

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

NO. 2010-CA-000094-MR

MELINDA KAYE ELMORE

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT  
HONORABLE SAM H. MONARCH, JUDGE  
ACTION NO. 08-CI-00162

MICHAEL RAY ELMORE

APPELLEE

OPINION  
AFFIRMING IN PART, VACATING IN PART  
AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Melinda Kaye Elmore appeals from a judgment and decree of dissolution of marriage rendered by the Butler Circuit Court. The sole issue presented on appeal regards the classification of Michael's retirement account as

---

<sup>1</sup> Senior Judge Sheila R. Isaac 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.

non-marital property. Because we conclude the trial court erred as a matter of law, we affirm in part, vacate in part and remand for additional proceedings.

The parties were married in June 1990 and separated in June 2008. At the time of their divorce, Michael was employed as a school principal, and Melinda was employed as a social worker's aide. The parties resolved many of their issues by executing a property settlement agreement, which was subsequently approved by the trial court. On March 13, 2009, the court held a hearing to resolve the contested issues, which included whether to classify Michael's Kentucky Teachers' Retirement Systems (KTRS) account as marital or non-marital property. At the hearing, discussion between counsel and the court indicated that Melinda's (non-KTRS) retirement account was valued at approximately \$8,000.00, and Michael's KTRS account was valued at approximately \$74,000.00. The court noted that KRS 161.700(2) excludes a KTRS account from classification as marital property; accordingly, the court classified Michael's KTRS account as non-marital. As to Melinda's non-KTRS account, the court held, pursuant to *Shown v. Shown*, 233 S.W.3d 718 (Ky. 2007), that her retirement account was also non-marital to the extent it did not exceed the value of Michael's KTRS account. After the court rendered its final judgment in April 2009, Melinda unsuccessfully sought post-judgment relief. She now appeals the court's decision to classify Michael's account as non-marital property.

“On appellate review of a trial court's ruling regarding the classification of marital property, we review *de novo* because the trial court's

classification of property as marital or non-marital is based on its application of KRS 403.190; thus, it is a question of law.” *Heskett v. Heskett*, 245 S.W.3d 222, 226 (Ky. App. 2008) (citation omitted).

While KRS 161.700(2) excludes KTRS accounts from classification as marital property upon divorce, the statute also provides that the exclusion applies only “to the extent permitted under KRS 403.190(4).” In turn, KRS 403.190(4) provides in relevant part:

If the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be. However, the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse.

In *Shown*, the Kentucky Supreme Court read the two statutes in conjunction with one another and found the statutes harmonious. *Shown*, 233 S.W.3d at 720-21. The Court construed the “level of exception” language of KRS 403.190(4) as applicable to the retirement accounts of either spouse, even where the teacher-spouse had a KTRS account that was significantly more valuable than the non-teacher spouse. *Id.* at 721. The Court concluded, “Both case law and the statutory language itself demonstrate that KRS 403.190(4) was intended to serve as a limitation upon exemption statutes such as KRS 161.700(2).” *Id.*

According to the statutory interpretation enunciated in the *Shown* decision, Melinda contends that the court should have classified the portion of Michael’s KTRS pension, which exceeded the value of Melinda’s retirement

account, as marital property. On the other hand, Michael contends that the trial court did not make sufficient findings for this Court to review the issue; alternatively, he asserts that any error was harmless because of the marital debts allocated to Michael.

After careful review, we agree with Melinda that the trial court erred in its interpretation of *Shown* and the relevant statutes. Here, as in *Shown*, the teacher-spouse's KTRS account exceeded the value of his spouse's pension. As Michael's pension exceeds Melinda's, KRS 403.190(4) exempts only the portion of Michael's KTRS account that does not exceed the value of Melinda's pension. Accordingly, we vacate the portion of the judgment regarding the classification of retirement benefits and remand for further proceedings consistent with this opinion.

For the reasons stated herein, the judgment of the Butler Circuit Court is affirmed in part, vacated in part and remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven O. Thornton  
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

David A. Lanphear  
Bowling Green, Kentucky