



**AMC 2023**

**Session 2**

# **The Intersection of Family Law with Civil and Criminal Law**

*Sara Andrew, Andrew Law Offices, S.C., Fond du Lac  
Comm. Barry Boline, Ozaukee County, Port Washington  
Dwight Darrow, Darrow Law Offices, S.C., Sheboygan  
Amy Menzel, Hammett, Bellin & Oswald LLC, Neenah  
Grant Zielinski, Divorce Financial Solutions, Milwaukee*

## About the Presenters...

**Sara B. Andrew** is an owner of Andrew Law Offices, S.C., in Fond du Lac and Whitefish Bay. The majority of her practice consists of real estate and estate planning. Formerly, she was legal counsel for Guaranty Title Services and a legal advisor to Information Professionals Co. (INFO PRO). Sara is the past president of the Fond du Lac County Bar Association, past president of the Association of Marquette University Women, and a recent member of the Joint Alpha Committee. She is a frequent speaker on real estate and estate planning topics and has contributed to the *Wisconsin Lawyer* by authoring articles, including one on correcting real estate documents. Sara received her undergraduate business degree and law degree from Marquette University. She is a member of the Fond du Lac and Milwaukee Bar Associations and the State Bar of Wisconsin.

**Barry J. Boline** has served as the Circuit Court Commissioner for Ozaukee County since his appointment in 2012. His responsibilities are varied and include presiding over pre- and post-judgment family matters, state and county traffic, small claims court, probate and guardianships, and some domestic violence and criminal matters. Since having become a commissioner, Barry has served as President of both the Wisconsin Family Court Commissioners Association and the Judicial Court Commissioners Association of Wisconsin, and is a frequent lecturer on family law issues throughout the state of Wisconsin.

**Dwight Darrow** practices in the areas of family law, personal injury and business-related litigation. Mr. Darrow has excelled in dealing with particularly complex and difficult cases for over three decades since earning his Doctor of Laws degree from the Marquette University School of Law in June of 1982. Mr. Darrow holds undergraduate degrees from the University of Hartford; Hartford, Connecticut, and Colby College in Waterville, Maine. Mr. Darrow has been admitted to practice law before all State of Wisconsin Circuit and Appellate Courts, the State of Wisconsin Supreme Court, The Federal Courts in the Eastern and Western Districts of Wisconsin, and the U.S. Bankruptcy Court for the Eastern District of Wisconsin. He has also been admitted to the bar for the United States Court of Appeals, 7th Circuit, and the United States Tax Court.

**Amy L. Menzel** is a partner at the Neenah law firm of Hammett, Bellin & Oswald, LLC. She received her undergraduate degree from Lawrence University in Government and her law degree from Marquette University. After graduation, she worked as a prosecutor for five in the Outagamie County District Attorneys Office with a special focus on sensitive crimes, including domestic abuse, child abuse and sexual assault cases. Since 2012, she has been with her current law firm and represents her clients in criminal, family, and personal injury matters. She is a past-president of the Outagamie County Bar Association and a member of the Wisconsin Association of Criminal Defense Lawyers and the National Association of Criminal Defense Lawyers. She also teaches in the police academy program at Fox Valley Technical College.

**Grant G. Zielinski** is a Certified Divorce Financial Analyst (CDFA), at Divorce Financial Solutions, LLC in Milwaukee Wisconsin. Grant and his father, Garrick Zielinski, created Divorce Financial Solutions, LLC in 2005 to help attorneys and their clients make well informed financial decisions incident to divorce. In his work at DFS, Grant has been involved in the drafting of over 6,000 Qualified Domestic Relation Orders (QDRO) and has personally provided over 3,000 Pension Valuations to attorneys and their clients. Grant specializes in the evaluation and division of Military Retirement and Wisconsin Retirement System. In addition to QDRO's and Pension Valuations, Grant has worked as a neutral financial specialist in Collaborative and Mediation cases to educate clients financial matters such as tax issues, maintenance, child support, and property division incident to divorce. Grant received his bachelor's degree from The University of Northern Iowa in 2006 where he played collegiate football for 4 years. He serves on the board of the Collaborative Family Law Council of Wisconsin (CFLCW), and the Collaborative Foundation of Wisconsin (CFW) and is member of the Wisconsin Association of Mediators (WAM). Personal email: [grant@divfinsolutions.com](mailto:grant@divfinsolutions.com)Star.

AMC Family Law Seminar:  
The Intersection of Family Law with Civil and Criminal Law

Attorney Dwight D. Darrow  
DARROW LAW OFFICES, S.C.

Lawyer Smith calls Lawyer Jones.

*“I have a client who will be receiving a large personal injury/social security/worker’s compensation award. My client tells me that you represent him (or her) in their divorce proceeding. Is there anything I should know before we conclude the settlement?”*

Four published cases address the issue.

