

RENDERED: OCTOBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000986-MR
AND
NO. 2007-CA-001059-MR

NANCY BUSHONG
(NOW KOPCZYNSKI)

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 05-CI-00202

BENJAMIN BUSHONG

APPELLEE/CROSS-APPELLANT

OPINION AND ORDER
AFFIRMING IN PART,
REVERSING IN PART AND DISMISSING IN PART

** ** * ** * ** *

BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,¹ SENIOR JUDGE.

MOORE, JUDGE: Nancy Bushong (now Kopczynski) appeals from a final judgment of the Shelby Family Court in which the court resolved the issues of

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

child support, maintenance, and property division in a dissolution action. On appeal, Nancy claims the family court erred by reducing Benjamin's child support obligation; not holding Benjamin in contempt; regarding Benjamin's maintenance obligation; division of the parties' assets; the award of attorney's fees to Benjamin; and regarding the parties' Kentucky Affordable Prepaid Tuition account for their minor child.

Benjamin has filed a cross-appeal from the final judgment claiming the trial court erred by failing to divide certain personal property.

As to Nancy's appeal, finding the trial court abused its discretion as to the award of attorney's fees, we affirm in part, reverse in part, and remand. In regards to Benjamin's cross-appeal, we dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

Benjamin and Nancy Bushong married in 2000, and one year later, their only child Audrey was born. In 2005, Benjamin filed a petition with the Shelby Circuit Court to dissolve the parties' marriage.² After the petition was filed, Nancy was granted temporary custody of Audrey; additionally, Benjamin was ordered to pay \$1,159.00 per month in temporary child support and \$1,711.00 per month in temporary maintenance. Subsequently, in October 2005, Benjamin's child support obligation was reduced to \$756.00 per month and his maintenance obligation was reduced to \$1,511.00 per month. Despite these reductions,

² Although the petition was initially filed with the Shelby Circuit Court and referred to a Domestic Relations Commissioner, the case was eventually transferred to the recently formed Shelby Family Court.

Benjamin quickly fell into arrears. A decree was entered in 2006 dissolving the parties' marriage; however, the issues of child support, maintenance and property division were reserved for later resolution. Ultimately, the family court terminated Benjamin's maintenance obligation in January 2007. That same month, Benjamin paid off the full amount of his arrearages.

In early 2007, the family court held a bench trial to resolve the remaining issues and entered a final judgment in March of that year. In the final judgment, the family court retroactively modified Benjamin's child support and maintenance obligations, setting child support at \$464.00 per month and maintenance at \$1,233.00 per month. Furthermore, the court determined that he had overpaid both obligations from June 2005 to December 2006 by \$13,005.00.

Regarding the parties' property, the record reveals that the most valuable asset held by the parties was the marital home at Persimmon Ridge (Persimmon House) in Louisville, Kentucky. In August 2006, the Persimmon House was sold for \$419,000.00. The parties garnered a net profit of \$209,883.00 from the sale, which was placed in a joint bank account pending trial. The family court concluded the proceeds consisted of both marital and nonmarital property. Regarding the nonmarital portion, the court determined that Nancy had contributed \$23,286.00 toward the purchase of the home. The court subtracted this amount from the proceeds and awarded it to her as nonmarital property. The court divided the remaining \$186,597.00 between the parties. The family court awarded a total

of \$63,414.00 to Benjamin, which included an award for attorney's fees, and a total of \$146,486.00 to Nancy, which included her nonmarital interest.

After the judgment was entered, Benjamin filed a motion to alter and amend the judgment and to make additional findings of fact. Nancy also filed a motion to alter, amend, vacate, or, in the alternative, for a new trial. The family court denied both motions. Now, Nancy appeals from both the final judgment and the order denying her post-judgment motion. Benjamin also seeks relief from the final judgment by way of a cross-appeal.

