

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-003057-MR

SHERYL ANN MAXWELL

APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 95-CI-00459

CHARLES TAYLOR MAXWELL

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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BEFORE: COMBS, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Sheryl Ann Maxwell has appealed from the final judgment entered on October 13, 1998, by of the Logan Circuit Court which overruled her exceptions to the findings and recommendations contained in the commissioner's report, and which adopted those findings as its own. We agree that some, but not all, of her arguments have merit. Thus, we affirm in part, reverse in part and remand.

Sheryl and Charles Taylor Maxwell were married in 1974. Their twenty-three year marriage produced three children: Charles Taylor Maxwell was born on September 6, 1977, Erica Paige Maxwell

was born on July 12, 1979, and Jeffrey Blake Maxwell was born on January 13, 1983. The children were 20, 18, and 14 years old respectively, at the time the decree of dissolution was entered. The parties resolved many of the issues arising from the breakup of the marital relationship by agreement; however, other issues were litigated before the Domestic Relations Commissioner.

Sheryl, who was eighteen years old at the time the parties married, was not employed during the marriage. Charles did not dispute Sheryl's testimony that they mutually agreed that she would be a full-time homemaker and the primary caretaker of the children. During the initial years of the marriage, Charles was employed in sales. In 1990, he formed a corporation and purchased an Arby's franchise. The fast-food restaurant in Russellville, Kentucky, provides him with annual earnings of approximately \$100,000.

The parties agreed that Sheryl would have sole custody of their youngest child, Blake. They also agreed that Charles would pay Sheryl \$230,000 for her share of the business, and that she was entitled to one-half his pension which had a value of \$390,000. A Qualified Domestic Relations Order was entered directing the plan administrator to distribute one-half of the vested pension to Sheryl. The marital residence was sold and the net proceeds of approximately \$62,000 were divided equally between the parties. The parties also agreed on the equal division of the personalty. An interlocutory decree of dissolution was entered on October 30, 1997, reserving all remaining issues for later adjudication.

On November 13, 1997, a hearing was conducted before the commissioner on the issues of child support, maintenance, responsibility for certain dental expenses for their child, Paige, health insurance coverage for all of the children, allocation of the tax exemption for the parties' minor child, and attorney's fees. In his report, the commissioner made the following recommendations to the trial court: (1) that Charles pay child support of \$860 per month for Blake; (2) that Charles pay Sheryl \$400 per month in maintenance for four years; (3) that Charles be entitled to claim Blake as a dependent for income tax purposes; (4) that each party be responsible for any debt incurred since their separation; (5) that each party be responsible for one-half of the costs and fees associated with a time-share condominium owned by the parties until such time as it is sold; (6) that each party pay his or her own attorney's fees; (7) that Charles provide health insurance for Blake and that the parties equally divide any medical expenses not covered by insurance; and, (8) that Charles not be responsible for the dental work needed by the adult child, Paige.

Sheryl filed numerous exceptions to the commissioner's findings and recommendations. Although Charles filed exceptions, they were not timely. On March 5, 1998, the trial court ordered the commissioner to supplement his recommendations with findings of fact on the issues of the gross and net incomes of both parties, the reasonable expenses of both parties, and the child support calculations. The trial court held in abeyance any

decision on the merits of the exceptions until the supplemental report was provided.

In his supplemental report, the commissioner found that Charles' monthly gross income was \$8,416, and that his net monthly income was \$5,800. He imputed a gross income to Sheryl of \$1,213 per month (\$7.00 per hour for 40 hours a week), and a net monthly income of \$925.00. Although Sheryl had testified that her expenses amounted to \$3,900 per month, the commissioner stated that many of her expenses "seemed excessive," and found that her reasonable monthly expenses totaled only \$1,869. He found that Charles had monthly expenses totaling \$2,267.

On October 13, 1998, the trial court entered its final judgment in which it overruled the exceptions of both parties and adopted the commissioner's recommendations. Sheryl's motion to alter, amend or vacate the judgment was denied on November 12,

1998, and Sheryl's appeal followed.<sup>1</sup> Additional facts will be discussed that are pertinent to the particular issue addressed.

