

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-000131-MR

MICHAEL HARGROVE

APPELLANT

v.

APPEAL FROM HARRISON FAMILY COURT  
HONORABLE BARBARA L. PAUL, JUDGE  
ACTION NO. 13-CI-00291

TRACEY HARGROVE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, JONES AND THOMPSON, JUDGES.

ACREE, JUDGE: Michael Hargrove appeals the Harrison Family Court's judgment and final decree awarding maintenance to Tracey Hargrove in their dissolution action. For the following reasons, we affirm.

Michael and Tracey were married in 1984. During most of their thirty-year marriage, Tracey was a homemaker and stay-at-home mother while

Michael provided the household income from his employment at Toyota Motor Manufacturing Kentucky.

The parties separated on February 8, 2012. On November 13, 2012, Michael filed a petition for dissolution. On November 22, 2013, Tracey requested temporary maintenance. In her affidavit, she indicated she needed \$2,531.15 in maintenance per month because she was unable to meet her listed total monthly expenses of \$4,071 with her net income of \$1,540.

Michael's response, filed on September 2, 2013, indicated he lacked sufficient income to provide maintenance to Tracey due to reduced income, reduced overtime and an increase in monthly bills including payment of the marital debt. His affidavit detailed total monthly expenses of \$4,354.

The family court first addressed maintenance by a temporary order in December 2013, awarding Tracey temporary maintenance of \$750 per month. Two months later, the family court ordered the parties to mediate maintenance and issues relating to the division of their assets. The bulk of the parties' assets was in Michael's retirement accounts. By agreement of the parties, the court entered a qualified domestic relations order (QDRO) by which Tracey was to receive \$14,224 from Michael's retirement accounts as her share of equity in the house; after other debts were satisfied from the accounts, the balance would be divided resulting in Tracey's receipt of approximately \$250,000. The parties resolved all

issues between them in the mediation agreement except for Tracey's request for maintenance and attorney fees.

On September 26, 2014, the family court held a hearing on these remaining issues. Tracey and Michael testified.

Tracey testified that she is a department manager at Hobby Lobby. She became employed a few years earlier as she was a stay-at-home mother until the children were out of school. She recently received a raise and now earns \$15 an hour. She typically works 35 hours per week for about \$29,500 per year.

Tracey offered Michael's 2012 individual tax return into evidence, which shows his gross income of \$122,046. She testified he has always worked overtime and his yearly income has been relatively consistent over the past ten years. She also testified to her belief that Michael was purposefully declining overtime opportunities he would have routinely accepted prior to the divorce in order to lessen the disparity in their incomes with the intent to reduce his maintenance obligation.

Tracey testified extensively about how her lifestyle changed since the parties separated, including her living in a small rental house in need of repairs, and lacking a refrigerator and dishwasher. She updated her financial disclosure indicating her monthly expenses. Although her gasoline costs were reduced after she moved closer to her work, her food expenses have increased from eating drive-

thru food because she does not have a refrigerator. She testified that she is “existing, barely making it,” and needed to borrow money from her children to help with food and expenses.

Tracey acknowledged that, after refiling taxes with Michael, she received an additional refund, but noted she had to use part of that money to pay a \$922 natural gas bill to have it turned back on in her home. She is fearful about spending the money because she is not sure about her future situation. She anticipated future car payments because her current vehicle has 300,000 miles on it. She did not want to spend the portion of the retirement fund she will receive from Michael to cover expenses believing she will need that money for retirement; she has only paid into social security for a couple of years.

Michael testified he started working at Toyota in 1997. His current net pay is about \$4,000 per month and he is taxed at a 35% rate. He submitted into evidence what he admitted were a random assortment of pay stubs that did not cover a calendar year, but instead had been selected from 2012, 2013 and 2014. He acknowledged that his W-2 and federal income tax return from 2012 are clear representations of what he made for that year.

Michael testified that he currently makes less money than he did in 2012 because he is not working as much overtime. He testified that after the shared debt is paid off through the QDRO, he will have expenses totaling about

\$3,300 a month. He agreed that his car payment of \$225 a month was incurred in violation of the status quo order that prohibited the parties from taking on additional debt during the pendency of the action, but stated that he needed a more reliable vehicle. Michael testified he cannot afford to pay his mortgage or other expenses if ordered to pay the \$3,000 a month that Tracey requested for maintenance. While his home has three bedrooms, a bonus room in the basement and a two-car garage, the pool is not functional due to a leak. He cannot afford to pay the \$2,000 for a new pool liner to fix the problem.