II. STANDARD OF REVIEW

In dissolution actions, our review is bounded by procedural rules, statute, and caselaw. According 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, not being supported by credible evidence. Furthermore, we must give due deference to the family court's opportunity to judge the credibility of witnesses. Hence, if there is a conflict in the evidence, the family court, not this Court, has the responsibility to decide which evidence to believe. *See Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. App. 1980); *Adkins v. Meade*, 246 S.W.2d 980 (Ky. 1952).

Moreover, family courts have very broad discretion to fashion a fair and appropriate remedy, in accord with the statutory scheme, which is specific to the particular action as no two dissolution actions are alike. *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988); *see also Herron v. Herron*, 573 S.W.2d

342, 344 (Ky. 1978). Thus, we may only reverse if the family court has abused its considerable discretion. *Herron*, 573 S.W.2d at 344. A family court has abused its discretion when it has acted arbitrarily, unreasonably or unfairly or if its decision was unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). Additionally, this Court, as an appellate court, exists to correct errors of law made by lower courts; not to provide the parties with a trial *de novo*.

III. ANALYSIS

A. NANCY'S APPEAL

1. Child Support

Prior to the breakup of the parties' marriage, Benjamin worked as a sales representative in the pharmaceutical industry for many years. At the time Benjamin filed the petition, he was earning approximately \$10,221.00 per month. However, three months after Benjamin filed for dissolution, he lost his job. Nearly a year later, Benjamin found a full-time job with the Boy Scouts of America, earning roughly \$2,858.00 per month. After a few months, Benjamin lost this job but was hired by a local bank, earning about \$2,500.00 per month.

Nancy also had a history of working in the pharmaceutical industry, but, after Audrey's birth, she only worked part-time. Prior to the filing of the petition, Nancy was earning approximately \$1,200.00 per month. In early 2006, Nancy found a full-time job, earning approximately \$3,700.00 per month; unfortunately, she lost that position by November.

Regarding child support, the family court made the following findings of fact and conclusions of law in the final judgment:

Since the filing of the petition, both parties have lost and found various jobs. However, in light of their employment histories and the testimony of the parties, the Court concludes that each was and is capable of employment which would earn \$50,000.00 per year. The child support guidelines with each party earning income in that amount would require Ben to pay Nancy \$464, plus half of any daycare expenses incurred less any amounts he pays for insurance for Audrey.

From and after January 1, 2007, [Benjamin] shall pay [Nancy] child support in the amount of \$464 per month plus one half of any daycare costs incurred less any amounts he pays for health insurance for the parties' infant daughter.

On appeal, Nancy argues if a parent is voluntarily underemployed, then the court may calculate child support based on the underemployed parent's potential income. KRS³ 403.212. According to Nancy, after Benjamin lost his well-paying sales position, he refused to find lucrative employment. To support this notion, she claims, based on her own trial testimony, that Benjamin could have found a job earning between \$70,000.00 and \$80,000.00 per year. Furthermore, she argues the family court erred when it imputed a \$50,000.00 annual income to both of them. She alleges the family court should have used Benjamin's prior income of \$10,221.00 per month and her prior income of \$1,200.00 per month to calculate Benjamin's child support obligation. As a result, Nancy insists Benjamin

³ Kentucky Revised Statute.

was voluntarily underemployed and the family court erred when it set his child support obligation at \$464.00 per month.

According to KRS 403.212(2)(d),

[i]f a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

The voluntary underemployment of a child support obligor is a question of fact for the family court to decide, and that decision will not be disturbed on appeal if it is supported by substantial evidence. *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000).

In the present case, Benjamin lost a job making over \$10,000.00 per month in 2005 and remained unemployed for nearly a year before securing employment with the Boy Scouts at a greatly reduced salary. Benjamin lost that job but found a position at a local bank at an even lower salary. Because Benjamin's work history demonstrated that he is capable of earning a more substantial income, the family court's finding of voluntary underemployment and its decision to impute a \$50,000.00 annual income to him were supported by substantial evidence. The court specifically relied on the parties' employment history and testimony in making this decision.