Sheryl first argues that the trial court erred in its adoption of the commissioner's findings and recommendations with respect to the amount of Charles' income for purposes of establishing his child support obligation. Sheryl, who works part-time and has actual earnings of about \$500 per month, does not complain that the trial court imputed monthly income to her of \$1,213. However, Sheryl contends that the trial court erred in failing to impute additional income to Charles consistent with the testimony of her expert witnesses. We do not find error in this regard.

The commissioner had several sources of evidence pertaining to Charles' income, including the parties' personal income tax returns for the five years prior to the dissolution and Charles' corporation's tax returns. At his deposition taken

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<sup>1</sup>Charles is also dissatisfied with that portion of the judgment which awarded maintenance to Sheryl. Indeed, the introduction of his brief states that "[t]his is a cross-appeal in a marital dissolution case," and he asks that we reverse the trial court's determination that Sheryl is entitled to maintenance in the first instance. Although Charles is entitled to make that argument in support of affirming the judgment, since he did not file a notice of appeal or cross-appeal, he is not entitled to seek affirmative relief from the judgment. Kentucky Rules of Civil Procedure (CR) 74.01; Standard Farm Stores v. Dixon, Ky., 339 S.W.2d 440 (1960); Lainhart v. Rural Doxol Gas Co., Ky., 376 S.W.2d 681 (1964); Mullins v. Bullens, Ky., 383 S.W.2d 130 (1964). Sheryl has moved this Court to dismiss the purported cross-appeal and to strike those portions of his brief which address his argument that she did not meet the statutory threshold for maintenance. Since Charles failed to file a notice of cross-appeal, and thereby waived any error with respect to the issue of Sheryl's entitlement to maintenance, it is unnecessary to enter a formal order dismissing a cross-appeal that does not exist.

in February 1997, Charles testified that he was not working full time at the business as he had in the past. However, by the time of the trial, Charles testified that he was working 40 to 50 hours a week at the franchise, yet at the same time, he testified that his income had decreased from its highest amount of \$108,885 in 1995, to \$6,500 per month, or \$78,000 annually. Sheryl's expert witnesses who had reviewed Charles' deposition, testified that Charles' restaurant was "over-managed," and that if Charles would spend more time in the business, he could eliminate two of the four managers' positions which would result in an income of about \$140,000 annually. They also questioned the large increase in the corporation's capital expenditures and a significant increase in labor costs during the period the dissolution was pending.

The commissioner rejected Charles' proof that his income had been drastically reduced. He found that his income "was and should be considered the same monthly income as B.E.S.T. Corporation as the Corporation and Mr. Maxwell are synonymous." Thus, the commissioner calculated Charles' monthly income to be \$8,416 (\$100,992 annually), which is very close to the amount reported as personal income for the last year the parties were living together. However, the commissioner essentially ignored the expert evidence offered to support Sheryl's argument that the corporate veil should be pierced to determine whether Charles was manipulating his expenses to avoid his financial obligations arising from the marital relationship, and the evidence that he

could increase his income by not relying on four managers to run the business for him.

It is axiomatic that the ultimate objective of a proceeding to determine child support is to secure the support needed by the children commensurate with the ability of the parents to meet those needs. Further, "[b]oth our statutory scheme and our case law demand that whenever possible the children of a marriage should be supported in such a way as to maintain the standard of living they would have enjoyed had the marriage not been dissolved."<sup>2</sup> Our analysis of this issue begins with Kentucky Revised Statutes (KRS) 403.212(2), which provides in pertinent part as follows:

- (a) "Income" means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.
- . . .
- (c) For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income. Specifically excluded from ordinary and necessary expenses for purposes of this guideline shall be investment tax credits or any other business expenses inappropriate for determining gross income for purposes of calculating child support. Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine

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<sup>2</sup>Stewart v. Madera, Ky.App., 744 S.W.2d 437, 439 (1988).

an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes. Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business or personal use of business property or payments of expenses by a business, shall be counted as income if they are significant and reduce personal living expenses such as a company or business car, free housing, reimbursed meals, or club dues.

