage in the form of the structured settlement, which had "contributed over half a million dollars into the family coffers." *See* WIS. STAT. § 767.61(3)(b) (property brought to the marriage by each party). However, the court observed that over the course of the parties' long marriage "their lives [had] merged, and who brought what into the marriage is no longer as important." The court also noted neither party had substantial assets not subject to division. *See* WIS. STAT. § 767.61(3)(c).

¶20 The court next considered each party's contributions to the marriage, including Barbara's contribution in homemaking and child care services. *See* WIS. STAT. § 767.61(3)(d). The court observed the parties had "what I characterize as a traditional marriage. Dad was the breadwinner and mom the primary caretaker of the children and the home." The court noted, "[T]here is no dispute … the parties agreed to this arrangement at the time [their children] were born." The court then described Barbara's contributions to the marriage in detail, observing that, in addition to caring for the parties' home and children, Barbara served as a classroom mom and girl scout leader, volunteered in the community, cleaned Charles' father's home on a weekly basis, and cared for Charles' ailing mother in the seven months preceding her death. The court concluded the parties' marriage was a "partnership," with each party "making equally valuable contributions to the family unit."

¶21 The court then addressed the parties' age and physical and emotional health. *See* WIS. STAT. § 767.61(e). It noted that both Barbara and Charles had "chronic yet treatable medical conditions[,]" but they were otherwise in good health. The court therefore determined this factor was "neutral."

¶22 The court considered Barbara's contributions to Charles' "education, training, or increased earning power." *See* WIS. STAT. § 767.61(f). The court observed:

> Charles has had the opportunity to build a career. He is a success story, having overcome the limitations of a formal education that ended after 10th grade and a traumatic injury that would have sidelined a less focused and hard working person. However, he didn't achieve earnings of $80,000 per year in a vacuum. He has had a partner, and that is Barbara, whose dedication to children and home freed Charles up to advance in his career, a career that requires a two-hour per day commute into the Cities. This was a joint venture. The decision for Barbara to be a stay-at-home mom has long term brought economic consequences to her. She can never recover the 15 or so years she has been out of the full-time job market. [Charles], on the other hand, leaves this marriage with his skills and experience intact, greatly enhanced by the past 25 years of career building.

¶23 The court also considered each party's earning capacity. *See* WIS. STAT. § 767.61(3)(g). Because Charles' earning capacity was not really in dispute, the court focused on whether Barbara could be earning more than the $7.65 per hour she made at Walmart. The court found credible Barbara's testimony as to "the extent of her job search and [her] willingness to take any job available[.]" The court also rejected the testimony of Charles' vocational expert, Kenneth Ogren, that Barbara had a current earning capacity of $10 per hour and could earn $12 per hour if she recertified as a dental assistant and found a job in Minnesota. The court observed that Barbara had been "out of the dental assistant market for almost 15 years" and Ogren "appeared reluctant to admit that the dental

field has changed in the last 15 years." The court stated, "One does not need to be a vocational expert to recognize how dramatically technology has advanced in the dental field." The court also noted Barbara had "valid reasons for not traveling to the Twin Cities for work," including her desire to be available to the parties' children if needed. The court determined Barbara's decision to work at Walmart was reasonable under the circumstances.

¶24 After noting that WIS. STAT. § 767.61(3)(h), (k), and (L) were inapplicable to the facts of this case,[3] the court proceeded to consider factors (j) and (m), which it stated were "at the crux of this dispute." *See* WIS. STAT. § 767.61(3)(j) (other economic circumstances of each party, including pension benefits, vested or unvested, and future interests); WIS. STAT. § 767.61(3)(m) (other factors that the court determines are relevant). The court observed Charles' and Barbara's only retirement asset was Charles' pension, which they had agreed to divide equally. Thus, each party would receive $483.86 per month. The court stated, "In the grand scheme of things, this is a nominal amount, and it represents the sum total of retirement accounts the Singerhouses have."

