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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002725-MR

NATALIE CAROLYN FOSTER HOLBROOK

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 03-CI-00071

KENNETH EDWARD HOLBROOK

APPELLEE

### OPINION AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR  
JUDGE.<sup>1</sup>

COMBS, CHIEF JUDGE: Natalie Holbrook appeals from a judgment of the Bell Circuit Court of November 23, 2003, dissolving her marriage to the appellee, Kenneth Holbrook. She argues that the trial court erred in classifying proceeds from a personal injury settlement as Kenneth's non-marital property. She also contends

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<sup>1</sup> Senior Judge John D. Miller, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

that the trial court erred in dividing the marital property and allocating the marital debts. After reviewing the record and the applicable legal authorities, we affirm.

The parties married in 1985 and separated in 2002. Natalie, a nurse, earns about \$3,100 per month. Kenneth is disabled as a result of a 1997 automobile accident, and he receives Social Security disability benefits of \$907 per month. After their separation, the parties agreed on all issues relating to the custody, support, and visitation of their two children: Ashley, born in 1995; and Nicholas, born in 2001. All other issues arising from the marital relationship were resolved by the trial court.

In its final judgment, the trial court awarded Natalie assets totalling \$128,310, which represented the marital residence and furnishings, a Jeep, her retirement account, and her profit sharing plan. Natalie was also assigned responsibility for all marital debts in the amount of \$110,047.44, a sum which included the mortgage on the residence and all credit card debts. Thus, she received a net award of \$18,262.56 in marital property.

Kenneth received \$12,029 in marital property in the form of a mobile home, a Ford truck, and other items of personalty; he was assigned none of the marital debt. Kenneth was also awarded the proceeds remaining from a 1999 settlement

of his automobile injury accident claim as his non-marital property.

On appeal, Natalie's first claim of error concerns the court's treatment of the proceeds from the personal injury settlement. In the fall of 1997, Kenneth suffered serious physical injuries as a result of an automobile accident. The parties filed a lawsuit against the tortfeasor to recover damages for Kenneth's injuries and for Natalie's loss of consortium. They settled the lawsuit for the lump sum of \$140,000. The settlement agreement did not contain any breakdown of the specific elements of damages that the payment was intended to compensate. The Holbrooks invested \$80,400 (the entire amount remaining after they paid their attorney's fees and costs) in a joint certificate of deposit (CD).

The CD remained in the bank, and the earnings were reinvested until June of 2002. At that time, Kenneth withdrew the money (which had grown to \$84,641) and from that point on asserted total control over it. He testified that only \$50,000 remained at the time of the parties' separation in December 2002. He accounted for the difference as representing trust accounts set up for the children, improvements made on the marital residence, and payment of living expenses.

Natalie did not dispute that Kenneth placed \$10,000 in their children's trust accounts. However, she testified that

none of the money had been spent on the house or was used to make purchases for the family. She asked the trial court to treat the entire \$84,641 as marital property and to divide it equally between the parties. Relying on Weakley v. Weakley, 731 S.W.2d 243 (Ky. 1987), Kenneth argued that the settlement proceeds were intended to compensate him for his pain and suffering. He asked that the remaining proceeds be characterized solely as his non-marital property.

The trial court agreed with Kenneth, specifically finding in the final decree that "the settlement was for [Kenneth's] pain, suffering and bodily injury." Without making a finding as to the exact amount left at the time of the parties' separation, the court awarded whatever remained from the settlement to Kenneth as his non-marital property.

Natalie first contends that the trial court erred in overlooking the fact that the settlement proceeds were partially intended to compensate her for her loss of consortium. (Appellant's brief, p. 4.) However, this argument has not been properly preserved for our review. Natalie did not assert a non-marital interest in any portion of the settlement proceeds as compensation for her loss of consortium in the trial court. In order to be considered on appeal, errors must have been

"precisely preserved and identified in the lower court." Skaggs v. Assad, 712 S.W.2d 947, 950 (Ky. 1986); CR<sup>2</sup> 76.12(4)(c)(v).

Natalie did not introduce any evidence to establish what portion of the settlement was intended to compensate her. Instead, she argued that the entire settlement was marital property because of the fact that the settlement check was made payable to both parties and that it was placed in a joint account. The parties themselves did not treat any part of the \$80,400 as compensation for Natalie's loss of consortium on their joint 1999 income tax return. Thus, we find no error in the trial court's failure to classify any of the proceeds as personal to Natalie.

Natalie next argues that Weakley, supra, does not support Kenneth because the settlement reached with the tortfeasor did not set forth the manner in which it was to be allocated among the various claims for damage. Both parties rely on the following pertinent portions of Weakley:

When [an] injury occurs during the marriage, the recovery allowable for loss of wages and permanent impairment of the power to earn money is, in many respects, similar to a workers' compensation award. It 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

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<sup>2</sup> Kentucky Rules of Civil Procedure.

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.

