

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001021-MR

WILLIAM KEENEY

APPELLANT

v. APPEAL FROM GREENUP FAMILY COURT  
HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 08-CI-00743

SUSAN KEENEY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: William Keeney appeals that portion of the April 24, 2009 decree of dissolution entered by the Greenup Family Court which characterized a settlement award in his favor, made pursuant to the Federal Employers' Liability Act (FELA), 45 United States Code (USC) 51, *et seq.*, as marital property and awarding a portion to his ex-wife, Susan Keeney. For the following reasons we affirm.

Before this Court, William fails to state in his brief how his claims of error were preserved and he also fails to cite to the record, both of which are required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Consequently, we shall accept the statement of facts contained in Susan's brief which does comply with the Rules.

The relevant facts are that Susan and William were married on March 17, 1995. During their marriage, William was employed at CSX Transportation, Inc. On February 10, 2006, William was injured on the job and did not work thereafter. He filed a claim pursuant to FELA which was still pending when the parties separated on October 3, 2008. The family court entered an order requiring William to immediately report any settlement to the court and to Susan's attorney and, further, that there was to be no dissipation of the proceeds.

In mid-February 2009, William revealed in his deposition that he had settled the FELA claim on November 20, 2008, and received two lump sum payments totaling \$312,272.00, plus a monthly benefit of \$2,607.00. He also acknowledged spending approximately \$50,000 of the proceeds, primarily for the purchase of a new vehicle.

All contested issues were addressed at the final hearing on April 14, 2009, including William's contempt for the court's order regarding the FELA

settlement.<sup>1</sup> The parties were given the opportunity to present evidence as to the character and value of their assets, including the FELA settlement proceeds.

To establish that the FELA settlement was non-marital property, William offered into evidence the FELA settlement agreement and release. The documents did not present any breakdown of the proceeds into categories of lost past wages, lost future wages, medical expenses, pain and suffering, etc., nor did they, in any other way, shed light on the marital or non-marital character of the settlement proceeds.<sup>2</sup> Over Susan's objection that the documents speak for themselves, William was allowed to testify that the settlement documents did not specify that any portion was to compensate him for past wages or future wages, but was simply to compensate him for his "injury."

On April 24, 2009, the family court entered its Findings of Fact, Conclusions of Law, Decree of Dissolution of Marriage and Order. Regarding the FELA settlement proceeds, the family court stated:

[William] admits he violated the Court's Order when he utilized some of the FELA proceeds. He received \$307,272.00 plus another \$12,000.00. The bulk of the money was received November 20<sup>th</sup>, 2008. He purchased a Cadillac Escalade in the amount of \$47,000.00 with part of the money. He also purchased a dirt bike for \$2,200.00 for his son. He also purchased Christmas presents with the money. He relates there is over

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<sup>1</sup> We note that the family court had previously granted the motion to withdraw filed by William's original attorney; Mr. Lyon, who represents William in this appeal, promptly informed Susan's counsel of the settlement upon entering his appearance. Ultimately, William was found to be in contempt of the family court's order and sanction was imposed. However, that issue is not relevant to the matter before us.

<sup>2</sup> William's FELA claim was contested in Jefferson Circuit Court, but he presented no pleadings indicating the categories of his claims which might have shed some light on the issue.

\$200,000.00 of the money left and it is in First and People's Bank. . . .

[William] introduced a copy of the settlement and final release from the FELA claim. The Court has examined those documents and cannot determine from those documents what the money was paid for. In other words, there is no documentation to show how much of the money was for pain and suffering, lost wages, medical expenses, etc. Without that documentation, which was the burden of [William], the Court is bound to find that the money is marital property which is to be divided between the parties. . . .

From the proceeds of the FELA settlement, the parties' credit card debt shall be paid there from. The remaining proceeds from the FELA settlement, except as otherwise set out herein, shall be divided equally between the parties as same has not been proven to be non-marital property. . . .

(Decree, entered April 24, 2009).

William filed a timely "Motion to Vacate, Alter or Amend." He did not file a motion for additional findings. He argued to the family court that it had erred in determining that all of the lump sum FELA settlement proceeds were marital assets; however, he pointed to no evidence to support his claim of error. The family court denied William's motion. This appeal followed.

