

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003214-MR (Direct)  
and  
NO. 1997-CA-003256-MR (Cross)

WILLIAM F. AYERS

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM PULASKI CIRCUIT COURT  
HONORABLE WILLIAM CAIN, JUDGE  
ACTION NO. 97-CI-00268

HANNELORE AYERS

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING IN PART  
AND

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VACATING AND REMANDING IN PART

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BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE, Judges.

COMBS, JUDGE: This is an appeal and cross-appeal from the judgment of the Pulaski Circuit Court in a dissolution action between William F. Ayers (William) and Hannelore Ayers (Hannelore). The parties challenge the court's division of the marital property. Having reviewed the record and the parties' briefs, we affirm the court's judgment in part and vacate and remand in part.

William and Hannelore were married on December 17, 1988; no children were born of the marriage. In April 1997,

William filed a petition for dissolution of the marriage. During the marriage, William and Hannelore both received money from workers' compensation settlements. William received approximately \$48,000.00 from three workers' compensation settlements between 1985 and 1992 for injuries sustained prior to the marriage. He was awarded an additional \$35,000.00 from three personal injury settlements.<sup>1</sup> The parties had spent all of the money from William's various settlements by the time of the dissolution action. Hannelore received \$94,900.00 from a workers' compensation settlement in 1997. When William filed his petition for dissolution, all that remained of Hannelore's settlement was the \$40,000.00 that she had placed in several certificates of deposit at her bank and \$4,600.00 in her savings account.

On November 18, 1997, the court entered its judgment dissolving the Ayers' marriage and dividing the non-marital and marital property. The court found that \$20,000.00 of William's personal injury settlements and \$16,000 of the money from his workers' compensation settlement were marital property. The court held that Hannelore's entire settlement was marital property. Pertinent to this appeal and cross-appeal, the court made the following findings as to the division of the marital and non-marital property:

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<sup>1</sup>The sum of \$15,000 of this \$35,000-aggregate figure was received during the marriage for an accident that had occurred prior to the marriage. Prior to their marriage, William had also received \$8,984.30 from a personal injury settlement in 1987.

D. The marital residence shall be sold at public auction by a private auction company agreeable to the parties. After the costs of the sale are paid, [William] shall be paid \$5,000.00 for his non-marital interest in the residence. The balance remaining shall be divided equally between the parties.

\* \* \*

G. The 1985 Chevrolet Blazer and the boat, motor, and trailer shall be sold at public auction by a private auction company agreeable to the parties, with the proceeds after payment of costs of the sale divided equally.

H. [William] shall be awarded one-half or a \$20,000.00 credit in the Certificate of Deposits which contain a portion of [Hannelore's] lump sum workers' compensation benefits. [Hannelore] shall be awarded a \$10,000.00 credit in [William's] personal injury settlement. Accordingly, [William's] amount shall be reduced as follows:

|                |  |
|----------------|--|
| \$20,000       | one-half of the Certificate of Deposits                              |
| <u>-10,000</u> | [Hannelore's] marital interest in [William's] Personal injury award. |
| \$10,000       | [William's] total marital interest                                   |

Therefore, [William] shall be awarded a \$10,000.00 credit which represents his marital interest.

[William] received \$47,332.12 in a workers' compensation settlement. Of that amount, approximately \$16,000.00 is marital property. Accordingly, [Hannelore] shall also be awarded an \$6,000.00 credit for her marital interest in [William's] workers' compensation award. Therefore, the net result that [William] is entitled to and shall be awarded is the sum of \$2,000.00. This amount is explained in the following calculations:

|          |   |                         |
|----------|---|-------------------------|
| \$20,000 | [William's] marital interest in the certificates in the amount derived from [Hannelore's] workers' compensation settlement. | of Deposits of \$40,000 |
|----------|---|-------------------------|

-10,000 [Hannelore's] marital  
interest in [William's]  
personal injury award.

10,000.00 [William's] marital  
interest

-8,000.00 [Hannelore's] marital  
interest in [William's]  
workers' compensation  
settlement.

\$2,000.00 TOTAL NET AMOUNT  
[WILLIAM] SHALL  
BE AWARDED.

From these calculations, [William]  
is awarded the sum of \$2,000.00 which  
represents his marital interest in the  
Respondent's workers' compensation award  
offset by [Hannelore's] marital interest in  
[William's] personal injury and workers'  
compensation settlements.