**A. 1982 – Mack v. Mack**

**108 Wis.2d 604; 323 N.W.2d 153**

**Court of Appeals**

1. Issues on appeal were whether personal injury proceeds and an interest in a federal employee retirement fund are marital property.
2. Pertinent Facts: The husband was in a motorcycle accident. The settlement was broken down into the following component parts:
  - a. Medical expenses; wage loss; and pain and suffering: \$28,176.00
  - b. Future claims: \$100,000.00
  - c. Property damage: \$1,000.00The settlement check was made out to both spouses. The proceeds were placed into a joint account and used for joint purposes.
3. The Court reviewed Wis. Stats. §767.255 (now 767.61) and decided that since the settlement was not a gift, bequest, devise, or inheritance, it was marital property.
  - a. However, “... we conclude that it is appropriate to treat the settlement as marital property, but to give the greatest share of it to James.” Citing Wis. Stats. §767.255(2), now §767.61(3)
  - b. “Because of the continuing effect of the injury to James, this is an appropriate case to alter the apportionment from the presumed equal division.”
4. NOTE: The Court specifically held that the unequal property division could be considered in deciding maintenance and support. Deciding that this would not be double courting. *Kronforst v. Kronforst*, 21 Wis.2d 54, 64

**B. 1987 – Richardson v. Richardson**  
**139 Wis.2d 778; 407 N.W.2d 231**  
**Supreme Court**

1. The wife was a victim of medical malpractice. At the time of the divorce, the claim had not been settled or brought to judgment.
2. The Circuit Court held that any recovery for money advanced to pursue the claim; money for loss of earnings up to date of divorce was marital property.
3. Any recovery attributed to loss of wife’s bodily functions, future earnings, and pain and suffering was not property of the parties subject to division.
4. The Court of Appeals reversed. Held the entire claim was marital property.
5. The Supreme Court held that a personal injury claim for medical malpractice is property subject to division under Wis. Stat. §767.61.
  - a. However, “the nature of the claim for personal injury renders the presumption of equal distribution established in sec. 767.255(now 767.61) inapplicable. We conclude that when dividing a personal injury claim (before settlement or judgment of the claim), 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 the 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 earning incurred during the marriage are to be distributed equally.”
  - b. “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. We therefore conclude that the statutory presumption of equal distribution should be altered with respect to certain components of a personal injury claim.”

**C. 1989 – Krebs v. Krebs**  
**148 Wis.2d 51; 435 N.W.2d 240**

**Supreme Court**

1. Personal injury claim – structured settlement
2. Circuit Court – proceeds subject to presumption of equal division
  - a. Court of Appeals – Richardson says, “No”
3. Component parts of the settlement:
  - a. “Uninjured spouse” \$1,000.00
  - b. “Injured spouse” \$24,000.00; \$1,000.00 medical; \$200.00 - \$546.00 per month structured payments
  - c. Beneficiaries are children of the “uninjured spouse”
4. Money received was placed into a joint account used for marital purposes.
5. The Circuit Court found “injured spouse” presented little to no evidence regarding loss of bodily function or loss of earning capacity.
6. The Circuit Court gave 70% to “injured spouse” and 30% to “uninjured spouse.”
7. The Supreme held error to apply presumption of equal division. The presumption should be that the “injured spouse” is entitled to the “structured settlement” which is specifically allocated.
  - a. Given the facts of this case, equity requires that there be a presumption that the “injured spouse” is entitled to compensation to be received in the future. However, the Trial Court must then apply the factors set forth in Wis. Stats. §767.61. While there is a presumption that (the injured spouse) is entitled exclusively to all remaining payments under the structured settlement, they are still subject to the relevant facts under sec. §767.61 stats. (Citing Richardson)
  - b. “The presumption we announce regarding division of a personal injury claim does not take away the flexibility a court needs to make an equitable property division. Flexibility is preserved because the 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 sec. 767.255.”

**D. 1990 – Weberg v. Weberg**  
**158 Wis.2d 540; 463 N.W.2d 382**  
**Court of Appeals**

1. Workers' compensation award in a bank account. Uninjured spouse wanted account divided equally.
2. "In this case, we believe the logic of Richardson and Krebs would make the presumption equally applicable to a situation where the claim is not inchoate or payable at some future time but already has been made."
3. The trial court, of course, must still consider the factors set out in §767.61 stats. Thus, "the Court may alter the presumed distribution [retention of the settlement by the injured spouse] after considering the special circumstances of the personal injury claim."
4. The "special circumstances" in Weberg?
  - i. The funds with which the account was opened were the proceeds of (Mr. Weberg's) workers compensation settlement.
  - ii. While they were placed in a joint account, these funds were not "co-mingled" with marital assets.
  - iii. Although some monies withdrawn from the account were used for alleged "family" purposes, the account was held jointly only "for the purpose of protecting (the wife) in the event of (the husband's) death.
  - iv. "There was no evidence that the funds were co-mingled with other marital assets. Nor do we believe that the fact that Weberg may have used some of the interest generated by the account, and some of the principal, to pay marital debts invalidates the court's findings. Weberg is not seeking a credit for the withdrawals from the account nor does the trial court's decision allow such a credit. It awarded him the balance of the funds, and we that that was appropriate."

## LESSONS LEARNED

1. Presumption
  - a. The appropriate way to frame the discussion regarding personal injury funds is to argue that a “presumption” exists in favor of awarding the balance of the personal injury award to the “injured spouse” for loss of future earnings (beyond the final divorce date), pain and suffering, and disfigurement.
2. One may overcome the presumption.
  - a. The factors in Wis. Stat. §767.61 are still important and, in the right factual circumstances, a successful argument could be made to either share or not share the personal injury award.
3. “Injured spouses”
  - a. “Injured spouses” follow the same rules and analysis we follow for gifted or inherited assets. Trace, trace, trace. No transmutation.
4. Credit for money spent.
  - a. Seems like no, although the case law certainly opens the door for consideration.