

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-001788-MR

BARRY BRANHAM

APPELLANT

v. APPEAL FROM JOHNSON FAMILY COURT  
HONORABLE JANIE MCKENZIE-WELLS, JUDGE  
ACTION NO. 07-CI-00588

VICKI BRANHAM

APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL AND WINE, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Barry Branham appeals from a Johnson Family Court decree of dissolution, entered on July 18, 2008, and the court's subsequent order denying Barry's<sup>2</sup> motion to alter, vacate, or amend the marital property award,

<sup>1</sup> Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

<sup>2</sup> We refer to the parties by their given names for the sake of clarity and without intending any disrespect.

entered on August 27, 2008. On appeal Barry contests the trial court's division of assets, findings of fact, and allocation of debt. Finding no clear error, we affirm the Johnson Family Court orders.

Barry married Vicki in 1983. They separated on July 30, 2007. On December 20, 2007, Vicki filed a petition for dissolution of the marriage. On July 18, 2008, the trial court entered its findings of fact, conclusions of law, and decree of dissolution. On July 29, 2008, Barry moved the trial court to alter, amend, or vacate its findings. On August 27, 2008, the trial court denied Barry's motion. This appeal follows.

First, Barry claims that the trial court improperly divided the marital assets in two ways: (1) by failing to label each property item as marital or non-marital; and (2) by finding that Barry's workers' compensation award was a marital asset, and thus subject to division.

It is well established that courts must designate property as marital or non-marital. KRS 403.190. In its decree of dissolution the trial court found that, "[t]he parties have no non-marital property to be restored." This finding was based upon the testimonies of both Barry and Vicki. Since the dissolution did not involve any non-marital property, it would be redundant to require the trial court to designate each individual item as marital property. There was no error in the trial court's designation of property.

Barry also claims that the trial court's division of assets was erroneous because workers' compensation benefits that include past and future lost wages do

not qualify as divisible marital assets. In January 2000, Barry injured both of his ankles while at work. From the time of his injury until May 5, 2007, Barry received temporary total disability benefits totaling \$193,431.40. In May 2007, the workers' compensation claim was settled. Barry received a \$10,000.00 lump sum payment in June 2007 and a \$28,000.00 lump sum payment in December 2007. A total workers' compensation settlement was approved on October 2, 2007. Barry currently receives \$509.00 a week plus \$1,500.00 per month in disabled social security benefits.<sup>3</sup>

Rather than expressly awarding Vicki a portion of Barry's lump sum workers' compensation payments in the property division, the trial court ordered Barry to pay \$14,000 on the debts secured by the marital residence. The trial court wrote that "this shall account for the [Appellee's] equitable share of the [Appellant's] Workers' Compensation Award received after the separation of the parties, but due to an injury which occurred 7 years prior to that time and during the marriage." Barry argues that Vicki was not entitled to a portion of the workers' compensation settlement because workers' compensation benefits are not considered marital property under KRS 403.190. We disagree.

KRS 403.190(2) provides:

For the purposes of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

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<sup>3</sup> The details of Barry's workers' compensation settlement are not within the Workers' Compensation Board Order Approving Settlement appended to the appellant's brief.

- (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
- (b) Property acquired in exchange for property acquired before the marriage or in exchange for the property acquired by gift, bequest, devise, or descent;
- (c) Property acquired by a spouse after a decree of legal separation;
- (d) Property excluded by valid agreement of the parties; and
- (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

The statute does not provide an exception for workers' compensation benefits. In *Johnson v. Johnson*, 638 S.W.2d 703, 704 (Ky. 1982), the Kentucky Supreme Court addressed the question of whether workers' compensation benefits and payments constituted divisible marital property. The Court held:

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 the hand and it is not within the exceptions to KRS 403.190, which is the controlling statute.

The *Johnson* Court declined to extend its reasoning beyond payments made prior to divorce. Since Barry's workers' compensation lump sum payments were received prior to the divorce, we find that the payments were clearly a

divisible marital asset and find no error in the trial court's decision. Barry's reliance on *Mosley v. Mosley*, 682 S.W.2d 462 (Ky. 1985), is misplaced. In the present case, Barry had received \$38,000.00 in lump sum benefits before the marriage was dissolved. The \$14,000.00 which the trial court effectively awarded to Vicki can be allocated to those payments. Thus, there is no division of "future" workers' compensation payments in the present case.

Next, Barry claims that the trial court erred in its assessment of the value of home furnishings. Vicki testified that the home furnishings had a value in excess of \$100,000.00. Although Barry disagreed with the amount, the trial court found that the home furnishings were valued in excess of \$100,000.00. We will not disturb the trial court's findings of fact, despite conflicting evidence, absent clear error. Kentucky Rules of Civil Procedure (CR) 52.01; *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). In light of Vicki's testimony, we find that ample evidence existed to support the trial court's conclusion.

Finally, Barry argues that the trial court erred by allocating a disproportionate amount of debt to him while awarding the automobile to Vicki. During the parties's separation, a marital automobile was repossessed. Vicki took possession of a marital truck valued at \$5,000.00 and claimed that she had no other form of transportation. The trial court awarded Vicki the truck and assessed the remaining debt on the repossessed car to Barry.

Barry claims that the trial court erred by assessing him one half of the deficiency balance while awarding the remaining marital automobile to Vicki.

KRS 403.190(1)(b) requires courts dividing marital property to consider the value of property set apart to each spouse. Moreover, KRS 403.190(1) requires courts to also consider other factors, including each spouse's contribution to the acquisition of marital property, the duration of the marriage, household duties, and the economic circumstances of each spouse. Courts are not obligated to divide property equally but instead must divide property in "just proportions." *Brosick v. Brosick*, 974 S.W.2d 498, 503 (Ky. App. 1998); KRS 403.190(1). Whether a division is within just proportions lies solely in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Niedlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). We do not find such abuse here.

The record reflects that Vicki did not receive maintenance or a portion of Barry's workers' compensation settlement, despite the 24-year duration of the marriage, including the several years Vicki spent caring for Barry while he was injured. We recognize that the trial court's award of debt is unequal, but we decline to conclude that the award was unjust or disproportionate.

Accordingly, we affirm Johnson Family Court's decree entered July 18, 2008, and order entered August 27, 2008.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Inez, Kentucky

BRIEF FOR APPELLEE:

Don A. Bailey  
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