The court also divided the money in the savings and checking  
accounts equally between William and Hannelore. William filed an  
appeal from the court's judgment, and Hannelore cross-appealed.

William argues on appeal that the court erroneously  
reduced his award of marital property with a set-off of  
Hannelore's marital interest in his workers' compensation and  
personal injury settlements. We agree. The record shows that  
all of the money from William's various settlements – both the  
marital and non-marital portions – had been spent by the parties  
before the dissolution action. The court has erroneously  
attempted to divide property which no longer exists.

The testimony of both William and Hannelore established that  
their financial assets remaining at the time of dissolution – the  
certificates of deposit and the savings and checking accounts –  
came from her workers' compensation settlement. With respect to

Hannelore's lump sum award of \$94,900.00 received in February, 1997, we are mindful of the recitation contained in the Redemption Order of the Michigan Department of Labor:

The lump sum is compensation for permanent impairment that will affect claimant over her life expectancy of 228 months. Even though paid in a lump sum, the benefits shall be considered to be \$417.00 a month for 228 months, as of 12-19-96.

Hannelore argues on her cross appeal that this sum should be treated as non-marital property since it was clearly intended to be an award for her future income benefits. She also contends that all items purchased with the money from the settlement are non-marital assets as well. We disagree. Despite the fact that she received the check only two months prior to the filing for dissolution, Hannelore nonetheless did receive the entire lump sum during the marriage for an injury that occurred during the marriage. The vicissitude of the timing of receipt of the money results in the characterization of all the residue of Hannelore's settlement as marital property subject to division. We are governed by Johnson v. Johnson, 638 S.W.2d 703 (1982), which is directly on point:

The principal question before us in this case is whether a lump-sum award of workers' compensation received by one of the spouses during the pendency of a divorce action between them is marital property within the meaning of KRS 403.190(2). We need not look beyond the plain language of the statute to find the answer. It defines marital property as all property acquired by either spouse subsequent to the marriage, with five listed exceptions. Though an award of workers' compensation may be intended to replace lost wages which otherwise would have been earned in the future, it nevertheless is money in hand and it is not within the exceptions to

KRS 403.190, which is the controlling statute.

Id. at 704.

This principle is reiterated in Mosley v. Mosley, Ky. App., 682 S.W.2d 462, 463 (1985) as follows:

Payments that are received, or weekly benefits that have actually accrued but have not yet been paid as of the date of the dissolution of the marriage, are to be included as marital property, just as earned income.

William next contends that court erred in finding that his non-marital interest in the parties' marital residence was only \$5,000.00. He argues that he spent \$5,632.96 in non-marital funds from his workers' compensation settlements on improvements to the parties' former home in Michigan. The parties sold the house in Michigan in 1990 and used the proceeds to purchase their marital residence in Kentucky. Thus, William asserts that his non-marital interest in the marital residence is \$10,632.96 rather than \$5,000.00. However, he offers no documentation to support his assertion and to satisfy his burden of tracing the additional non-marital funds to improvements on the house in Michigan. Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990). The record shows that both William and Hannelore testified by deposition that he contributed \$5,000.00 of non-marital funds toward the purchase of the house in Michigan. We do not find that the trial court abused its discretion nor that it clearly erred in concluding that William had only a \$5,000.00 non-marital interest in the parties' marital residence.

William also argues that the court erred in finding that the 1985 Chevrolet Blazer was marital property. He alleges that Hannelore gave the Blazer to him as a gift and that under KRS 403.190(2)(a) it is non-marital property. Contrary to William's assertion, Hannelore denied that she gave the Blazer to him as a gift. She testified that she used the money from her settlement - marital property - to pay-off the money that they borrowed to buy the Blazer. We find no error in the trial court's finding.

In summary, we hold that the court erred in attempting to salvage part of William's non-marital interest in his various settlement awards by virtue of a set-off against existing assets. Absent a clear trail of tracing, no funds remained to be divided or set off. Additionally, we hold that the entire remainder of Hannelore's workers' compensation settlement (both the \$40,000.00 in certificates of deposit and the \$4,600.00 in her savings account) was marital property subject to division. Therefore, we vacate and remand Paragraph H of the judgment and direct the court to re-calculate William's marital interest as to the remaining portions of Hannelore's workers' compensation settlement.

We affirm in part and vacate and remand in part the judgment of the Pulaski Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-  
APPELLEE:

Robert E. Gillum

BRIEFS FOR APPELLEE/CROSS-  
APPELLANT:

Jane Adams Venters

Somerset, KY

Somerset, KY