

RENDERED: JANUARY 27, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-002468-MR
AND
NO. 2003-CA-002491-MR

SUSAN BARNETT COMER

APPELLANT/CROSS-APPELLEE

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

GARRY MARRS COMER

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** * * * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: Susan Barnett Comer appeals from the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage entered by the Green Circuit Court on January 10, 2002. (Case No. 2003-CA-002468-MR). Susan alleges that the circuit court erred in its allocation of the real property at issue in the

¹ 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 Kentucky Revised Statute 21.580.

case, in its allocation of marital debt, and in its failure to award her maintenance. In his cross-appeal (Case No. 2003-CA-002491-MR), Garry contends that the family court erred by failing to more specifically designate the boundaries associated with its awarding of one-half of a 13.26 acre tract of property to each of the parties, and by failing to address his request for attorney fees. For the reasons stated below, we remand for additional findings regarding the marital/nonmarital character of the real property at issue in the case; remand for additional findings concerning the family court's assignment of marital debt; and remand for a more specific division of a tract of property that was distributed equally between the parties. We affirm the family court's determinations with respect to the remaining issues.

The parties were married on October 11, 1985. Four children were born during the marriage. On August 11, 1999, Susan filed a petition for dissolution of marriage.

On March 21, 2001, the parties entered into a partial settlement agreement. The agreement resolved the issues of child custody, visitation, child support, household furnishings, firearms, vehicles, and health insurance. Garry agreed to pay child support in the amount of \$500.00 per month and to maintain health insurance on all of the minor children. Non-reimbursed medical expenses were to be paid in accordance with Kentucky

Revised Statutes (KRS) 403.211. Additionally, the parties later agreed that each would receive his/her own retirement plan.

Following a hearing on issues concerning the distribution of real property, allocation of marital debt, and either party's entitlement to maintenance, on January 10, 2002, the family court entered its Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage. The order divided various tracts of real property between the parties; allocated the mortgage debt associated with the real property; and determined that neither party was entitled to a maintenance award.

Subsequently, Susan and Garry each filed a motion to alter, amend, or vacate. Following a hearing on the motions, on May 23, 2002, the family court entered an order captioned "Order on Petitioner and Respondent's Motion to Alter, Amend, or Vacate the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage." In the text, however, the Order overruled only Garry's motion to alter, amend, or vacate.

Susan appealed (Case No. 2002-CA-001220-MR) and Garry cross-appealed (Case No. 2002-CA-001338-MR) the family court's rulings to this Court; however, upon realizing that Susan's motion to alter, amend, or vacate had not been ruled upon, on October 16, 2003, this Court entered an order dismissing the

appeals and remanding the case for a ruling upon Susan's motion to alter, amend, or vacate.

Following remand, on November 5, 2003, the family court entered an order denying Susan's motion to alter, amend or vacate, after which the case was ripe for appeal. Susan thereafter filed her notice of appeal (Case No. 2003-CA-002468-MR) and Garry filed his notice of cross-appeal (Case No. 2003-CA-002491-MR).

We begin with a general statement of our standard of review. Under Kentucky Rules of Civil Procedure (CR) 52.01, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). An appellate court, however, reviews legal issues de novo. See, e.g., Carroll v. Meredith, 59 S.W.3d 484,

489 (Ky.App. 2001); Hunter v. Hunter, 127 S.W.3d 656 (Ky.App. 2003).

CASE NO. 2003-CA-002468-MR

In her direct appeal, Susan contends that the family court erred in its allocation of marital property, its allocation of debt between the parties, and in denying her request for maintenance.

Allocation of Property and Debt

Issues remaining for decision following the execution of the settlement agreement were the assignment and distribution of four tracts of real property (including the lot upon which the marital residence was situated) and two mortgages. The first two tracts originally consisted of a single 17.08 acre tract. This tract was later subdivided into the 3.28 tract upon which the marital residence is situated and a 13.26 acre lot. The third tract is a 13.64 acre parcel, and the fourth tract is a 14 acre parcel.

Garry purchased and owned the 17.08 acre tract and the 13.64 acre tract prior to the parties' marriage. He owned a one-half interest in the 14 acre lot at the time of the parties' marriage; however the other half-interest in the lot was given to him by his parents shortly following his marriage to Susan. As 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 any intervening factors, all of the real property would, in the normal course of events, be characterized as Garry's nonmarital property.

At the time of the hearing, there were two mortgages on the property, a \$98,012.90 first mortgage, and a \$10,000.00 second mortgage. It appears that the mortgages were secured by all of the acreage and the marital residence.

