

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

NO. 2009-CA-000820-MR

GARRY MARRS COMER

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT  
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE  
ACTION NO. 99-CI-01010

SUSAN BARRETT COMER

APPELLEE

OPINION  
AFFIRMING

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

MOORE, JUDGE: Garry Marris Comer and Susan Barrett Comer having litigated this matter for nearly ten years, including this third appeal, are thoroughly familiar with the facts and procedural background. Accordingly, our focus will be succinctly directed to the issues presently contested.

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<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 Statute (KRS) 21.580.

Through the dissolution of marriage proceedings initiated by Susan on August 11, 1999, Garry and Susan entered into a partial settlement agreement on March 21, 2001. For the purposes of this appeal, items that remained unresolved are the distribution of 44.72 acres, on which the parties' marital residence is located, and debt the parties incurred during their marriage.

Although the property is one contiguous piece of land, it is often referenced as four tracts of land. The first two tracts originally consisted of a single 17.08 acre tract, which was later subdivided into a 3.82 tract, where the marital residence is located, and a 13.26 acre lot. The third tract is a 13.64 acre parcel, and the fourth tract is a 14 acre parcel.

There is no dispute that Garry purchased and owned the first two tracts (17.08 acres) and the third tract (13.64 acres) prior to his marriage to Susan. Garry also owned a one-half interest in the fourth tract (14 acres) when the parties were married in 1985. The other one-half interest was conveyed to him by his parents shortly after the parties were married for \$1.00 in consideration.

This Court noted when the issue of this property was on appeal previously, “[a]s Garry either owned the property interests prior to the marriage, or the property interests were given to him during the course of the marriage, *absent intervening factors, all of the real property would, in the normal course of events, be characterized as Garry’s nonmarital property.*” (No. 2003-CA-002468-MR and No. 2003-CA-002491-MR) (emphasis added).

This Court, however, determined that its review was “hampered” because of the trial court’s “failure to make threshold findings regarding the marital/nonmarital character of the real property under consideration.” Accordingly, this Court remanded the case to the trial court for additional findings “with directions to characterize each of the four tracts of property as marital or nonmarital”; “on the issue of assignment of the parties’ marital debt”; and to assign a “valuation to the property assigned to each party.”

Consistent with the mandate of this Court, the family court on remand held a hearing at which testimony and evidence were taken. Garry and Susan testified, and both submitted documentation regarding the character of the property at issue. Relevant to the determination of whether the property was marital or nonmarital, the family court cited a 1998 deed executed while the parties were married, with a conveyance as follows:

THIS DEED OF CONVEYANCE, made and entered into on this the 31<sup>st</sup> day of December, 1998, by and between **GARY**<sup>[2]</sup> **MARRS COMER and wife, SUSAN B. COMER**, hereinafter referred to as Grantors, whose address is 4134 Dye Ford Road, Alvation, KY 42122 and **GARY MARRS COMER and wife, SUSAN B. COMER**, hereinafter referred to as Grantees, whose address is 4134 Dye Ford Road, Alvation, KY 42122.

WITNESSETH: That for and in consideration of the love and affection which the Grantors hold for the Grantees, the Grantors do hereby alien, grant and convey unto the Grantees, for their joint lives and with the remainder unto the survivor thereof, his or her heirs or assigns, that certain real property located at Warren

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<sup>2</sup> Throughout various exhibits and in the family court’s order, Garry’s name is spelled “Gary.” Because the spelling of “Garry” is used on the notice of appeal, we will use that spelling and change any quotes we use from the family court’s order from “Gary” to “Garry.”

County, Kentucky, and being more particularly described as follows, to-wit:

[Description of the tracts of land at issue].

TO HAVE AND TO HOLD the above property together with all of the improvements thereon and all of the appurtenances thereunto belonging unto the Grantees, for their joint lives and with the remainder to the survivor thereof, his or her heirs or assigns forever; it being the intention of the parties hereto that the herein described property be conveyed in such manner as to pass under this deed the interest of the one first dying unto the survivor thereof in its entirety in fee simple, absolute.