Very recently, this Court held that KRS 403.212(2)(c) "confronts trial courts with the unenviable task of distinguishing between a self-employed child-support obligor's taxable income and what may be called his or his disposable income."<sup>3</sup> The statute plainly requires the trial court to "carefully review" the income and expenses of a business so that a child of the marriage will be supported at the appropriate level. The trial court is authorized, indeed is charged by the statute, to look behind the business structure, corporate or otherwise, for manipulation or mismanagement where the evidence so warrants. On the other hand, we appreciate the trial court's reluctance, even with the aid of expert witnesses, to substitute its judgment for that of a party's on the proper manner to operate a business.

From his findings, it is obvious that the commissioner did not blindly accept the testimony of Charles regarding his current earnings, nor was he satisfied that Charles' personal

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<sup>3</sup>Snow v. Snow, Ky.App., \_\_\_\_ S.W.3d \_\_\_\_ (rendered July 14, 2000).



income tax returns reflected an accurate picture of his ability to pay child support. Rather, the commissioner established Charles' earnings as being equal to those of his corporation, recognizing that, as the sole shareholder, all retained earnings were available to Charles.

While it would have been preferable for the commissioner to have specifically addressed the expert testimony offered by Sheryl, it is apparent that the commissioner was not convinced that any improper manipulation had occurred or that further adjustment to Charles' income was appropriate. A review of the record reveals that Charles did counter this evidence with his own testimony supporting his need for the four managers, the same number of managers he had consistently employed at the restaurant. He also offered a reasonable justification for the increase in capital expenditures, including the need to replace seven-year-old equipment and the roof on the restaurant. This evidence is sufficient to support the commissioner's recommendation, and the trial court's ultimate findings; and accordingly, the decision in this regard will not be disturbed in this appeal.<sup>4</sup>

Next, Sheryl argues that the trial court clearly erred and abused its discretion by adopting the findings and recommendations of the commissioner with respect to the award of maintenance. This is the most troublesome issue we must address in Sheryl's appeal. As stated earlier, the trial court ordered

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<sup>4</sup>CR 52.01; McKinney v. McKinney, Ky.App., 813 S.W.2d 828 (1991).

Charles to pay maintenance of \$400 per month for four years. Sheryl, who had requested maintenance of \$1,200 per month until Blake reached majority, and \$2,000 per month after that until she is able to make withdrawals from the pension plan without penalty, contends that the award is both inadequate as to amount and duration.

As with the previous issue, we begin our discussion with the applicable law. KRS 403.200(2) provides that once it is established that maintenance is appropriate, the award "shall be in such amounts and for such periods of time as the court deems just" after considering the following "relevant factors:"

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

"Under this statute, the trial court has dual responsibilities: one, to make relevant findings of fact; and

two, to exercise its discretion in making a determination on maintenance in light of those facts.”<sup>5</sup> Both this Court and the Supreme Court of Kentucky have held that maintenance is a matter delegated to the sound discretion of the trial court.<sup>6</sup> “Barring a showing of absolute abuse” this Court is not to disturb the resolution of this issue reached by the trial judge who “comprises the heart, soul and conscience of a marital dissolution.”<sup>7</sup>

It is undisputed that Charles is a college graduate with a degree in business administration, and that he is the sole owner of a corporation which provides him with an annual income of more than \$100,000. On the other hand, Sheryl’s formal education ceased at high school, and she has obtained no additional training. By agreement of the parties, she served the family as a full-time homemaker; and as a result, Sheryl is clearly disadvantaged with respect to competing for suitable employment. It is also undisputed that the parties enjoyed a comfortable life style. Their marital residence sold for over \$230,000, they were members of the local country club, the family vacationed twice a year, at the beach and in the mountains, and shopped at department stores. Since the dissolution, Charles has purchased a luxury automobile, a new house, and has remarried. In contrast, Sheryl testified that she drives a minivan with over

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<sup>5</sup>Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992).

