

RENDERED: April 3, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 97-CA-0533-MR

CLAYTON STEPHEN DUVALL

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT  
HONORABLE DAVID L. KNOX, JUDGE  
ACTION NO. 89-CI-000030

YOLANDA JO TURNER (FORMERLY DUVALL)

APPELLEE

**OPINION**  
**AFFIRMING**

\* \* \* \* \*

BEFORE: COMBS, EMBERTON and MILLER, Judges.

COMBS, JUDGE: This is an appeal from an order of the Woodford Circuit Court denying the motions of Clayton Stephen Duvall for modification of child custody and child support, for restitution, for litigation fees, and for other relief. We affirm.

Clayton and Yolanda Jo Turner were married on June 2, 1979. Three children were born of the marriage: Miranda, born October 10, 1982; Joshua, born March 12, 1984; and Amber, born December 11, 1985. On February 2, 1989, Clayton filed a petition to dissolve the marriage. He requested custody of the three children. In her response to the petition, Yolanda also sought custody of the children.

In May 1989, Clayton was arrested and jailed for soliciting an undercover police officer to rape and sodomize Yolanda. Clayton apparently planned to photograph the incident and use the pictures as evidence of Yolanda's unfitness for custody. Yolanda was awarded temporary custody of the children. On August 24, 1989, the trial court entered a decree dissolving the marriage. The issue of child support was reserved pending Clayton's release from jail. On September 15, 1989, Clayton pled guilty to the solicitation charge and received a sentence of seven years.

In February 1991, Yolanda filed a motion seeking child support on the grounds that Clayton, though still incarcerated, now had the means to pay support as a result of an inheritance from the estate of his grandfather. In March 1991, the trial court ordered that appellant's inheritance be deposited with the Clerk of the Court and that Yolanda be awarded \$100.00 per week in child support. In January 1992, following the settlement of the grandfather's estate, this court-ordered plan was implemented. In August 1994, the trial court approved an agreement between the parties which provided that in lieu of child support, Clayton would pay the monthly private school tuition and entrance fees for the children and that he would continue to pay the costs of the children's education through college.

At some point, Yolanda remarried. This marriage produced one child, Dakota. The marriage also coincided in the

molestation of both of Yolanda's daughters born of her marriage to Clayton. A relative of Yolanda's new husband had sexual contact with Miranda; in early 1996, the new husband had sexual contact with Amber. Yolanda timely reported the incidents to the Department for Social Services. At some point in 1996, following Clayton's release from prison, Joshua requested permission to live with Clayton, beginning an extended visitation with him in the summer of 1996. By an agreed order entered August 10, 1994, the parties consented to permit each child to select the parent with whom he or she would reside.

On July 31, 1996, Clayton filed a motion seeking permanent custody of the three children, involuntary termination of the mother's parental rights, reimbursement of his inheritance from his grandfather's estate, and damages for loss of clothing and personal belongings awarded to him in the dissolution decree. For procedural reasons, the motion was refiled on September 3, 1996. In November 1996, Clayton filed a motion seeking the termination of appellee's parental rights to Dakota and for adoption of that child. Arguing that Clayton had failed to pay certain educational costs under the agreement, Yolanda filed a motion (November 13, 1996) to determine the child support arrearage. On November 20, 1996, Clayton filed a motion for expenses associated with bringing his motions and for travel to Kentucky for the resulting hearings. On November 21, 1996, Clayton filed a motion seeking a restraining order to keep Randall McVey, a friend of Yolanda's, away from the children.

On November 21, 1996, a hearing was held before the Domestic Relations Commissioner. On December 5, 1996, the Commissioner entered his report and recommendation generally denying appellant's motions. On February 12, 1997, the trial court entered an order adopting the Commissioner's Report and Recommendations. This appeal followed.

On appeal *pro se*, Clayton presents eight enumerated arguments. However, it appears that few of the issues raised on appeal were ever raised before the trial court -- either in appellant's initial motions or in his motion for reconsideration. When the trial court has not had an opportunity to address an alleged error, an appellate court is precluded from reviewing the alleged error. See Sherley v. Commonwealth, Ky., 889 S.W.2d 794 (1994). While some of the arguments raised on appeal are related to issues originally brought before the trial court, they present new theories. A new theory of error cannot be presented on appeal. See Harrison v. Commonwealth, Ky., 858 S.W.2d 172 (1993) cert. denied, 512 U.S. 1238, 114 S. Ct. 2746, 129 L. Ed. 2d 864 (1994); Ruppee v. Commonwealth, Ky., 821 S.W.2d 484 (1991). Furthermore, appellant has failed to establish by proper citation to the trial court record that his arguments are preserved for appeal. Errors to be considered for appellate review must be precisely preserved and identified in the lower court. Combs v. Knott County Fiscal Court, Ky., 141 S.W.2d 859 (1940); CR 76.12(4)(c)(iv). Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947, 950 (1986).

We will nonetheless attempt to sort out and address the issues as we are able to discern them from the arguments of the parties and from the Commissioner's report of December 5, 1996 as adopted by the trial court where these issues have been properly preserved.