In the family court's January 10, 2002, order, the family court awarded Susan the marital residence and the 3.82 acre lot upon which it was situated, and one-half of the 13.26 acre tract. Garry was awarded the remaining one-half of the 13.26 acre tract, the 14 acre tract, and the 13.64 acre tract.

With regard to the debt, Susan was assigned the entire \$98,012.90 first mortgage, and \$8,000.00 of the \$10,000.00 second mortgage. Garry was assigned the remaining \$2,000.00 of the second mortgage.

KRS 403.190, Disposition of Property, provides, in relevant part, as follows:

- (1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also

shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
 - (b) Value of the property set apart to each spouse;
 - (c) Duration of the marriage; and
 - (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.
- (2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:
- (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
 - (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
 - (c) Property acquired by a spouse after a decree of legal separation;
 - (d) Property excluded by valid agreement of the parties; and
 - (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

- (3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

Our standard of review on a question of division of property is stated as follows: "[t]his court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous ... The property may very well have been divided or valued differently; however, how it actually was divided and valued [is] within the sound discretion of the trial court." Cochran v. Cochran, 746 S.W.2d 568, 569-70 (Ky.App.1988) (citation omitted). There is no statutory basis requiring that property be divided equally. Wood v. Wood, Ky. App., 720 S.W.2d 934, 935 (1986) (award of \$1,024,525 to husband and \$512,000, including \$300,000 cash, to wife upheld).

In its January 10, 2002, order, the family court addressed property and debt distribution and assignment issues as follows:

The Court will now address the valuation and disposition of the marital residence and forty four (44) acres situated at 4134 Dye

Ford Road, Bowling Green, Warren County, Kentucky. Pursuant to KRS 403.190(3), all property acquired by either spouse after the marriage and before a decree of dissolution is presumed to be marital property regardless of how the property is held. The presumption is rebutted by successfully asserting that the property was acquired by a method listed in KRS 403.190(2). Also, the trial court must make some valuation of the property. Callahan v. Callahan, Ky.App., 579 S.W.2d 385 (1979). Most important, where there is a lack of evidence on valuation, the trial judge has discretion to (1) order proof to be obtained; (2) appoint experts to furnish the value at a cost to the parties, or (3) direct that the property be sold. Robinson v. Robinson, Ky.App., 569 S.W.2d 178 (1978) overruled on other grounds Brandenburg v. Brandenburg, Ky.App., 617 S.W.2d 871 (1981). Notably, under Kentucky case law "acquired property" is synonymous with equity. An increase in the value of property that is due solely to the joint efforts of the parties is divisible marital property. Goderwis v. Goderwis, Ky., 780 S.W.2d [39] (1989). However, increases that are not due to the parties' joint efforts are separate, non marital interests. The marital home of the parties and the surrounding acreage was purchased prior to the marriage of the parties. The Petitioner admitted during her testimony on October 24, 2001, that all but one of the tracts of land in dispute were purchased prior to the marriage. The tract of land purchased during the marriage concerned a sale by the Respondent's father to the Respondent of a tract of land for \$1.00 shortly after the marriage of the parties. The Court finds the payment of \$1.00 to the father was in no way indicative of the value of the tract; consequently, the Court finds the sale of the piece of property for \$1.00 was a gift with the purchase price of the property being mere peppercorn.

A mortgage exists on the home to Wells Fargo Bank with a payoff amount of \$98,012.90, which was testified to by the Petitioner at the second day of final trial which occurred on October 24, 2001. The Petitioner testified she had singly paid \$2,758.94 from August 18, 1999 until June 20, 2001 to reduce the principal balance on the mortgage to Wells Fargo. The monthly mortgage payment on the marital home is \$639.65, and the Petitioner testified the Respondent had not assisted in any mortgage payments since he moved out in August, 1999.

Further, a home equity loan exists on the property with an approximate balance of \$10,000 which was testified to by the Petitioner at the first day of the final trial on June 20, 2001. The Petitioner's testimony revealed the home equity loan has a cap of \$10,000. The principal due on the loan had been reduced by the Petitioner by approximately \$2,517.00 since the Respondent left the home, but the Petitioner testified that a need arose for her to purchase a car since the 1990 Volvo station wagon she drove became unsafe to operate on public roads. The car the Petitioner purchased was a 1991 Volvo station wagon with 140,000 miles for \$3,500.00. The purchase by the Petitioner of a ten (10) year old automobile demonstrates her simple want of finding a serviceable automobile. Consequently, the Court finds the additional funds borrowed on the home equity loan which maxed it out again at \$10,000.00 was a reasonable expenditure.

