

RENDERED: JANUARY 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000906-MR

MICHAEL D. EASTER

APPELLANT

APPEAL FROM OLDHAM CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 10-CI-00278

ELIZABETH M. EASTER

APPELLEE

AND

NO. 2011-CA-000949-MR

ELIZABETH MAE EASTER

CROSS-APPELLANT

CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 10-CI-00278

OPINIONAFFIRMING APPEAL NO. 2011-CA-000906-MR
AND CROSS-APPEAL NO. 2011-CA-000949-MR

** ** * * * * *

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Michael D. Easter brings Appeal No. 2011-CA-000906-MR and Elizabeth Mae Easter brings Cross-Appeal No. 2011-CA-000949-MR from a February 16, 2011, Findings of Fact and Conclusions of Law, a February 17, 2011, Addendum to Findings of Fact and Conclusions of Law, and a May 11, 2011, Final Order of the Oldham Circuit Court, Family Court Division, awarding maintenance and attorney's fees to Elizabeth. We affirm both appeals.

Michael and Elizabeth Easter were married in July 1986. Michael filed a petition for dissolution of the twenty-four year marriage on March 10, 2010. As the parties were unable to reach an agreement regarding disposition of marital property, assignment of marital debt, and spousal maintenance, a hearing upon these issues was held on October 17, 2010.¹

At the hearing, it was established that since very early in the marriage, Michael had been employed with Catalyst Services, Inc. (Catalyst). Most recently, Michael served as both Regional Director and Interim Vice President for Catalyst. The evidence indicated that by 2010 Michael was earning in excess of \$280,000 per year in years when bonuses were received, whereas Elizabeth spent the

¹ The parties have two children that were emancipated before entry of the decree of dissolution of marriage. Thus, there are no issues related to child support or visitation on appeal.

majority of the parties' marriage as a homemaker, had no significant employment history, and held a GED diploma. By Findings of Fact and Conclusions of Law and Decree of Dissolution entered February 16, 2011, the family court awarded Elizabeth maintenance as follows:

The Court determines that Ms. Easter is entitled to spousal maintenance as follows. Mr. Easter is to continue to pay \$700.00 per month in temporary spousal maintenance until Ms. Easter moves out of the marital home. Upon her vacating the marital home his spousal maintenance shall increase to \$2,000.00 per month until the month following the closing of the sale of the marital home with equity distribution to both parties. Thereafter, Mr. Easter's responsibility for spousal maintenance shall continue for an additional 48 months at the rate of \$1,500.00 per month, payable \$750.00 on the 1st and \$750.00 on the 15th of each month. His maintenance payments will then lower to \$1,000.00 per month, and continue for an additional 24 months.

One day later, on February 17, 2011, the family court rendered an addendum to the February 16, 2011, order. Therein, Elizabeth then timely filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the February 16, 2011, Findings of Fact and Conclusions of Law. By order entered May 11, 2011, the family court made the following modification to the award of maintenance:

The Court in its Findings of Fact and Conclusion of Law had considered Mr. Easter's base salary of \$125,000.00 a year, but had overlooked his history of significant bonuses which had provided to Mr. Easter an annual income in excess of \$280,000.00 over the last couple of years. Mr. Easter had testified that the last few years had been particularly lucrative due to his work in the oil field and the boom in the oil economy. However, that boom is showing no signs of ending. The Court erred in under-estimating Mr. Easter's true annual compensation. The

Court reviews its spousal maintenance award and amends it as follows:

Acknowledging that Ms. Easter has vacated the former marital home, the Court sets spousal maintenance payable from Mr. Easter to Ms. Easter in the amount of \$3,750.00 per month commencing May 1, 2011[,] and continuing for a period of 60 months. Thereafter, Mr. Easter's spousal maintenance obligation shall lower to \$1,800.00 per month until Ms. Easter's sixty-second birthday, at which time Mr. Easter's spousal maintenance shall be offset by any social security received by Ms. Easter dollar for dollar up to \$1,800.00 per month.

This appeal and cross-appeal follow.

In Appeal No. 2011-CA-000906-MR and Cross-Appeal No. 2011-CA-000949-MR, Michael and Elizabeth, respectively, argue that the family court erred in the award of maintenance. Both parties contend that the family court erred in the amount of the maintenance award, and Michael contends that the family court also erred in the duration of the maintenance award. Michael believes that the award of maintenance to Elizabeth of \$3,750 per month for sixty months, followed by \$1,800 per month until her sixty-second birthday, and then \$1,800 per month offset by social security is excessive. Elizabeth believes the amount of maintenance is inadequate.