<sup>6</sup>Id.; Moss v. Moss, Ky.App., 639 S.W.2d 370 (1982); Browning v. Browning, Ky.App., 551 S.W.2d 823 (1977); Leveridge v. Leveridge, Ky., 997 S.W.2d 1, 2 (1999).

<sup>7</sup>Moss, supra at 373.

115,000 miles, buys her clothes at Walmart, and has had to put most of her personalty in storage as her two-bedroom apartment is too small to accommodate it.

In his initial report, the commissioner made the following findings and observations with respect to the issue of maintenance:

The Commissioner finds that [Sheryl] and [Charles] are both well educated, articulate, and capable of earning wages. The Commissioner finds that [Sheryl] is not employed but by expert testimony which she proffered is capable of earning at least \$7.00 per hour based on a 40 hour work week, and therefore in considering any maintenance award, the Commissioner must assume that wage. [Sheryl] has consistently testified that she is unable to work because of her dedication to her remaining minor child and his swimming. [Sheryl] further testified that she is only interested in working in her son's school or in a pet care facility which could only be part time due to her dedication to her son and his swimming. The Commissioner does not find the testimony compelling, and has advised [Sheryl] throughout these proceedings that she is capable of working and needs to work. Based on [Sheryl's] capabilities and ability to work as evidenced by her own expert testimony, and further based on the award to [Sheryl] of approximately \$500,000.00 in cash awards as well as her personal property, and further based on the fact that [Charles] has assumed all of the parties' debt but for that debt which has been incurred by each following their separation, it is the finding of the Commissioner that [Sheryl] is not entitled to life maintenance but only for a term of years and that term of years being (4) years beginning January, 1998. The maintenance award per month shall be in the amount of \$400.00 for a period of 48 months beginning January, 1998. This amount will meet [Sheryl's] expenses as submitted and reviewed by the Commission when combined with

her computed<sup>8</sup> [sic] income, and earning[s] from her property award.

It is apparent to this Court that the findings of the commissioner, that were ultimately adopted by the trial court, fail to conform to the requirement to "make relevant findings of fact,"<sup>9</sup> a matter which Sheryl brought to the attention of the trial court both in her exceptions and in her motion to alter, amend or vacate the judgment. While the trial court directed the commissioner to remedy this deficiency and to render a supplemental report, the commissioner never made any findings with respect to the income Sheryl could expect to earn from the property set aside to her,<sup>10</sup> or any findings with respect to the factors in KRS 403.200(2)(b) to justify a short period of rehabilitative maintenance, or any findings with respect to KRS 403.200(2)(c), the standard of living established during the marriage.

In addition, many of the findings of fact are clearly erroneous. For example, Sheryl is not "well educated." She is also not "unemployed," but employed part-time. Although the

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<sup>8</sup>"Computed" should have been "imputed".

<sup>9</sup>Perrine, supra at 826.

<sup>10</sup>Sheryl testified that she paid rent of \$900 per month and that if, as she planned, she invested \$60,000 of her cash settlement into a down payment on a house, she could reduce that figure to \$600 per month. In determining Sheryl's reasonable monthly needs, the commissioner used the \$600 amount, presumably accepting as reasonable, her plan to invest some of the cash in real estate. Sheryl's expert witness testified that she could expect to earn \$700 per month on the cash remaining after the purchase of a house. The commissioner questioned this witness about the possibility of Sheryl's obtaining an even greater return, but he neglected to make a finding of any amount in either report.

commissioner did not find Sheryl's explanation for working part-time to be "compelling," Charles presented no evidence to refute Sheryl's claim that she wanted to be available to allow her son to continue his participation in swimming and to be able to accompany him to out-of-town competitions. Also, the commissioner's reference to Charles' assumption of the marital debt is not supported by the record which actually indicates that there was no marital debt to assume.