In addition to testifying about his monthly income, Michael testified that his hourly wage working second shift is \$33.43 for his forty-hour work week with occasional mandatory overtime on Saturdays. He can take on voluntary overtime at time-and-a-half on Saturdays and double time on Sundays. He also receives three bonuses a year for attendance, key point indicator and a lump sum bonus, but they are not guaranteed. His bonuses total \$3,000 to \$7,000 a year.

Michael testified that at age fifty-four, he cannot work every weekend. He almost has enough seniority to move to a day shift, but at that time will lose 5% of his pay. He is currently working every other weekend. During his marriage, he worked seven days a week, holidays and sold back his vacations. He is only working overtime now to pay bills, not because he wants to work overtime. He

believed his base pay was the only amount which should be considered for determining the appropriate amount of maintenance.

At the conclusion of the hearing, the family court indicated it would take judicial notice of the entire file when considering its ruling. The court stated there would be maintenance awarded based on the thirty-year marriage and the disparity in the parties' income.

On October 16, 2014, the family court entered a final decree. Based on Tracey's uncontested testimony, the family court found she should make about \$29,500 in 2014 working for Hobby Lobby and, using a 21% deduction, her net income for 2014 should be about \$23,305 or \$1,942 per month. The family court found convincing Tracey's testimony that she is unable to support herself in the same manner as she had during the marriage and that it should award maintenance.

The family court resolved the issue of how much Michael's income was, and how maintenance should be calculated as follows:

[Michael] did not request that he pay no maintenance but denied his ability to continue working overtime and requests maintenance be calculated on his wages of \$33.45 per hour for a 40 hour work week and admits he currently works overtime every other weekend and certain mandatory days. The Court agrees that [Michael] should not have to work seven days per week but finds maintenance calculations should include a reasonable amount of overtime as it is common knowledge that Toyota employees typically work a lot of overtime. The calculation should also include the bonuses received by [Michael]. The Court finds it should

use the pay stub for [Michael] for 2 week pay period ending September 14, 2014 as a basis for calculations. This would be the 18th of 26 total paychecks for the year. Using the gross taxable pay shown it is projected that [Michael] will earn about \$111,700. This is considerably less than 2012 gross income of \$121,295 and less than the projected gross income of \$114,600 for 2013 using a pay stub from September 2013 as the basis. Allowing even a further reduction for [Michael's] request not to have to work so much overtime, the Court finds it reasonable to impute a gross income for this year of \$110,000 with a projected net pay of \$68,200 (allowing 38% withholding and deductions calculated from pay stubs net divided by gross) for 2014 or \$5683 net income per month.

The Court finds it should combine both parties' net income and equally divide the total and [Michael] should pay to [Tracey] an amount that will equalize their net incomes in monthly maintenance of \$1960. ( $5683 \text{ plus } 1942 = 7805$  divided by 2 = 3902 less the net amount [Tracey] makes  $1942 = 1960$ ).

[Tracey] requested maintenance for 13 years. The Court finds this would allow [Tracey] to reach her full retirement age of 65 however, [Tracey] will be eligible to draw Social Security in 10 years at age 62 and [Michael] will be eligible in 8 years. There was no evidence presented at the hearing regarding this issue and the Court finds it reasonable that [Michael] should pay maintenance only until he is eligible for Social Security at age 62.

The family court denied Tracey's request for attorney fees.

On October 27, 2014, Michael filed a motion to alter, amend or vacate the order arguing the family court failed to comply with KRS<sup>1</sup> 403.200(2)(a) and (f) by failing to consider Tracey's receipt of \$250,000 in assets to meet her needs and whether Michael could meet his monthly obligations prior to paying maintenance without being required to continue to work overtime.

At the hearing held on November 19, 2014, Michael attempted to introduce additional evidence about how much of his pay from 2014 was base pay, overtime pay and bonus pay. The family court stated that the evidence introduced by Michael about his annual pay at the previous hearing was sparse, but that was his opportunity and it would not accept additional proof.

On December 22, 2014, the family court entered an order denying the motion to vacate.<sup>2</sup> Michael timely appealed.

Michael argues the family court abused its discretion because he cannot meet his own expenses and maintenance obligations without working a substantial amount of overtime (fifty to sixty hours per week), removing his retirement contributions and reducing his medical and dental insurance. He argues the family court erred by failing to consider that Tracey could access approximately \$250,000 in retirement benefits penalty free via a QDRO to support

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> The family court did correct the total number of maintenance payments to correctly reflect when Michael would turn sixty-two.



herself and failing to address whether Michael could meet his standard of living while paying the \$1,950 a month in maintenance as ordered. Michael also argues that the family court erred in considering Michael's bonuses which are not guaranteed and considering his optional overtime pay when calculating his income.