It is axiomatic that the amount and duration of a maintenance award is within the sound discretion of the family court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). As an appellate court, we review an award of maintenance for an abuse of discretion. *Combs v. Combs*, 622 S.W.2d 679 (Ky. App. 1981). And, in awarding maintenance, the family court is required to consider all relevant factors

including those enumerated in subsection (2) of Kentucky Revised Statutes (KRS)

403.200, which provides:

- (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.

KRS 403.200(2).

In this case, the family court properly considered the factors set forth in KRS 403.200(2) when it awarded maintenance to Elizabeth. The family court recognized that despite Michael's high level of income, the parties had acquired very little marital property during their twenty-four year marriage. Thus, the marital property apportioned to Elizabeth was relatively modest. The family court

further recognized that Elizabeth's ability to support herself was limited by her age, lack of work experience, and limited education. These factors led the family court to determine that Elizabeth was only "marginally capable" of supporting herself through employment. The family court also noted that Michael's income certainly allowed him to meet his own needs while also meeting Elizabeth's needs. Hence, we do not believe the family court abused its discretion by awarding Elizabeth maintenance of \$3,750 per month for sixty months, followed by \$1,800 per month until her sixty-second birthday, and then \$1,800 per month offset by social security benefits. Simply put, we conclude that both Elizabeth and Michael's contentions of error as to the amount and duration of the family court's award of maintenance are without merit.

Michael also contends that the family court erred in its modification of the award of maintenance following Elizabeth's CR 59 motion. Specifically, Michael asserts that the family court abused its discretion by increasing the amount and duration of the maintenance award from that originally awarded in the February 16, 2011, Findings of Fact and Conclusions of Law. In support thereof, Michael asserts that the family court considered evidence that was not introduced at the hearing on October 17, 2010.

It is well-established that upon consideration of a motion to alter, amend, or vacate pursuant to CR 59, the family court may not consider evidence consisting of facts or events that occurred subsequent to trial. *Gullion v. Gullion*, 163 S.W.3d

888 (Ky. 2005). And, as previously set forth, an award of maintenance is reviewed for abuse of discretion. *Gentry*, 798 S.W.2d 928.

A review of the record in this case reveals that the family court only considered evidence introduced during the hearing on October 16, 2011. In fact, the family court stated in the May 11, 2011, order that it had merely “overlooked” the significant bonuses that Michael was receiving from his employer. At the hearing on October 16, 2011, Michael specifically testified concerning his income and bonuses. Upon Elizabeth’s CR 59 motion to reconsider, the family court merely re-evaluated the evidence previously presented and determined that Michael’s significant bonuses, which elevated his income above \$280,000 per year, should have been given more weight. Thus, the family court did not consider evidence outside the record; rather, the family court merely reconsidered the weight given to certain evidence (the bonuses) presented at the October 16, 2011, hearing. Consequently, we do not believe the family court abused its discretion by modifying the award of maintenance following Elizabeth’s CR 59 motion.

Elizabeth contends that the family court erred in its award of attorney’s fees to her. Specifically, Elizabeth asserts that the family court’s award of \$2,000 in attorney’s fees was inadequate as she incurred approximately \$10,000 in attorney’s fees.

It is well-established that the family court enjoys broad discretion in the award of attorney’s fees. *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986). And, pursuant to KRS 403.220, the family court is only required to consider the

financial resources of the parties. *Id.* In this case, there is a disparity between the parties' income. Michael has yearly gross income of over \$280,000 while Elizabeth is unemployed. Elizabeth was awarded one-half of the equity in the parties' marital residence, one-half of Michael's 401K, and permanent maintenance in a substantial amount. Upon consideration of the whole, we simply cannot conclude that the family court abused its discretion in its award of \$2,000 in attorney's fees to Elizabeth.

In sum, we hold that the family court's award of maintenance and attorney's fees to Elizabeth was proper and thus affirm the family court in both Appeal No. 2011-CA-000906-MR and Cross-Appeal No. 2011-CA-000949-MR.

For the foregoing reasons, the Findings of Fact and Conclusions of Law, Addendum to Findings of Fact and Conclusions of Law, and Final Order of the Oldham Circuit Court, Family Court Division, in Appeal No. 2011-CA-000906-MR and Cross-Appeal No. 2011-CA-000949-MR are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE:

Jason A. Bowman
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Thomas M. Denbow
Louisville, Kentucky