Regarding Nancy, the record reveals, prior to the dissolution, she worked part-time earning \$1,200.00 per month; however, she eventually secured a full-time position earning approximately \$3,700.00 per month. Because Nancy's work history demonstrated she was capable of earning more than \$1,200.00 per month, the evidence supported the family court's finding of voluntary underemployment and its decision to impute income to her. As a result, the family court did not err when it set Benjamin's child support obligation at \$464.00 per month.

2. Contempt of Court

In her brief, Nancy points out that Benjamin repeatedly failed to pay child support for eleven months and maintenance for fifteen months. Benjamin's failure to pay his obligations, according to Nancy, violated the family court's order to make such payments. Now, she claims the family court erred by not holding Benjamin in contempt of court and by not compelling him to pay his obligations.

When a court exercises its contempt powers, it has nearly unlimited discretion. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007); *see also Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986). Accordingly, this Court will not disturb a lower court's decision regarding contempt absent an abuse of its discretion. *Meyers*, 233 S.W.3d at 215.

In the present case, there is no dispute that Benjamin was at one point in arrears; however, the lower court decided not to hold him in contempt. Nancy

has not shown why this amounts to an abuse of discretion. Furthermore, Benjamin paid his arrearages in full, purging himself of any contempt. Consequently, we find no error.

3. Maintenance

As previously stated, Benjamin's initial maintenance obligation was \$1,711.00 per month, but the obligation was reduced to \$1,511.00 per month in October 2005 and terminated in January 2007. In the final judgment, the family court retroactively reduced Benjamin's maintenance obligation to \$1,233.00 per month effective from January 2006 until it was terminated.

In her brief, Nancy argues

the mortgage payment and other expenses that were based on the parties (sic) incomes did not go away until the closing on the Persimmon Ridge property in August of 2006. This is the date that maintenance should have terminated at the rate of \$1,511.00 per month. The Trial Court erred in reducing the maintenance amount and duration.

It is well settled in the Commonwealth that both the amount and duration of maintenance is within the sound discretion of the family court. *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky. App. 1994); *see also Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990). Here, Nancy does not attempt to show how the family court abused its discretion; she merely claims it erred. Absent a showing of abuse of discretion, we will not disturb the family court's decision. Thus, there is no error.

4. Nonmarital interest in real property

Prior to the parties' marriage, Nancy purchased a home on Brothers Avenue in Louisville (the Brothers House) for \$78,000.00. At trial, Nancy and her father both attested she made all the mortgage payments on and made substantial improvements to the home, prior to the marriage. Furthermore, Nancy testified, during the marriage, she and Benjamin jointly paid the mortgage but made no substantial improvement to the property. In other words, Nancy avers that all major improvements were made by her prior to the marriage. Eventually, the parties sold the Brothers House for \$126,000.00, netting approximately \$30,000.00, after satisfying the mortgage.

On appeal, Nancy claims, based on her and her father's testimonies, that approximately \$28,700.00 of the proceeds represented her nonmarital interest in the Brothers House. To support this proposition, Nancy argues that, after she married Benjamin the Brothers House did not appreciate in value except as the result of general economic conditions.

According to Nancy, when she and Benjamin purchased the Persimmon House, they paid a \$60,000.00 down payment. Nancy alleges this down payment consisted of: 1) the \$30,000.00 proceeds from the sale of the Brothers House, of which she claims \$28,700.00 as nonmarital property; 2) a \$6,000.00 gift from her mother, which she claims was nonmarital property; and 3) \$23,700.00, which was the parties' joint contribution. So, Nancy argues that approximately \$34,700.00 of the \$60,000.00 down payment consisted of her nonmarital property.

At trial, the evidence revealed that the parties contracted with Nancy's father to build the Persimmon House for \$250,000.00. This price was also reflected in the deed conveying the property to the parties. However, as Nancy avers, her father testified that it cost him \$303,166.00 to build the house, as the contract price did not include the price of the land. Nancy's father also attested that the actual value of the Persimmon House at the time it was built was \$394,000.00. Furthermore, at trial, both Nancy and her mother swore the difference between the house's contract price and its allegedly additional costs and value above that price was a gift from Nancy's parents to her alone.