The findings with respect to Sheryl's reasonable needs are even more seriously flawed. In his supplemental report, the commissioner found Sheryl's monthly expenses to be \$1,869. Sheryl had testified that her monthly expenses exceeded \$3,900 and she presented documentary evidence to support that claim. However, the commissioner, without elucidation, eliminated many of the items in her monthly budget, including: costs for the care of the family pet; the fee for her cell phone, which Sheryl testified was needed because her car frequently broke down; auto club dues (again necessitated by the aging vehicle); all the expenses she incurs for Blake's participation in competitive swimming, including travel to swim meets; and Blake's birthday and Christmas gifts. The items totally eliminated from Sheryl's monthly budget by the commissioner amount to nearly \$500 per month. Other expenses were essentially cut in half by the commissioner, including the amount Sheryl testified, and documented, that she spends for food, gas, clothing, laundry, hair cuts, entertainment, credit card debt, cable television and household supplies.

On the other hand, in arriving at Charles' monthly expenses, the Commissioner found that he had a mortgage payment of \$1,200 per month although Charles testified that his housing expense was \$750 per month. Although none of the children resides with Charles, and although his new wife presumably shares in the household expenses,<sup>11</sup> the commissioner determined that Charles' reasonable monthly needs exceeded those of Sheryl.

Without exception, the monthly expenses eliminated from Sheryl's monthly budget were items typically enjoyed during the marriage; i.e., expenses related to the care and maintenance of the family pet, their child's extra-curricular activities, birthday and Christmas gifts for the child. The commissioner's determination that these expenses and half of several other items were "excessive" demonstrates a lack of appreciation of the settled principle that the issue of what is "reasonable" must be ascertained within the context of the standard of living enjoyed during the marriage.<sup>12</sup> In construing a statute nearly identical to our own, the Missouri appellate court held that

[i]n many marriages by tacit or express agreement, the wife remains at home and cares for the children and foregoes her opportunity to develop a career or acquire job experience. Where such a spouse has been out of the job market for extended periods. . .

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<sup>11</sup>The Commissioner refused to allow Sheryl to inquire into the contribution, if any, Charles' current wife makes to offset Charles' actual monthly household expenses. Clearly, her income and contribution are relevant to the issue of his ability to pay maintenance, and on remand this evidence must be allowed. See Roberts v. Roberts, Ky.App., 744 S.W.2d 433, 435 (1988).

<sup>12</sup>Casper v. Casper, Ky., 510 S.W.2d 253, 255 (1974); Sharp v. Sharp, Ky., 516 S.W.2d 875, 877 (1974); Weldon v. Weldon, Ky.App., 957 S.W.2d 283, 285 (1997).

it may be proper for the court to place greater emphasis on the lifestyle enjoyed during the marriage, the duration of the marriage and other traditional factors.

Reasonable needs as used in the statute is a relative term. In a marriage of lengthy duration where one spouse has foregone career development, the marital standard of living may serve as an important guide in computing the spouse's reasonable needs. In a very practical sense it is frequently the best evidence of what the parties have together determined their "reasonable needs" to be [footnote omitted].<sup>13</sup>

The commissioner attempted to impress upon both parties that they would not be able to maintain the same lifestyle separately that they had maintained during the marriage. However, we agree with Sheryl that the record does not support the commissioner's findings on the issue of her "reasonable needs." In all, considering the number of findings that are clearly erroneous, and the lack of certain important findings, the matter must be reversed and remanded for a re-evaluation of the amount of maintenance.

Further, the trial court's findings are inadequate with respect to the issue of duration of maintenance. Clearly, there is evidence to support the commissioner's observation that an award for life is not indicated, including Sheryl's age and lack of any health problems. However, our review of the record does not reveal any evidence that remotely suggests that Sheryl will be self-sufficient, that is, able to meet her own reasonable needs after a period of four years, particularly in light of the

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<sup>13</sup>Brueggemann v. Brueggemann, 551 S.W.2d 853, 857 (Mo.App.1977).



fact that she will no longer be receiving child support. Under these circumstances, we hold that the trial court abused its discretion in setting the duration of the maintenance award, and this too must be reversed and reconsidered on remand.<sup>14</sup>