To the extent that a personal injury award for loss of earnings and permanent impairment of ability to earn money is applicable to the years while the marriage existed, it is marital property. To the extent that the award can be prorated to the remaining years of life expectancy following the dissolution of the marriage, it is nonmarital.

However, any portion of the recovery which constitutes damages for pain and suffering must stand on a different footing because it is in no sense the replacement of earnings that otherwise would have accrued during the marriage.

As a matter of fairness it does not seem right that upon the dissolution of the marriage one of the parties should be rewarded because the other party had the misfortune to suffer painful injuries as a result of an accident. The law does not require such a result.

Even when the injury occurs during the marriage, the injured party, prior to marriage, was free of the pain for which damages are awarded. The pain-free physical condition which existed before the marriage is exchanged for a condition burdened with pain. We consider KRS<sup>3</sup> 403,190(2) applicable, and hold that as to pain and suffering resulting from an injury sustained during the marriage, the injured party has simply exchanged property acquired before the marriage, i.e., good health, free from pain, for the money received as compensation for the loss.

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<sup>3</sup> Kentucky Revised Statutes.

. . . .

We do not attempt to decide here the proper procedure for the allocation between marital and nonmarital property of a personal injury award for an injury sustained during the marriage where the settlement of judgment does not indicate what portion of the award applies to earning capacity and what portion is allocated to pain and suffering.

Weakley, 731 S.W.2d at pp. 244-245.

Citing the last paragraph quoted above, Natalie contends that the trial court was required as a matter of law to classify the entire settlement proceeds as marital property. However, that language addresses a *procedure* for parsing out the elements of an award that does not dictate the substantive result that Natalie seeks. Her argument disregards Weakley's emphasis that the result she seeks would work an injustice to the party who actually sustained debilitating injuries.

We conclude that the trial court reasoned correctly in attempting to determine from the evidence the non-marital portion of the settlement proceeds (pain and suffering) and the marital portion (lost wages that would have been earned during the marriage). It found that the settlement was intended solely to compensate Kenneth for his pain and suffering rather than to replace his wages. That finding must be reviewed by this court under the "clearly erroneous" standard. Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986); CR 52.01. After our review of the

record, we have discovered no error in the court's determination. In addition to Kenneth's own testimony, its finding is supported by the following pertinent statements made by the appellant herself:

Q. What did your husband do prior to becoming disabled?

A. . . . He has never really been much for work. He went from job to job and, throughout our marriage, he was off work much, much more than he was working. He's got the perfect situation now. He can draw a check and sit around and smoke pot.

. . . .

Q. Can you tell the Court the reason for the breakup of this marriage?

A. Even before Kenneth went on disability he really didn't do anything. He was hard pressed to hold a job. He has had so many jobs you couldn't count them on both fingers and toes. He would work a little bit and quit, work a little bit and quit. Basically, he was just content to sit around the house and do nothing. We were constantly arguing and fighting and I just figured I could do a lot better for myself and my children without him.

In consideration of Kenneth's poor earning history and the undisputed fact that at least \$10,000 was dedicated to the benefit of the parties' children, we conclude that the trial court did not err in finding that the remaining settlement proceeds were intended to compensate Kenneth for his pain and

suffering and, accordingly, in treating the proceeds as non-marital in nature.

Natalie also contends that the court abused its discretion in dividing the marital estate so as to allocate to her alone the entire marital debt.

Simple arithmetic applied to Natalie's award of marital property less the marital debts she is obligated to pay under the Decree calculates to a net award to Natalie of \$957.00. At the same time, Kenneth's take under the Decree calculates to \$102,170.00. The inequity is obvious and mandates a reversal of the Trial Court.

(Appellant's brief, at p. 9.)

In making this argument, Natalie ignores the non-marital nature of the personal injury settlement. She also utilizes her own valuations for various items of property -- values that were not accepted by the trial court in dividing the property. Using its valuations, the trial court calculated the marital assets as being worth a total of \$140,339. Natalie was awarded property worth \$128,310 -- or 91% of the gross estate. After subtracting the entire marital debt from her share of the assets, the court awarded her 60% of the marital property.

Because the values placed on the property by the trial court were supported by the evidence, its findings as to valuation are not clearly erroneous. Therefore, they cannot be disturbed. Cochran v. Cochran, 746 S.W.2d 568, 569-570 (Ky.App.

1988). "KRS 403.190 vests in the trial court wide discretion in the division of marital property." Johnson v. Johnson, 564 S.W.2d 221, 222 (Ky.App. 1986).

We have found no abuse of that discretion. Although Natalie is encumbered with a large amount of debt, including a considerable amount of credit card debt, the record reveals that she is the party who primarily incurred the debt. She is also the party who received the property purchased with the debt. She is the only party leaving the marital relationship with the financial ability to pay the debt. Under these circumstances, there was no abuse of discretion in the court's assignment of all of the debt to her. Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001).

The decree of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gerald L. Greene  
Pineville, Kentucky

BRIEF FOR APPELLEE:

R. Scott Wilder  
Pineville, Kentucky