---

[3] *See* WIS. STAT. § 767.61(3)(h) (desirability of awarding family home to party with greater physical placement); WIS. STAT. § 767.61(3)(k) (tax consequences to each party); WIS. STAT. § 767.61(3)(L) (written agreements made before or during the marriage concerning property distribution).

When dividing property at divorce, a circuit court need not consider factors listed under WIS. STAT. § 767.61(3) that are factually inapplicable to the case at hand. *See* ***LeMere v. LeMere***, 2003 WI 67, ¶26, 262 Wis. 2d 426, 663 N.W.2d 789. Charles does not argue that the factors listed in § 767.61(3)(h), (k), and (L) are applicable to this case.

We also observe the circuit court did not explicitly address WIS. STAT. § 767.61(3)(i) (amount and duration of maintenance and family support payments). However, the court implicitly found that, even though Barbara was receiving both maintenance and child support payments from Charles, it was nevertheless appropriate to award Barbara a portion of the final annuity payment under the special circumstances of this case. The court's failure to address § 767.61(3)(i) was not an erroneous exercise of discretion. *See* ***LeMere***, 262 Wis. 2d 426, ¶27.

¶25 The court then summarized Barbara's uncontroverted testimony that the parties had always intended to use the final annuity payment as their "nest egg" for retirement. The court stated Charles' decision not to participate in his current employer's 401(k) plan supported Barbara's testimony. Although Charles had testified he could not afford to contribute to a 401(k), the court found his testimony incredible, given that he had recently used $3,250 from his 2011 bonus to purchase a car for the couple's sixteen-year-old daughter. The court concluded:

> The record in this case supports a finding that the annuity is much more akin to a retirement account than it is to a [personal injury] settlement. Barbara's testimony is uncontroverted that the couple had a grand plan that they would fund with the 2014 annuity payment. There are no other significant retirement accounts. And because Barbara has been out of the full-time job market for the past fifteen years and doesn't have the ability to obtain the type of job that has significant retirement benefits, this may be the only retirement she will ever have. Without a division of the annuity, there will be little to show for 25 years of joint efforts. This couple chose not to save for retirement based on the knowledge the annuity would be that to them and be there for them.

¶26 Finally, the court considered the circumstances of Charles' personal injury claim. The court found it significant that, "while Charles will always suffer from the loss of his eye, his life story since the accident is one of great success and accomplishment." The court observed the accident had not diminished Charles' earning capacity, and his ongoing medical expenses were minimal. Although Charles testified to daily flashbacks, the court noted he had not sought psychological treatment for thirty years and there was "no other evidence of emotional trauma." Thus, the accident's residual effects on Charles were limited.

¶27 After considering all of these factors, the court concluded "the presumption that Charles is entitled to 100 percent of the settlement proceeds

… does not apply to the facts in this case." However, the court declined Barbara's request to order an equal division of the final annuity payment. Instead, the court awarded Charles sixty percent of the final payment, "in light of the fact that Charles endured the pain and suffering of being burned over 90 percent of his body and the disfigurement of having lost an eye."

¶28 The circuit court properly exercised its discretion by finding that the special circumstances of this case warranted dividing the final annuity payment. The supreme court did not define the term "special circumstances" in ***Richardson*** or ***Krebs***, and we do not attempt to do so here. We merely conclude that, in this case, the circuit court applied the proper law to the facts of record and used a rational process to conclude that special circumstances were present. *See* ***LeMere***, 262 Wis. 2d 426, ¶13.

¶29 As special circumstances, the circuit court cited: (1) the parties' lack of any significant retirement assets; (2) Barbara's inability to accumulate sufficient assets to enjoy a comfortable retirement, given her age and her time out of the full-time workforce; (3) the parties' joint decision that Barbara would stay home with the children, which benefitted Charles' career but decreased Barbara's ability to obtain a job with significant retirement benefits; (4) the limited residual effects of Charles' injuries; and (5) the parties' plan to use the final annuity payment as their "nest egg" for retirement. Under these circumstances, the court concluded it was necessary to award Barbara a portion of the final annuity payment so that she would have something "to show for 25 years of joint efforts." Contrary to Charles' assertion, the special circumstances the court relied on will not be present in every divorce case. Our decision here does not, as Charles suggests, mean that special circumstances must be found in every case involving a long-term marriage or one spouse's decision to stay home and care for the

children. We simply conclude that, based on the combination of all the factors cited above, the circuit court could reasonably find that special circumstances justified dividing the final annuity payment.