The most important issue concerns custody of the parties' children. In the final decree, Yolanda was awarded sole custody of the three children. However, under the existing agreed order entered into on August 10, 1994, each child was entitled to select the parent with whom he or she would reside. Presently, Miranda and Amber reside with Yolanda, and Joshua resides with Clayton. Clayton's motion to modify custody was filed September 3, 1996. KRS 403.340(2) sets forth the standard to be used in determining whether a modification of custody is warranted and provides in relevant part that:

"[t]he court shall not modify a prior custody decree unless: . . . (c) the child's present environment endangers seriously his physical, mental, moral or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him." See Quisenberry v. Quisenberry, Ky., 785 S.W.2d 485 (1990).

The trial court carefully considered this standard and concluded that Clayton had failed to show that the two children in the custody of Yolanda (Amber and Miranda) are seriously endangered in their current environment. The trial court rejected Clayton's allegations relating to sexual abuse, concluding that the perpetrators of the abuse had been removed from the children's environment by the actions of Yolanda. The

trial court further found that Yolanda's friend, Randall McVey, does not present any major threat to the children; appellant alleges that McVey has engaged in drug abuse in the presence of the children.

As a reviewing court, we may not substitute findings of fact for those of the trial court where they are not clearly erroneous. Riechle v. Riechle, Ky., 719 S.W.2d 442 (1986); Bennett v. Horton, Ky., 592 S.W.2d 460 (1979); see also CR 52.01. As the findings of the trial court regarding Amber and Miranda's present environment are not clearly erroneous, they will not be disturbed. The trial court applied the proper standard, and accordingly we find no error.

Clayton raised two issues with the trial court relating to child support. The first issue concerns the current court-approved child support agreement, which provides that in lieu of paying child support under the guidelines, appellant will pay the private school tuition for the children. The trial court's order recognizes that Joshua is currently residing with Clayton and that, consequently, his support obligation should be reduced to reflect the cost of tuition for the other two children. This order is consistent with the agreed order on child support, and we find no error. Second, the trial court determined that there is an arrearage in child support of \$1,800 - \$2,000 related to Clayton's past failure to pay tuition. We must accept findings of the trial court unless clearly erroneous. See Riechle, supra. As this finding is not clearly erroneous, we affirm the court's

holding regarding the arrearage.

Clayton argued to the trial court that he is entitled to restitution relating to personal property and inheritances. He seeks reimbursement of \$5,000 for the value of clothing awarded in the final decree that he allegedly never received. The decree stated that this "personal property had been previously divided." Clayton did not seek timely reconsideration of this finding.

Clayton further alleges that he is entitled to reimbursement of a \$30,000 inheritance received from the estate of his father during the course of the parties' marriage. The trial court recognized that while this inheritance was non-marital property, Clayton failed to raise the issue prior to entry of the final decree -- nor did he attempt to establish its non-marital character through tracing. See Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990).

Res judicata applies when a previous judgment has been rendered involving the same subject matter and the same parties. BTC Leasing, Inc. v. Martin, Ky. App., 685 S.W.2d 191 (1983). Even if an issue was not litigated in the initial action, a subsequent action will be barred if the issue should have been raised in the first action. Newman v. Newman, Ky., 451 S.W.2d 417, 419 (1970). The issue as to clothing was raised but abandoned upon failure to seek reconsideration of the findings of the trial court. The issue as to the inheritance was not raised at all in the proceedings leading up to the final decree.

Consequently, these issues are barred from relitigation under res judicata. BTC Leasing, supra; Newman, supra.

Clayton further argues that he is entitled to reimbursement of amounts related to his \$11,500 inheritance from the estate of his grandfather. The inheritance occurred after the final decree and while appellant was incarcerated. The trial court ordered that the proceeds of the inheritance be paid to the clerk of the court for distribution to appellee as child support. Clayton subsequently filed his notice of appeal with this Court. The appeal was dismissed for failure to file a prehearing statement. See Duvall v. Turner, 91-CA-0708-MR, rendered August 26, 1991, unpublished. Appellant may not, under the doctrine of res judicata, again raise this issue. See BTC Leasing, Inc. v. Martin, supra.

Lastly, the trial court denied appellant's request for fees and costs. Under KRS 403.220, a court may award attorney's fees and costs upon a finding of financial disparity between the parties. Bashir v. Bashir, Ky., 698 S.W.2d 823, 826 (1985). The amount of an award of attorney's fees is committed to the sound discretion of the trial court. The trial court is in the best position to observe any conduct and tactics which waste the court's and attorneys' time; courts enjoy wide latitude to sanction or discourage such conduct. Gentry v. Gentry, Ky., 798 S.W.2d 929, 937-38 (1990). We find no error in the trial court's denial of Clayton's fees and costs.

The order of the trial court is affirmed.



ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

Clayton Stephen Duvall  
Houston, TX

BRIEF FOR APPELLEE:

William K. Moore  
Versailles, KY