On appeal, Nancy alleges, based on her own testimony and the testimony of her parents, Benjamin was only entitled to \$15,334.13 from the proceeds, which represented his marital interest in the property. On the other hand, she contends she was entitled to the balance, \$194,549.16, which represented both her marital and her substantial nonmarital interest in the property. Therefore, Nancy believes the family court erred when it did not award her that amount.

In a dissolution action, the division of the parties' assets is controlled by KRS 403.190. Pursuant to that statute, the trial court must go through three steps to divide assets: 1) characterize each item of the parties' property as either marital or nonmarital; 2) assign to each party his or her nonmarital property; and 3) equitably divide that remaining marital property between the parties. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). Furthermore, it is presumed that all property acquired by either party during the marriage is marital unless the

property falls under the gift exceptions found in KRS 403.190(2)(a)-(b). However, this is a rebuttable presumption, and if a party claims that property is nonmarital due to the gift exception, then that party bears the burden of proof on that issue. *Id.* at 660. In determining whether the transfer of property was a gift, the trial court may consider the source of the money used to purchase the property, the status of the marriage at the time of transfer, and the intent of the donor, which is the most important factor overall. *Id.*

In the present matter, because Nancy claimed the vast majority of the proceeds from the sale of the Persimmon House consisted of her nonmarital interest, she bore the burden of proof. To sustain her burden, she presented her testimony and the testimony of her parents.

Regarding this issue, the family court stated:

There was considerable testimony concerning various gifts to Nancy from her parents. However, the Court finds most of it to be irrelevant. The fair market value of the Brothers Avenue property was sworn [to] by both Nancy and Ben shortly after their marriage when Nancy conveyed it to herself and Ben and there was no testimony concerning the increase in value of the property after the marriage. The Persimmon Ridge property was conveyed to them for the amount stated in the building contract, which specifically included the cost of the land. . . . While there is considerable testimony in the record concerning work done to the Brothers Avenue house prior to the transfer to Ben and Nancy and concerning the construction of the Persimmon Ridge house prior to their purchase, Nancy presented no evidence to overcome the presumption that the increased value was nonmarital. . . .

As the fact-finder, the family court had the sole discretion to determine the quality, character, and substance of the evidence and to draw reasonable inferences from it. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Furthermore, it had the sole duty to judge the credibility of the witnesses, and it had the choice to believe or disbelieve any part of their testimonies. *See Ghali*, 596 S.W.2d at 32; *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

To find Nancy's appellate argument persuasive, we must accept her trial testimony and the testimony of her parents regarding the improvements to the Brothers House and the gifts relating to the Persimmon House as true. However, the family court concluded in the final judgment that this evidence was not credible and rejected it. We are bound to defer to the family court's decision regarding this evidence. Consequently, without this evidence to support her argument, Nancy cannot establish the family court abused its discretion regarding her nonmarital interest in the Persimmon House.

5. Marital assets

Regarding this assignment of error, we set forth Nancy's argument, as found in her brief, in its entirety:

V. The Trial Court failed to divide the marital assets equitably thereby depriving Appellant her fair share of these assets.

This issue was preserved for appellate review by the post judgment motion which [Nancy] filed with the Trial Court (T.R. 1135-1205). Clearly, pursuant to KRS

403.190, the retirement accounts with BioMartin, Medius and Mylan are marital assets as they were obtained during the marriage and should be divided equally. Other amounts that [Benjamin] received but did not divide with [Nancy] are as follows: stock options of \$7,568.00; severance pay from BioMartin of \$4,581.69; reimbursement for Audrey's daycare of \$1,450.00[;] bonus check of \$2,019.78 and one half of the money used by [Benjamin] to purchase his \$7,800.00 Buick.