. . . .

The *Brandenburg* formula requires this Court to divide the marital contribution and the total contribution and then multiply the quotient by the equity in the home to find what percentage of the total value of the home is marital. Brandenburg v.

Brandenburg, Ky.App., 617 S.W.2d 871 (1981). No testimony or documents were presented to this Court which would allow this Court to compute the nonmarital and marital percentages. The parties married in 1985 while the Respondent purchased the house and seventeen (17) acres on Dye Ford Road in 1975. Two (2) other contiguous tracts of land were purchased by the Respondent during a prior marriage. Another tract of land was sold to the Respondent by his father several months into the marriage of the parties for \$1.00. The Respondent purchased his former wife's interest in the property through their divorce action in 1982. The Court finds the house and acreage has an approximate value of \$140,000.00 The figure was derived from an appraisal completed on February 7, 2000 by Graham Company; however, the total value of the marital home and surrounding acreage has certainly increased since February 7, 2000. Testimony elicited at trial revealed that since the appraisal several improvements had been added to the marital home which added value to the marital home. The Court finds the home individually has a value of approximately \$105,000; however, a mortgage currently exists on the home in the amount of \$98,012.90 along with a home equity loan in the amount of \$10,000.00. The figure for the home's value was derived from an appraisal prepared on May 22, 2001 by Brantley Appraisal Company. The Respondent's plan for division of the property involved the Petitioner being awarded the marital home and the tract of land on which it is located with the Respondent being awarded the other three (3) tracts of land.

The Court has reviewed the evidence presented and of record to reach a decision in this matter with the added proviso that the Court was not provided with enough information to properly complete the *Brandenburg* formula as designed by the

Kentucky Court of Appeals. The Court finds the Petitioner should be awarded the home and the tract of land on which it sits. The first mortgage shall be assigned solely and individually to the Petitioner; however, the Respondent shall be responsible for \$2,000.00 of the \$10,000.00 owed on the home equity loan. The Respondent should be awarded the entirety of the 14 and 13.64 acre tracts. The Petitioner and Respondent should dissect the 13.26 acre tract with the Respondent receiving the top half of the tract and the Petitioner receiving the bottom half of the tract. The two and a half tracts awarded to the Respondent are contiguous and the 14 acre tract of land awarded to the Respondent allows road access.

Susan contends that the family court erred in its distribution of the real property at issue in this case. She does not, however, provide a specific alternative distribution plan. Garry's proposed distribution plan consisted of awarding Susan the marital residence and the 3.82 acre tract upon which it is situated, and awarding him the remaining real property.²

The findings of the family court, as far as they go, are supported by substantial evidence and are, accordingly, not clearly erroneous. We are hampered in our review, however, by the family court's failure to make threshold findings regarding the marital/nonmarital character of the real property under consideration. Under KRS 403.190, the trial court's division of

² Even if the marital residence and the tract upon which it is situated is Garry's nonmarital property, the awarding of this property to Susan was proper because the distribution was in conformance with Garry's own distribution plan.

property involves a three-step process: (1) characterizing each item of property as marital or nonmarital; (2) assigning each party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties. See Travis v. Travis, 59 S.W.3d 904, 909 (Ky. 2001). Because the family court failed to follow this formula, we cannot proceed with a proper review of the family court's distribution of the real property at issue in this case.

Garry either owned the property prior to the marriage or received the property by gift from his parents during the marriage. In the normal course of events, then, all of the real property would be characterized as his nonmarital property.

In her arguments, however, Susan appears to presuppose that the character of the all of the real property is marital because of events occurring during the marriage. She notes that all of the property, by conveyance and deed, was converted to a tenancy by the entirety for the reason, it appears, of providing for a survivorship interest as a matter of estate planning. Subsequently, Garry deeded his interest in the property to his wife for reasons apparently related to his personal bankruptcy action. In her brief, Susan states "[b]ecause the Appellee conveyed the property to the Appellant by general warranty deed to December 31, 1998, any non-marital interest he may have claimed in the parcels was extinguished."

Garry, on the other hand, argues that the distribution of property was proper because "the trial court saw the non-marital nature of such properties despite the conveyance." As the intent of the parties at the time of the conveyance is relevant in determining the effect on the marital/nonmarital character of the property following the transaction, See Hunter v. Hunter, 127 S.W.3d 656 (Ky.App. 2003), this is a factual issue for resolution by the family court.