¶30 Charles argues the circuit court erred by finding that the parties intended to use the final annuity payment to fund their retirement. He asserts that, given the parties' spending habits, there was "little likelihood any of this money would have ever made it into a retirement account." However, the court's finding to the contrary was based on Barbara's undisputed testimony and was not clearly erroneous. *See* WIS. STAT. § 805.17(2). Although other evidence supported an inference that the parties would have spent the final annuity payment instead of saving it for retirement, the court was not required to draw that inference. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (A circuit court's factual findings will not be disturbed "where more than one reasonable inference can be drawn from credible evidence."); ***Sellers v. Sellers***, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996) ("[F]indings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the finding[,]" even if other evidence supports a contrary finding.).

¶31 Charles also argues WIS. STAT. § 767.61(3)(L) precluded the court from considering Barbara's testimony about the parties' intent to use the final annuity payment as a retirement fund. WISCONSIN STAT. § 767.61(3)(L) directs courts to consider any "*written agreement* made by the parties before or during the marriage concerning any arrangement for property distribution[.]" (Emphasis added.) Charles argues he and Barbara had at most an oral agreement regarding the final annuity payment, and the court was therefore precluded from considering that agreement. We disagree. WISCONSIN STAT. § 767.61(3)(m) gives the court expansive authority to consider "[s]uch other factors as the court may in each

individual case determine to be relevant." Here, the court found it relevant that the parties made a joint decision not to save for retirement in anticipation of receiving the final annuity payment. Thus, under § 767.61(3)(m), the court could properly consider Barbara's testimony.

¶32 Charles also asserts the court should not have considered the parties' intent to use the final annuity payment as a retirement fund because "both parties are responsible for the lack of retirement savings." However, Charles does not explain how this assertion supports his argument. In fact, that both parties are responsible for the lack of retirement savings actually supports the circuit court's decision to divide the final annuity payment between them. Because both parties chose not to save for retirement in reliance on the annuity payment, fairness dictates that each party should receive a portion of the payment. This is particularly true given the court's finding that Barbara's fifteen-year absence from the workforce benefitted Charles' career but dramatically reduced Barbara's ability to obtain a job with significant retirement benefits.

¶33 Charles next contends Barbara has not shown "the type of financial hardship sufficient to overcome the presumption and divide the annuity." He asserts Barbara is "far from destitute." While that may be true, Charles cites no authority for the proposition that a finding of financial hardship is necessary for a court to divide a personal injury settlement. Neither ***Richardson***, ***Krebs***, nor WIS. STAT. § 767.61(3) requires a finding of financial hardship.

¶34 Finally, Charles argues that, under ***Amato***, 434 A.2d at 643, "the only justification for dividing a personal injury settlement is when the damages are 'truly shared' or the marital estate is 'diminished' by the loss of past wages or medical expenses." Our supreme court cited ***Amato*** favorably in both ***Richardson***

and ***Krebs***. *See* ***Richardson***, 139 Wis. 2d at 786; ***Krebs***, 148 Wis. 2d at 57-58. However, the court did not rely on ***Amato*** to create a hard and fast rule that personal injury settlements may be divided only to reimburse the noninjured spouse for shared damages or lost marital assets. Instead, the court held an injured spouse is presumptively entitled to his or her personal injury damages at divorce, but the presumption can be rebutted by a showing of special circumstances. *See* ***Richardson***, 139 Wis. 2d at 785-86; ***Krebs***, 148 Wis. 2d at 57-58. The circuit court properly applied this rebuttable presumption. We therefore affirm the court's decision to divide the October 2014 annuity payment.

By the Court.—Judgment affirmed.

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