Regarding Garry's intent in executing this deed, he testified that he did so to secure a mortgage on the property. His brief before this Court regarding his intent is in accord. Garry writes that he "clearly stated that it was his intent to complete a financial transaction rather than gift the property to [Susan]." According to Garry's testimony, he was "blindsided" when Susan filed for divorce eight or nine months after the deed was executed.

Regarding Garry's intent in executing the 1998 deed, the family court found that Garry was "disingenuous[] and not credible." The also family court found that:

[Garry] testified at trial that one reason he executed the 1998 Deed was to protect his family and property from bankruptcy. Further the evidence reveals that commencing in 1997, [Garry] was under investigation by the FBI for knowingly and without authorization by law converting to his own use money belonging to the United States in the execution of his office of Postmaster.[<sup>3</sup>] The

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Garry pled guilty on June 30, 1999, in United States District Court to violating 18 U.S.C. 1711 for Misappropriation for Conversion to Own use of U.S. Postal Funds by a U.S. Postal

Federal Government seized the Gamaliel Post Office and stopped payment of [Garry's] salary for a period of two (2) years from 1997 through to 1999. On February 22, 1999, [Garry] entered a plea of guilty in the federal criminal action of the United States District Court, Western District of Kentucky, Criminal Number 1:99CR-8-M relating to his criminal actions as a postmaster in Gamaliel, Kentucky. The Court finds that on December 31, 1998, [Garry] knowingly and voluntarily executed the 1998 Deed with an intent [sic] transfer title from his name solely to a joint tenancy with his wife, Susan, to avoid seizure of the entire property by the Federal Government and so that he would be seen as retaining little to no individual interest in any property to the detriment of his family. Susan, acting as she had throughout the marriage, consented to this conveyance to protect the substantial marital investment and non-marital investment in the property; in the Decree of Dissolution, this Court recognized Susan's non-marital investment in the property; in the Decree of Dissolution, this Court recognized Susan's non-marital investment although the tracing was insufficient to properly distinguish from her marital investments. Therefore, based upon the behavior of the parties over the course of their marriage, the totality of the evidence, and the plain and clear language contained in the 1998 Deed, the Court finds that the clear and only feasible interpretation of the 1998 Deed is that [Garry] intended to convey to his wife, Susan, a joint tenancy with the right of survivorship in the whole 44.72 acres of land as specifically described by metes and bounds in the 1998 Deed, and therefore, the whole 44.72 acres as so described is marital property.

Accordingly, the family court determined that the intent of Garry in the execution of the 1998 deed was to convey to Susan a joint ownership interest in the entirety of the property. Having done so, the family court concluded that the property is marital property.

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Employee.

Pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, we must defer to the family court's findings of fact unless they are clearly erroneous, *i.e.*, not supported by credible evidence. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). Regarding credibility determinations, the

trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part. The trier of fact may take into consideration all the circumstances of the case, including the credibility of the witness.

*Bissell v. Baumgardner*, 236 S.W.3d 24, 29-30 (Ky. App. 2007) (quoting *Commonwealth v. Anderson*, 934 S.W.2d, 276, 278 (Ky. 1996) (internal citations omitted in *Bissell*)). A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Rivers v. Howell*, 276 S.W.3d 279, 281 (Ky. App. 2008) (citations omitted). We review for an abuse of discretion to determine if the family court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). We also review "issues pertaining to the assignment of debt incurred during the marriage . . . under an abuse of discretion standard." *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001).

Regarding whether an item is marital or nonmarital, we review the family court's factual findings under a two-tiered scrutiny. First, factual findings

are reviewed under the clearly erroneous standard, and second, the ultimate legal conclusion denominating the item as marital or nonmarital is reviewed *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

Although the family court's order is silent on it, the central issue before the family court actually became whether Garry had given Susan a joint marital interest in the entity of the property. The only reasonable interpretation of the family court's order in referencing a conveyance is that the property was nonmarital and that Garry made a gift to Susan when he executed the 1998 deed. This is a factual determination. *Hunter v. Hunter*, 127 S.W.3d 656, 660 (Ky.App. 2003) (citing *Ghali v. Ghali*, 596 S.W.2d 31 (Ky. App. 1980)).