Next, Sheryl argues that the trial court erred in its allocation of the tax exemption for Blake to Charles. In his report, the commissioner, without any explanation, recommended that Charles be entitled to claim Blake as a dependent for federal and state income tax purposes. Again, Sheryl's complaint addresses both the lack of findings to support the allocation, as well as the propriety of the award. Charles relies on the line of cases that holds that regardless of which parent is awarded custody, the trial court retains discretion to allocate the exemption to the non-custodial parent.<sup>15</sup> He insists that the failure of the trial court to make any findings in allowing him to claim Blake as an exemption is excusable since his earnings, and thus his tax liability, are substantially higher than Sheryl's.

Generally, the determination of which party is entitled to claim a minor child as a tax dependent is governed by reference to federal law, specifically, 26 U.S.C.A. § 152(e), which provides that a child of divorced parents shall be treated for tax purposes as a dependent of the custodial parent.

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<sup>14</sup>See Frost v. Frost, Ky.App., 581 S.W.2d 582, 584-85 (1979).

<sup>15</sup>See Pegler v. Pegler, Ky.App., 895 S.W.2d 580 (1995); Marksberry v. Riley, Ky.App., 889 S.W.2d 47, 48 (1994); Hart v. Hart, Ky.App., 774 S.W.2d 455, 457 (1989).

However, we agree with Charles that the issue is one which is ultimately left to the sound discretion of the trial court. In exercising that discretion, however, we believe it is incumbent upon the trial court to articulate findings for divesting the custodial parent of the exemption.

In the case sub judice, it is obvious that Charles does have significantly more income than Sheryl. However, it is also apparent from the evidence that the amount of child support he has been ordered to pay does not provide for the entirety of Blake's needs. Further, this is not a situation where the income of the custodial parent is at a level eliminating the need for the exemption. Sheryl has earnings from her part-time employment, maintenance which is taxable to her, and interest income from her marital property.

More importantly, there is no finding that allocating the exemption to Charles would benefit Blake. "A trial court should allocate the exemption so as to maximize the amount available for the care of the children."<sup>16</sup> Accordingly, on remand, the trial court is directed to make findings, with reference to the evidence, to justify the allocation of the exemption.

Finally, Sheryl has raised three issues with respect to the judgment's rulings relating to health insurance and medical expenses. First, she argues that the trial court erred in requiring that the parties share equally any medical expenses for Blake not covered by insurance. Clearly, this ruling is

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<sup>16</sup>Hart, supra at 457.

erroneous as a matter of law. KRS 403.211(8) mandates that "[t]he cost of extraordinary medical expenses shall be allocated between the parties in proportion to their adjusted gross incomes." "Extraordinary medical expenses" is defined by the statute as "uninsured expenses in excess of one hundred dollars (\$100) per child per calendar year." This part of the judgment is reversed, and the matter is remanded for the trial court to enter a new judgment in conformity with the statute.

Next, Sheryl contends that the trial court erred in failing to address the issue of health insurance coverage for the two children who have reached the age of majority, but who are full-time college students. This issue, like the previous one, is governed by a specific statutory provision. KRS 403.211(7)(a), provides:

The court shall order the cost of health care of the child to be paid by either or both parents of the child regardless of who has physical custody. The court order shall include:

1. A judicial directive designating which parent shall have financial responsibility for providing health care for the dependent child, which shall include, but not be limited to, insurance coverage, payments of necessary health care deductibles or copayments; and
2. A statement providing that if the designated parent's health care coverage provides for covered services for dependent children beyond the age of majority, then any unmarried children up to twenty-five (25) years of age who are full-time students enrolled in and attending an accredited educational institution and who are primarily dependent on the insured parent for

maintenance and support shall be covered.

Although Sheryl brought this statute to the attention of both the commissioner and the trial court, the judgment does not address the issue of health insurance coverage for Paige and Taylor. Charles has never contested the fact that the two older children are unmarried, attending school full-time, and primarily dependent on him and Sheryl for their support. At a hearing before the commissioner on October 28, 1997, Charles testified that both adult children were still covered under his health insurance policy. Sheryl expressed concern at that time that the judgment should require Charles to continue to insure the two older children as required by the statute, but the commissioner opined that he was without authority to require such coverage. At the final hearing held two weeks later, Charles testified that he had removed Taylor and Paige from his health insurance policy.