In a dissolution proceeding, a family court has very broad discretion when dividing marital property. *Cochran*, 746 S.W.2d at 570; *see also Herron*, 573 S.W.2d at 344. On the subject of Benjamin's retirement accounts, the family court awarded one half of their collective value to Nancy, contrary to Nancy's argument.

Regarding the \$7,568.00 in stock options, the family court found Benjamin had used this money to pay child support, maintenance, and his living expenses prior to the dissolution. In her brief, Nancy does not challenge the evidence supporting this finding and does not show how the family court abused its discretion.

As to the remainder of the assets, we note the family court did not mention them in the final judgment. And, in Nancy's brief, she does not cite to any evidence in the record that would establish their existence, nor does she demonstrate how the family court abused its discretion. She merely makes a conclusory statement that the family court failed to equitably divide the assets. This is insufficient to establish an abuse of discretion. Consequently, we find no error.

6. Attorney's fees

Regarding attorney's fees, the family court noted:

While neither party has been blameless in this matter, i.e., both filed motions for protective orders when the only issue was whether depositions would be taken in Shelbyville or in Louisville, Nancy's pleadings, from her motion seeking to compel Ben to take Audrey to a birthday party and seeking to have Ben arrested for flagrant nonsupport when there was over \$200,000 sitting in a joint account, clearly extended this matter unnecessarily. Although the parties have similar financial means at the end of the day, Nancy's conduct in this proceeding merits an award of one half of Ben's attorney fees in the amount of \$17,875.

On appeal, Nancy insists the family court abused its discretion when it ordered her to pay half of Benjamin's attorney's fees because, during the dissolution proceeding, she repeatedly filed motions to compel him to pay his child support. Furthermore, Nancy claims the court abused its discretion because, in the past, Benjamin earned more money than her and because Benjamin's request for attorney's fees was based on an affidavit that was filed with the family court after trial, depriving her of the opportunity to cross-examine Benjamin regarding his attorney's work.

Kentucky Revised Statute 403.220 permits a family court to order one party in a dissolution proceeding to pay a reasonable amount for the attorney's fees of the other party "but only if there exists a disparity in the relative financial resources of the parties in favor of the payor." *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001). We will not disturb the family court's decision concerning

attorney's fees absent an abuse of the court's sound discretion. *Id.* A trial court has abused its discretion when it has acted arbitrarily, unreasonably or unfairly or if its decision was unsupported by sound legal principles. *Sexton*, 125 S.W.3d at 272.

In the final judgment, the family court, in reaching its decision as to attorney's fees, found "the parties have similar financial means at the end of the day[.]" This finding is inconsistent with the Supreme Court's holding in *Neidlinger* that attorney's fees are only appropriate where a disparity in the relative finances of the parties exist. 52 S.W.3d at 519. As a result, the family court's decision to award attorney's fees was in error. Hence, we reverse that portion of the final judgment relating to attorney's fees and remand the matter to the family court to adjust the parties' monetary awards accordingly.

7. Kentucky Affordable Prepaid Tuition Account

In 2005, the parties entered into a contract with Kentucky Affordable Prepaid Tuition (KAPT) program establishing an account for their daughter Audrey. As part of the contract, the parties agreed to pay \$313.00 per month to fund the account. Addressing this obligation, the family court decided, "After crediting any interest which may have accrued on the proceeds of the Persimmon Ridge property to Audrey's KAPT fund obligation, the parties shall alternate payments until the debt is paid in full."

According to Nancy, the family court's decision requires her to be solely responsible for the KAPT obligation from April 2005, when Benjamin filed

the petition, until January 2007. Nancy believes that Benjamin should be required to pay his fair share of this obligation for this time period. Furthermore, Nancy insists Benjamin should pay his fair share of the obligation until it is paid in full.