Garry includes an analysis before this Court of the relevant factors to be determined regarding whether property may be considered a gift. He did not, however, request additional findings pursuant to Civil Rule (CR) 52.03 at the family court level regarding whether the elements of a gift were met. Consequently, we cannot reverse or remand on this issue. CR 52.04.

This Court also remanded this matter regarding assignment of a mortgage debt which the parties owed on the property in the approximate amount of \$108,000. In the family court's initial findings, it assigned \$106,012.90 of the parties' debt to Susan and \$2,000 to Garry. Upon remand, the family court assigned \$29,700.00 in nonmarital debt to Garry and also determined that he owed Susan one-half of the amounts she has paid since 1999 for mortgage payments, insurance payments and taxes on the property. This latter amount is \$16,292.00

plus one-half of Susan's expenditures since the date of the hearing in January 2008 to the date of the sale of the property.

Susan was assigned \$2,500.00 in nonmarital debt for an automobile she purchased after the parties separated. Both parties were assigned one-half of the marital debt portion of the mortgage balance, with the notation "amt. to be defined at the time of the sale after payment of non-marital debts of both parties."

Turning to our standard of review of the family court's assignment of debt, the trial court has broad discretion in its allocation of debt, and we will only reverse that allocation for an abuse of discretion. *See Lykins v. Lykins*, 34 S.W.3d 816, 822 (Ky. App. 2000).

It is vital to understand that unlike marital property, there is no presumption that a debt incurred during a marriage is marital or nonmarital in nature. Rather, debts are generally "assigned on the basis of such factors as receipt of benefits and extent of participation[.]" Finally, there is no presumption that debts must be divided equally or in the same proportion as the marital property.

Smith, 235 S.W.3d at 15 (citing *Neidlinger*, 52 S.W.3d at 522) (internal notes omitted). Where debt is acquired for the benefit of one spouse as opposed to the benefit of the marriage, we cannot say it is improper for the family court to assign that debt to that spouse. *See Glidewell v. Glidewell*, 859 S.W.2d 675, 679 (Ky. App. 1993).

Garry argues that the family court's assignment of debt is clearly erroneous. We disagree. He contends the \$27,500.00 was assigned to him without documentation for debts he incurred for gambling, drinking, sale of various



tractors, equipment, cattle and for his legal defense in the federal criminal case against him. He maintains that the only evidence that any money borrowed via loans or money obtained from selling farm equipment or cattle was Susan's testimony.

Another \$2200 in debt was assigned to Garry because it was used from mortgage proceeds to pay a final installment on a pre-marital debt on the property. That the \$2200 was incurred prior to the parties' marriage is not disputed although Garry maintains that it was error for the family court to have designated it as such and then to have characterized all of the property at issue as marital.

Regarding assignment of debt, the family court held a very thorough and methodical hearing and made detailed findings of fact on the debt accumulated by the parties. In essence while Garry testified that monies borrowed or realized from selling farm equipment or cattle was used for marital purposes, Susan testified that these funds were used to support Garry's gambling and drinking habits. Thus, credibility of the parties was at issue, for which we give great deference to the family court.

Regarding the debts incurred, for example, in 1987, the parties took out a \$9000.00 mortgage which was deposited into Garry's checking account.<sup>4</sup> Garry testified, but did not produce documentation, that this amount was used to purchase a tractor. Susan testified that none of the amount was used for marital purposes. The family court specifically found Susan to be more credible.

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<sup>4</sup> The testimony at the hearing was that the parties maintained separate checking accounts.

Another mortgage was taken out in 1992 in the principal amount of \$61,500. Susan testified that these funds were used to pay off prior mortgages and to pay back the post office for monies Garry improperly used for gambling. Garry claimed that \$10,000 of this amount was used for farming operations but produced no documentation to support this. Again, the family court specifically found Susan to be more credible.

