

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 6, 1996

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

NOTICE

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

No. 96-0518-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

In re the Marriage of:

**JULENE MARIE HOVILA
n/k/a JULENE HOVILA-SCHMIDT,**

Petitioner-Respondent

v.

MICHAEL JOHN HOVILA,

Respondent-Appellant.

APPEAL from an order of the circuit court for Ashland County:
ROBERT E. EATON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Michael Hovila appeals an order requiring him to pay child support on a personal injury settlement.¹ He argues that the proceeds

¹ This is an expedited appeal under RULE 809.17, STATS.

of a personal injury settlement should not be included within the definition of gross income for purposes of applying a 25% withholding order for child support and that \$5,500 of the settlement that he used to pay a loan to his personal injury attorney should not be considered income for child support purposes. We reject these arguments and affirm the order.

The parties were divorced in 1990 and Michael was ordered to pay 25% of his gross income for support of the parties' two minor children. Michael was then injured on the job and, in May 1995, settled claims with his employer for \$275,000; \$150,000 of this as a cash payment and \$125,000 in the form of a structured annuity that paid \$745 per month for life. Michael's personal injury attorney was paid out of the \$150,000 cash payment and a \$5,500 loan the attorney made to Michael was also paid from the cash award, leaving Michael with \$72,353 plus the annuity. Michael concedes that he must pay 25% of the monthly annuity payments as child support when he receives them, but argues that he should not have to pay child support on the \$72,353 cash payment or the \$5,500 loan.

Michael's argument that the cash payment was not intended to replace income was not properly preserved because he did not present any evidence on that issue to the trial court. WISCONSIN ADM. CODE § HSS 80.02(13) defines gross income to include personal injury awards intended to replace income. The trial court cannot be expected to differentiate between parts of an award designed to replace income and parts attributable to other factors in the absence of any evidence. The burden was on Michael to present this evidence. Michael had sole control of the information regarding a breakdown of the settlement. He succeeded in blocking Julene's efforts to obtain this information prior to the hearing. Michael cannot be heard to complain about the trial court's allocation of the settlement proceedings when he has concealed the information necessary to make any other decision.

Citing *Krebs v. Krebs*, 48 Wis.2d 51, 419 N.W.2d 573 (Ct. App. 1988), Michael argues that all of the award should be presumed to be compensation for losses other than wages. The issue in *Krebs* was whether the trial court properly applied the presumptive 50/50 division of marital property to a personal injury award that included scarring and disfigurement. The parties were still married at the time of the structured settlement. The court concluded that payments to be received in the future based on a structured

settlement that did not identify what portion of the future payment was to compensate for pain, suffering, bodily injury, future earnings, past medical and other expenses or lost earnings during the marriage are presumptively the sole property of the injured person. *Krebs* is distinguishable in several ways. First, it involves property division, not child support. A structured settlement with future payments may not be accessible by a former spouse as a form of property division but still constitute income for purposes of child support. Second, the structured settlement in *Krebs* occurred while the parties were still married. The parties therefore had equal access to any information relevant to the allocation of the settlement. Finally, *Krebs* involved damages for scarring and disfigurement. Michael's settlement is apparently based primarily on lost wages. Michael has not worked as a railroad engineer since the date of his injury. He did not work at any job from the date of the injury until three weeks before the hearing when he acquired a part-time minimum wage job. He was thirty-four years old at the time of the settlement. The annuity makes up for less than half of Michael's previous income. The entire personal injury award, less the attorney's fees, could not have purchased an annuity that would equal Michael's former annual salary. Even if we applied a presumption that the cash payment was not meant to replace income, that presumption is rebutted by the facts presented here. In the absence of any evidence establishing that a portion of the settlement was designed to compensate Michael for damages other than lost wages, the trial court properly required him to pay child support on the entire cash settlement.

Michael also notes that the trial court had authority to deviate from strict application of the percentage guidelines. He submitted to the trial court an accounting of how he spent the cash payment in an effort to establish that he did not have the capacity to pay 25% of that amount. Those expenditures included a van, a computer for recreational use, two boats, trips and a \$10,000 beer can collection. From January to October 1995, he paid only \$180 child support for the two children. The trial court properly refused to deviate from the percentage guidelines under these circumstances.

The \$5,500 used to repay a loan to Michael's personal injury attorney was properly included in the settlement agreement and made subject to the 25% child support order. The attorney loaned Michael that money as an advance on his settlement. Whether he received the money in advance or after settlement does not change the character of the money. It was properly combined with the cash award and, in the absence of any evidence that it was

paid to Michael for a purpose other than wage compensation, it was properly subjected to the child support formula.

By the Court. – Order affirmed.

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