KRS 403.200 provides the relevant considerations for awarding maintenance:

(1) In a proceeding for dissolution of marriage or legal separation . . . 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 . . . .

(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 . . . ;

(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.

The family court has broad discretion to decide whether to award maintenance. *Shafizadeh v. Shafizadeh*, 444 S.W.3d 437, 446 (Ky. App. 2012). “Under [KRS 403.200], the [family] 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.” *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). A reviewing court must affirm this decision unless the family court’s findings of fact are clearly erroneous or it has abused its discretion. *Id.*; *Age v. Age*, 340 S.W.3d 88, 96 (Ky. App. 2011).

The family court initially must make findings as to whether the spouse seeking maintenance is entitled because that spouse is not able to meet his or her reasonable needs through that spouse’s property or employment income without maintenance. *Shafizadeh*, 444 S.W.3d at 446; *Drake v. Drake*, 721 S.W.2d 728, 730 (Ky. App. 1986).

If a spouse is awarded a large sum of marital assets, the family court should consider whether these are sufficient resources to support that spouse or whether maintenance is needed. KRS 403.200(1)(a). The spouse seeking

maintenance does not have sufficient assets if those assets will not “yield income or profits sufficient for [that spouse’s] comfortable maintenance in a style suitable to the social standing established by the parties during marriage without [that spouse] being required to consume the principal.” *Colley v. Colley*, 460 S.W.2d 821, 827 (Ky. 1970). However reasonable minds may differ on whether such resources are sufficient and so long as there is substantial evidence to support the family court’s ruling, the reviewing court may not substitute its judgment for that of the family court even if it disagrees with the family court’s decision that a spouse has been awarded sufficient assets for his or her support. *Perrine*, 833 S.W.2d at 826-27; *Drake*, 721 S.W.2d at 730-31.

“If an award of maintenance is found to be appropriate pursuant to KRS 403.200(1), a court must then consider all relevant factors in determining the amount and duration of maintenance pursuant to KRS 403.200(2).” *McVicker v. McVicker*, 461 S.W.3d 404, 420 (Ky. App. 2015). In doing so, the family court is not required to render explicit findings of fact as to each of the KRS 403.200(2) factors. *Shafizadeh*, 444 S.W.3d at 446.

Having reviewed the family court’s final decree, we conclude that the family court has made the necessary findings to justify an award of maintenance. Michael’s objection, expressed in his brief, that the family court “fail[ed] to address [that] the wife was to receive approximately \$250,00.00 in retirement” is

not well taken. At paragraph 10 of the Supplemental Findings of Fact, Conclusions of Law, Judgment and Final Decree, the court noted Tracey's acknowledgement that she would be receiving that amount from the retirement account but concluded "she will need her retirement when she can no longer work just the same as" Michael. It is in that same paragraph that "[t]he Court finds . . . it should consider maintenance payments by Husband to Wife in an amount based on both incomes for enough years for wife to be eligible to draw from retirement [*i.e.*, the \$250,000] or Social Security."

As to Michael's other arguments, there was substantial evidence in the record that Michael could adequately support himself after maintenance was deducted and, under the circumstances, it was appropriate for his annual salary to include some overtime and bonuses. We conclude that the family court did not abuse its discretion in calculating the maintenance award, that such amount awarded was reasonable, and that the KRS 403.200(2) factors were properly considered.

Accordingly, we affirm the Harrison Family Court's final decree.

JONES, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. While I agree with the majority that there was substantial evidence in the record that

Michael could adequately support himself after maintenance was deducted and, under the circumstances, it was appropriate for his annual salary to include some overtime and bonuses, I disagree that the family court made the necessary findings to justify an award of maintenance.

I believe the family court erred where it failed to make findings as to whether Tracey could meet her reasonable needs, which were not satisfied through her employment, by accessing income available to her through the approximately \$250,000 in retirement benefits she was awarded. Although Tracey argued she would need these retirement benefits when she could no longer work and the family court and majority appear to assume she will indeed keep these retirement funds for her retirement, there is nothing preventing her from withdrawing all or a portion of those funds now and using them to support the purchases she claims she needs maintenance to fund. If this assumption about what Tracey will do with the retirement funds is incorrect and Tracey withdraws all or some of these funds, I believe it is Michael's prerogative to request an adjustment to his maintenance payments based on such a change to Tracey's finances.

Accordingly, I would reverse and remand for appropriate findings.

BRIEF FOR APPELLANT:

David Higdon  
Georgetown, Kentucky

BRIEF FOR APPELLEE:

Dodd D. Dixon  
Winchester, Kentucky