Because it is unclear from the family court's order which of the real property is marital and which is nonmarital, we are unable to undertake a meaningful review of the family court's distribution of the property. We accordingly remand for additional findings by the family court with directions to characterize each of the four tracts of property as marital or nonmarital. The family court should make additional findings as necessary to support its characterization of the property as marital or nonmarital. In addition, the family court should assign a valuation to the property assigned to each party.

Susan also contends the family court erred by failing to give her credit for her nonmarital funds invested into the improvement of the marital residence. In support of her argument, Susan states as follows:

The Appellant, on the other hand, had a legitimate non-marital interest claim which was traceable pursuant to evidence submitted

at trial. Chenault v. Chenault, Ky., 799 S.W.2d 575, 579 (1990). The Appellant received over \$20,412.66 as monies inherited from her grandparents in 1990 and 1994. In addition, she received a gift of \$4,730.00 from her sister. These funds were used to pay for renovations to the property totaling approximately \$16,612.81. At trial, the Appellant presented bank records showing deposits of these funds and payment of contractors. Further, after the parties' separation, the Appellant continued to renovate the property by replacing carpet, painting, and adding tile to the bathroom. Additionally, she paid all mortgage payments, insurance premiums and property taxes on the property in question.

The trial court recognized that the Appellant should not be held to a stringent standard of tracing. The Appellant's evidence was sufficient and she is entitled to a credit against any marital equity for her entire non-marital contribution.

The family court addressed this issue as follows:

The Petitioner demonstrated she had spent a total of \$9,882.81 on improvements to the marital home. The Petitioner testified the money to improve the home was derived solely from an inheritance she received. The accounting on what was spent to improve the home was exceptional; however, the accounting for tracing the inheritance funds was lacking. The Kentucky Supreme Court set forth in Chenault v. Chenault, Ky., 799 S.W.2d 575, 579 (1990), the general requirement that nonmarital assets be traced into assets owned at the time of dissolution while relaxing some of the draconian requirements previously established for tracing nonmarital assets. The Petitioner testified she received an inheritance from the death of her grandparents in the total amount of \$22,000.00 which was distributed to her in several payments. The

distributions to the Petitioner were placed in either checking or savings accounts of the parties. Subsequently, checks were written by the Petitioner to pay for various improvements to the marital home. It is important to note that the checks were not written immediately after the inheritance checks were deposited into the account of the parties. The Petitioner even testified she had transferred at least one distribution payment from a savings account to a checking account before writing a check for home improvements at a later date.

Prior to the Chenault decision by the Kentucky Supreme Court, the Kentucky Court of Appeals set forth a minimal tracing requirement in Allen v. Allen, Ky.App., 584 S.W.2d 599 (1979). The Allen decision required a party asserting a non-marital claim to funds in a bank account at least demonstrate that the account in which nonmarital funds were deposited and commingled with marital funds was not reduced below the nonmarital funds deposited. The requirement, though not citing Allen directly, was argued by the Respondent's counsel through his cross-examination of the Petitioner. Although the bank accounts of the parties in which the non-marital inheritance distribution checks were deposited dropped below the amounts deposited in the inheritance checks, the Chenault decision explicitly calls into question the tracing requirement posited in Allen. Regardless of the continuing efficacy of the Allen decision, the Court finds the Petitioner commingled her inheritance distributions in the joint bank accounts of the parties. The checks for home improvements were not written immediately after the distributions which further muddled the ability of the Petitioner to demonstrate that funds used for home improvements were derived solely from nonmarital sources.

A party claiming that property, or an interest therein, acquired during the marriage is non-marital bears the burden of proof. Sexton v. Sexton, Ky., 125 S.W.3d 258, 266 (2004); Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816, 820 (2002). "Tracing" is defined as "[t]he process of tracking property's ownership or characteristics from the time of its origin to the present." Sexton, 125 S.W.3d at 266 (citing Black's Law Dictionary 1499 (7th ed.1999)). When the original property that is claimed to be non-marital is no longer owned, then the non-marital claimant must trace the previously owned property into a presently owned specific asset. Id.; See also Chenault v. Chenault, Ky., 799 S.W.2d 575, 578 (1990).

The tracing requirement simply means that "[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset." Graham & Keller, 15 *Kentucky Practice, Domestic Relations Law* § 15.10, p. 512. (2nd ed. West Group 2000). See also KRS 403.190(3), and Brosick v. Brosick, 974 S.W.2d 498 (Ky.App. 1998). If the claimant does so, then the trial court assigns the specific property, or an interest in specific property, to the claimant as his or her non-marital property. See Brunson v. Brunson, 569 S.W.2d 173, 176 (Ky.App. 1978); and Angel v. Angel, 562 S.W.2d 661, 664-665 (Ky.App. 1978).