In 1994, the parties took out another mortgage on the property in the amount of \$80,000. Susan testified that these funds were used to pay off the 1992 mortgage and that approximately \$19,000 was used to pay back the post office for monies Garry improperly used for gambling. Garry testified that he did not recall for what purpose the money was used.

Another mortgage was taken out in 1998, in the principal amount of \$101,200 to refinance the 1994 mortgage at a lower rate and to use approximately \$25,000 for home improvements, including a new heating system, insulation and other renovations. Garry did not dispute Susan's testimony regarding this.

In total, at the time of the parties' dissolution, the parties owed approximately \$108,000. Regarding the debt and the parties' testimony, the family court specifically found that:

[Garry] should also be assigned the portion of non-marital debt incurred due to [Garry's] compulsive gambling and drinking habits and his criminal conviction. [Garry's] admissions at trial revealed that he made gambling bets several times a week ranging from \$20 to \$100. [Garry] placed the low end of his bets at \$20, but as high as \$100. [Garry] also admitted to

spending about \$20 per night on alcohol during one or more phrases of the marriage. [Garry] testified that he used his pay and proceeds from the sale of the cattle to support his compulsive habits. He also admitted to paying his criminal legal defense bill of \$5,000 with money from the cattle operation. Testimony from both parties established that all cattle, the bull, and all farm equipment had been sold by the time the parties separated, and that none of the proceeds from those sales went for marital purposes, mortgage payments or for home improvements. Susan testified that proceeds from mortgages dating back to 1992 were used to pay back the Post Office for misappropriated funds used by [Garry]. And that Susan's teaching salary supported the family for all but three years of the marriage. Consequently, at least \$27,500 of the mortgage debt can be traced by [Garry's] admission directly to the supposed running of the cattle operation on the marital property to essentially front his gambling, drinking and criminal activities. (\$2500 tractor in 1985, \$9000 for tractor & farm in 1987, \$10,000 for cows and feed in 1993, and \$5000 for his criminal attorneys fees). Based upon Respondent's evasive testimony and demeanor at trial and on remand concerning how many cattle he owned or sold at various times, and his pattern of compulsive behaviors, along with the Petitioner's credible testimony that proceeds from the cattle operation went into Respondent's separate checking account instead of toward any mortgage or marital purpose, the Court is persuaded that no less than \$27,500 of the outstanding debt can be and should be attributed to debts incurred by Respondent wholly for his own purposes and pleasure, selling all of the cattle and farm equipment bought via mortgage loans, thus spending even the invested mortgage funds for his own non-marital purpose and use.

Given the testimony of the parties and the family court's determination on credibility, we cannot say that the assignment of debt in this matter was improper.

Our analysis of Garry's appeal ends here pursuant to CR 76.03(8).

Pursuant to this rule, "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." *See also Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004). In Garry's prehearing statement, he lists the issues on appeal as follows:

1. Whether the Trial Court followed the Court directives regarding the division and characterization of marital and nonmarital property as well as marital and nonmarital debt and whether this amended division was proper?
2. Whether the Trial Court may order the sale of the Real Estate through a real estate agent rather than using the Master Commissioner or Special Master Commissioner?

Although Garry addresses valuation of the property in his brief, he did not include this as an issue on appeal in his prehearing statement. Pursuant to CR 76.03(8) and *Sallee*, 142 S.W.3d at 698, because this issue was not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for "good cause shown," this issue is not properly before this Court for review.

Regarding whether the legal issue of whether the family court erred in ordering the property be sold by a real estate agent as opposed to the Master Commissioner, at oral argument counsel for both parties represented to the Court that they had previously stipulated that if the family court's judgment was affirmed, then the property would be sold by a Master Commissioner, rather than a

real estate agent. Consequently, the parties did not brief this issue on appeal.

Accordingly, the legal issue is deemed waived. *Cherry v. Augustus*, 245 S.W.3d 766, 780 (Ky.App. 2006).

For the reasons as stated, we affirm.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT  
FOR APPELLANT:

David F. Broderick  
Bowling Green, Kentucky

BRIEF AND ORAL ARGUMENT  
FOR APPELLEE:

B. Alan Simpson  
Bowling Green, Kentucky