When determining how to divide the property of divorcing spouses, the family court must first make findings of facts. CR 52.01. Then, "[i]t is the duty of the trial court to apply statutory standards [*i.e.*, Kentucky Revised Statutes (KRS) 403.190] to the [findings of] facts . . . and to make a just division of the marital property." *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). On review, the

family court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. "The Court of Appeals then should . . . determine if there has been an abuse of discretion" in the application of those statutory standards. *Herron*, 573 S.W.2d at 244.

In this case, the family court properly considered William's evidence that all or a portion of his FELA settlement proceeds were non-marital. The evidence included that William received the settlement proceeds after the parties were married and before they were divorced. Because "[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property," KRS 403.190(3), the family court correctly concluded that it was William's burden to overcome that presumption with evidence establishing what portion of his settlement with CSX, if any, was non-marital. *Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. App. 1977) ("The burden is on the Appellant to prove by clear and convincing proof that" that property presumed marital by operation of KRS 403.190(3) is non-marital.). William failed to do so.

The settlement document William presented said nothing about the character of his award sufficient to overcome the presumption of KRS 403.190(3). On the other hand, the family court was aware that William was unable to work for more than three years before the parties' marriage terminated. The family court was also aware that in addition to the lump sum payments, William was to receive future monthly payments of \$2,607. These two facts make unreasonable the inference

William urges – “that the bulk, if not the entirety of the settlement . . . was for pain and suffering and loss of future wages, neither of which constitute marital property.” (Appellant’s brief, p. 5). Considering that William had no income for three years before the marriage ended and was going to be receiving separate future monthly payments, it is more reasonable to infer that the bulk if not the entirety of the settlement was for wages William lost during the marriage. As our Supreme Court said in *Weakley v. Weakley*,

When the injury occurs during the marriage, the recovery allowable for loss of wages and permanent impairment of the power to earn money is . . . a replacement for the ability of the injured party to earn money that otherwise would have been earned during the marriage. Both the injured party and the spouse of the injured party had an expectation that those earnings would have continued but for the injury. Loss, during the marriage, of ability to earn money which otherwise would have been earned during the marriage is a loss to the marital estate.

*Weakley v. Weakley*, 731 S.W.2d 243, 244 (Ky. 1987).

Simply arguing that the FELA settlement is “property having both marital and non-marital components[,]” (Appellants’ brief, p. 4), is not sufficient to overcome the presumption of KRS 403.190(3). Even if it could be inferred that the settlement is a mixed asset, the family court would have to speculate as to what percentage is marital and what percentage is non-marital. The presumption of KRS 403.190(3) frees the court from the perils of such speculation. Again, it fell to William to provide proof sufficient to identify the specific amount of the settlement proceeds that were non-marital. William’s uncertainty whether the non-

marital portion represented merely “the bulk [or] the entirety” of the proceeds assures us that even William himself can do no more than speculate.

The family court determined the FELA award was marital property because William failed to demonstrate otherwise. The facts determined by the family court are not clearly erroneous. The family court’s application of the law to those facts does not indicate an abuse of discretion.

Finally, William contends the family court erred when it failed to make additional findings of fact following his “Motion to vacate, alter, or amend” the order. William argued before the family court that the order of April 24, 2009, did not take into account any of the factors enumerated in KRS 403.190(1) which instruct courts how to divide marital assets. We disagree.

KRS 403.190(1) instructs a family court to divide marital assets as follows:

[The court] shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

KRS 403.190(1). The statute does not require a circuit court to consider these factors for each item of marital estate; rather, the court is to make an equitable division of the marital estate as a whole. Similarly, we review the family court's division as a whole. *Day v. Day*, 302 S.W.3d 86, 89 (Ky. App. 2009) (appeal of finding entire workers' compensation settlement was marital property and reviewing "division of marital property as a whole"). It was therefore not improper for the family court to fail to apply the provisions of KRS 403.190(1) to a single marital asset, so long as it appears from the record the statutory factors were applied to the assets as a whole. Our review of the record reveals the family court took into account the work history of the parties, their relative income, their respective non-marital property and the debt and equity they had accrued during the marriage. The family court's refusal to make more specific findings with respect to the FELA award alone was not erroneous.

For the foregoing reasons, we affirm the Greenup Family Court's Findings of Fact, Conclusions of Law, Decree of Dissolution of Marriage and Order.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Lyon, Jr.  
Greenup, Kentucky

BRIEF FOR APPELLEE:

Gordon J. Dill  
Ashland, Kentucky