As previously mentioned, a family court has very broad discretion in dissolution proceedings to fashion a fair and equitable remedy. *Cochran*, 746 S.W.2d at 570; *see also Herron*, 573 S.W.2d at 344. We will not disturb the court's solution unless it abused that vast discretion. In regards to the KAPT obligation, Nancy only makes a conclusory statement regarding the KAPT obligation. Nancy failed to set forth how the trial court abused its discretion; we find no error.

8. Additional Relief

Nancy points out that she requested the family court to transfer the parties' dissolution proceeding to Jefferson County because the parties now live there. Nancy requests us to reverse and remand this matter for a new trial; in addition, she requests that we direct the matter to be remanded to the Jefferson Family Court.

Whether or not to change venue lies within the trial court's sound discretion. KRS 452.030. In her brief, Nancy neither shows nor claims the family court abused its discretion when it denied her transfer motion. Accordingly, we find no error.

B. BENJAMIN'S CROSS-APPEAL

In his cross-appeal, Benjamin argues he presented a list of personal property, totaling \$16,440.00, to the family court, yet the family court failed to divide the assets as required by KRS 403.190. Thus, he contends he was denied an equitable division of property.

With this assignment of error, Benjamin is challenging the family court's order entered on April 26, 2007, denying his post-judgment motion to alter and amend the final judgment. According to CR 73.03(1), "The notice of appeal . . . shall identify the judgment, order or part thereof appealed from." It is through the notice of appeal that an appellant places a judgment or order before this Court for review.

Where an appellant has made a simple error in the designation of the documents appealed from, the Supreme Court has held the appeal will not be automatically dismissed if the appellant substantially complied with CR 73.03(1). *Ready v. Jamison*, 705 S.W.2d 479, 481-482 (Ky. 1986); *see also City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).

In his notice of cross-appeal, Benjamin stated, "Notice is hereby given that Petitioner/Cross Appellant, Benjamin Bushong, hereby cross appeals to the Kentucky Court of Appeals from the final and appealable order entered by the Circuit Court on March 20, 2007." As can be seen, Benjamin identified only one document, the final judgment entered on March 20, 2007. He neither identified nor referred to the April 26 order in his notice of cross-appeal. Unfortunately, in

his prehearing statement filed with this Court, Benjamin also does not reference the April 26 order.

While we recognize that the high Court has adopted the substantial compliance rule, in the instant case, there has been no compliance which identifies the April 26 order before this Court. To rise to the level of substantial compliance, there must be at least some compliance. Here, there was none. Consequently, we dismiss Benjamin's cross-appeal as it is not properly before us.

IV. CONCLUSION

A. NANCY'S APPEAL

For the foregoing reasons, that portion of the Shelby Family Court's final judgment ordering Nancy to pay half of Benjamin's attorney's fees is reversed, and the matter is remanded for further proceedings not inconsistent with this opinion. The remainder of the final judgment is affirmed.

B. BENJAMIN'S APPEAL

Upon the Court's own initiative, and being otherwise advised, this Court ORDERS that the cross-appeal, 2007-CA-001059-MR, be, and it is hereby, DISMISSED.

MOORE, JUDGE, AND HENRY, SENIOR JUDGE, CONCUR.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I disagree with our Court's substitution of its judgment for the judgment of the trial court in its decision to award attorney's fees to Benjamin.

The trial court was in a unique position to analyze the record as to who caused the excessive litigation in this divorce action. In addition, even though the trial court made a finding that the parties have similar financial means, the facts obviously dispute such a finding. From the marital residence, the wife was awarded \$146,486 and the husband was awarded \$63,414 which in itself indicates a difference in financial circumstances between the parties.

In addition, the trial court awarded substantial maintenance in this five-year marriage which was paid from the husband to the wife. Because of the inconsistency in the finding by the trial court and the record, this judgment should be reversed for the trial court to modify its findings to conform to the evidence and for the discretionary awarding of attorney's fees in compliance with *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001).

ENTERED: October 31, 2008

/Joy A. Moore
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Harold L. Storment
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Gregg Y. Neal
Shelbyville, Kentucky