In Chenault v. Chenault, supra., the Kentucky Supreme Court recognized that tracing to a mathematical certainty is not always possible, noting that: "[w]hile such precise requirements for nonmarital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skill or persons who are imprecise in their record-keeping abilities." Id. at 578. As a result, the Chenault court held that testimony alone may be sufficient to satisfy the tracing requirement. More recently, however, the Court has held that while Chenault relaxed the more draconian requirements for tracing, it did not do away with the tracing requirements altogether. Terwilliger v. Terwilliger, 64 S.W.3d at 821. It has long been the rule that nonmarital funds which have been commingled with marital funds may be traced by showing that the balance of the commingled account "was never reduced below the amount of the nonmarital funds." Allen v. Allen, 584 S.W.2d 599, 600 (Ky.App. 1979).

The family court concluded that Susan failed to meet her burden to establish tracing of the nonmarital funds she acquired during the marriage. While Susan did provide evidence of her inheritance from her grandparents, her gift from her sister, deposits of those funds into the parties' bank accounts, and evidence that funds were used from the bank accounts to make

improvements to the marital home, the family court's determination that her evidence was insufficient to establish tracing was not clearly erroneous. While we may have reached a different conclusion than the family court regarding whether Susan had met her burden of proving tracing, we will not substitute our judgment for its determination.

Susan contends that the family court erred by assigning her the entire \$98,012.90 first mortgage debt and \$8,000.00 of the \$10,000.00 second mortgage debt. Susan argues that there is unrebutted evidence in the record demonstrating that amounts of the mortgage loan proceeds were used to finance Garry's personal legal fees, business losses, gambling losses, and losses associated with his alcoholism.

Our Supreme Court has held that "issues pertaining to the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard." Neidlinger v. Neidlinger, 52 S.W.3d 513, 523 (Ky.2001). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Sherfey v. Sherfey, 74 S.W.3d 777, 783 (Ky.App. 2002), citing Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994). (Internal quotations omitted). "The exercise of discretion must be legally sound." Id., citing Kuprion, 888 S.W.2d at 684.

Again, we are hampered in our review of this issue because the family court did not make findings in support of its assignment of \$106,012.90 in debt to Susan against the assignment of \$2,000.00 in debt to Garry. The reason for the disparity in the assignment of debt is not immediately apparent, and, absent findings of fact in support of its assignment of debt, we are unable to undertake a meaningful review of this issue. We accordingly remand for additional findings on the issue of the assignment of the parties' marital debt. In connection with its additional findings, the family court should make findings addressing Susan's allegation that portions of the mortgage loan funds were used to finance Garry's personal legal fees, gambling and business losses, and losses associated with Garry's alcoholism. After the family court has made its additional findings, it should revisit the assignment of debt in light of its findings.

Maintenance

Next, Susan contends that the circuit court erred by failing to award her maintenance.

KRS 403.200 provides as follows:

- (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant

a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
 - (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
- (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
- (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. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion. Weldon v. Weldon, 957 S.W.2d 283, 285 (Ky.App. 1997).

With regard to its decision not to award maintenance to Susan the family court made the following findings:

The Court will now address whether the Petitioner is entitled to an award of maintenance. The first factor to consider is whether the Petitioner lacks sufficient property, including property apportioned to her, to provide for her reasonable needs. The Court finds the Petitioner has sufficient property, including property apportioned to her, to provide for her reasonable needs. The second factor to consider is whether the Petitioner is able to support herself through appropriate employment or if she is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home. The Court finds the Petitioner is able to support herself through appropriate employment. The Petitioner earns a gross income of approximately \$38,903.10 per year, and her children are between the ages of twelve (12) and fifteen (15) who are in good health which means they do not require her to remain in the home. The Court is aware that the Petitioner will have trouble paying all of her bills, but a divorce by its nature is expensive for both parties since the incomes which formerly supported one household now support two. Therefore, the Court has reviewed the two (2) factors necessary for an award of maintenance to be

made, and the Court finds the Petitioner is not entitled to an award of maintenance.