KRS 403.211(7) (a), which was amended in 1996, plainly mandates, as evidenced by its use of the word "shall,"<sup>17</sup> that the parent responsible for providing health insurance coverage for any minor children, shall also be required to provide such coverage, if available, for children past the age of majority who are unmarried, in school full-time and who are dependent on their parent(s) for their support. This statute evinces a legislative intent that children who are pursuing a college education be afforded health insurance by their parents whenever possible.

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<sup>17</sup>KRS 446.010; see also Hardin County Fiscal Court v. Hardin County Board of Health, Ky.App., 899 S.W.2d 859, 861 (1995) ("[i]t is elementary that 'may' is permissive and 'shall' is mandatory in statutory language.").

Despite the statute's seeming clarity, the commissioner, apparently under the mistaken belief that he had no such authority, did not make any findings whatsoever about the status of the children or the availability of the coverage. At the hearing on the exceptions, Charles' counsel informed the trial court that such coverage was not available. However, a review of the testimony before the commissioner revealed that such coverage was available on October 28, 1997, and canceled on Charles' initiative on, or before, November 13, 1997. This part of the judgment is reversed, and the matter is remanded for the trial court to make findings with respect to the statutory provisions and to enter a new judgment in conformity therewith.

The last issue concerns the failure of the trial court to address the issue of dental treatment needed by Paige. Sheryl presented evidence that Paige, who turned 18 years old four months prior to the final hearing, was advised to have this treatment prior to reaching the age of majority. She alleged that Paige did not have the treatment prior to her eighteenth birthday because Charles refused to pay for the treatment. Charles, who was ordered to pay 100% of the children's medical expenses pendente lite, testified that it was his belief that the procedure was desired purely for cosmetic purposes.

As with the tax exemption issue, the commissioner made no findings to support his recommendation that Charles not be responsible for the treatment. Without appropriate findings we are unable to determine whether the trial court adopted the commissioner's recommendation because it believed the treatment

was unnecessary, or whether it accepted Charles' argument that since Paige had turned 18, he could not be ordered to pay for the treatment. This part of the judgment is reversed, and the matter is remanded for the trial court to make adequate findings that could be reviewed on appeal, if such relief is sought.

Accordingly, the judgment of the Logan Circuit Court is affirmed in part, reversed in part, and the matter is remanded for consideration of additional evidence as required by this Opinion, and as otherwise determined at the discretion of the trial court, and for the entry of a new judgment based on the additional findings and in a manner consistent with this Opinion.

COMBS, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

KNOFF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I agree with the majority opinion on all issues except in regard to setting aside the trial court's maintenance order. This case is yet another example of the need for maintenance guidelines to be adopted by the legislature or by the Supreme Court of Kentucky. In the absence of such guidelines, there is no consistency among trial courts in determining the appropriate amount and duration of maintenance awards. This is often an area of great unfairness in the family law cases of Kentucky.

Nevertheless, I cannot agree with the majority's decision to vacate the trial court's maintenance award in this case. "The decision to grant or deny a maintenance award lies

within a trial court's sound discretion as it applies the governing factors of KRS 403.200 to the parties circumstances upon dissolution of marriage". Leveridge v. Leveridge, Ky., 997 S.W.2d 1, 2 (1999). *Citing* 403.200(2). This Court is not authorized to substitute its judgment for that of the trial court in reviewing a maintenance award. Id. Although the factual findings supporting the maintenance order could have been more thorough, and the evidence could have supported a different award than the trial court chose to make, I cannot say that the trial court's determinations as to maintenance constituted an abuse of discretion or were clearly erroneous. Consequently, I would affirm the trial court's order on this issue.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

B. Alan Simpson  
Bowling Green, KY

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

J. Stewart Wheeler  
Russellville, KY