Based upon 2001 earnings, Susan earns a gross yearly income of \$38,903.10 from her position as a middle school science teacher, or approximately \$3,241.93 per month in gross income. Susan's net pay from her job is \$2,627.52 per month. When combined with her \$500.00 per month child support payment from Garry, her net monthly income is approximately \$3,127.52 per month. In the trial court's property distribution, Susan was awarded the marital home and acreage with a combined value, as determined by the family court, of approximately \$140,000.00. Marital debt allocated to Susan consisted of the first and second mortgage on the residence of \$98,012.90 and \$8,000.00, respectively. The monthly mortgage payment on the marital home is \$639.65. Susan alleges that she has total monthly expenses of \$4,183.00.

Charles testified at the hearing that his net disability retirement income is \$1,549.94 per month and that he earns up to an additional \$100.00 per month in income from part-time work through Enterprise Rent-A-Car. Based upon this, after payment of his \$500.00 per month child support obligation, Garry's net income is approximately \$1,149.94 per month, or approximately \$13,800.00 per year.

The amount and duration of maintenance is within the sound discretion of the trial court. Russell v. Russell, 878 S.W.2d 24, 26 (Ky.App. 1994) Furthermore, in matters of such discretion, "unless absolute abuse is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge." (Emphasis added.) Clark v. Clark, 782 S.W.2d 56, 60 (Ky.App. 1990). See also Platt v. Platt, 728 S.W.2d 542 (Ky. App. 1987); Moss v. Moss, 639 S.W.2d 370 (Ky.App. 1982) and Weldon v. Weldon, 957 S.W.2d 283, 285-286 (Ky.App. 1997).

We cannot conclude that the family court absolutely abused its discretion in denying Susan's request for maintenance. Garry's relatively modest net income after payment of his child support obligation would make any substantive maintenance award impractical. Moreover, Susan has a stable job which provides a moderate income. In combination with her child support award, the trial court's finding that Susan has sufficient means to meet her reasonable needs was not clearly erroneous. CR 52.01. We accordingly affirm the family court's denial of a maintenance award.

CASE NO 2003-CA-002491-MR

In his cross-appeal, Garry contends that the family court erred by failing to more specifically designate the boundaries of a 13.26 acre tract of property which was evenly

divided between the parties, and by failing to address his request for attorney fees.

Boundaries of 13.26 Acre Tract

As previously noted, the family court awarded each of the parties one-half of the 13.26 acre tract.³ The family court's January 10, 2002, order stated "[t]he Petitioner and Respondent should dissect the 13.26 acre tract with the Respondent receiving the top half of the tract and the Petitioner receiving the bottom half of the tract."

In his motion to alter, amend, or vacate, Garry indicated that a dispute had developed regarding how the tract should be divided and requested that the family court clarify its intention regarding how the tract should be partitioned.

In his brief, Garry states that "[w]ithout any further specific direction from the trial court, the parties have not been able to agree as to how the property should be dissected. Without any further directive from the trial court, the parties are left to speculate and debate what the trial court's intention was in the property distribution and dissection." The family court's division of the tract with mere reference to the "top half" and the "bottom half" is ambiguous. We accordingly

³ Elsewhere in this opinion we have remanded the issue of the marital/nonmarital character of this tract for additional findings by the family court. We recognize that depending upon the outcome of the family court's additional review of marital/nonmarital character of this tract, this issue may become moot.

remand with instructions for the family court to clarify the boundary line between the "top half" and the "bottom half" of the tract.

Attorney Fees

Garry also contends that the trial court erred by failing to consider his request for attorney fees. Susan contends that this issue is not preserved for review. We agree.

Garry does not, as required by CR 76.12(4)(c)(iv) provide a reference to the record identifying the manner in which the issue is preserved. Moreover, our review of the circuit court record discloses that Garry did not file a motion requesting attorney fees; that he did not identify attorney fees as an issue in his mandatory case disclosure, in the parties' partial settlement agreement, or in his trial memorandum; and that he raised this issue for the first time in his CR 59.05 motion to alter, amend, or vacate.

"A party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." Kurt A. Philipps, Jr., *7 Kentucky Practice, Rules of Civil Procedure Annotated*, CR 59.05, cmt. 5, at 541 (6th ed. 2005). The issue of attorney fees is accordingly not preserved for our review, and we will not address this issue on the merits.

For the foregoing reasons the portions of the trial court's judgment dealing with the marital/nonmarital character of the real property at issue, assigning marital debt and attempting to equally divide a tract of real estate are vacated, and this case is remanded for additional proceedings consistent with this opinion. In all other respects the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

B. Alan Simpson
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

David F. Broderick
P. Kevin Hackworth
Bowling Green, Kentucky