

RENDERED: FEBRUARY 26, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000619-MR

JEFFREY LYLE AUBREY

APPELLANT

v. APPEAL FROM MADISON FAMILY COURT  
HONORABLE JEFFREY M. WALSON, JUDGE  
ACTION NO. 04-CI-00116

KAREN BRADLEY AUBREY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Jeffrey Lyle Aubrey appeals the March 13, 2009, order of the Madison Family Court that denied his motion for modification or termination of maintenance payments to his ex-wife, Karen Bradley Aubrey.

Because we hold that the trial court abused its discretion, when it found that there

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

was not a change in the parties' circumstances that would warrant a maintenance modification or termination, we reverse.

The parties were divorced on March 5, 2004. In its decree of dissolution, the trial court incorporated, by reference, a separation agreement between the parties. Among other provisions, the agreement provided that Jeff was to make monthly maintenance payments to Karen in the amount of \$2,500.00.<sup>2</sup> In 2008, Karen inherited property valued in excess of \$1,000,000.00 from the estate of her mother. In 2009, Jeff filed a motion to modify or terminate maintenance, arguing that the earnings from the inheritance would be approximately \$40,000.00 to \$45,000.00 per year and that such earnings constituted a continuing change in circumstances sufficient to make the original maintenance award unconscionable. The trial court disagreed and entered an order denying his motion. It is from that order that Jeff now appeals.

The standard of review of a family court's determination regarding a motion to modify maintenance is that of abuse of discretion. *See Bickel v. Bickel*, 95 S.W.3d 925, 927-28 (Ky. App. 2002). We will not set aside the family court's factual findings unless they are clearly erroneous. *See Wheeler v. Wheeler*, 154 S.W.3d 291, 296, n.16 (Ky. App. 2004). Questions of law are reviewed *de novo*. *See Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

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<sup>2</sup> This was an open-ended maintenance award. Due to a cost of living increase contained in the separation agreement, that amount has increased to \$2,750.22 per month.

Maintenance awards are governed by KRS 403.200. Under this statute, maintenance is appropriate when the receiving party lacks sufficient property to provide for his/her reasonable needs and is unable to support him/herself through employment. The court is required to consider “all relevant factors,” including the financial resources of the receiving party and the ability of the paying party to meet his/her own needs while meeting those of the receiving party.

Maintenance awards may be modified or terminated either: 1) upon agreement of the parties; or 2) by showing changed circumstances so substantial and continuing as to make the terms of the award unconscionable. *Castle v. Castle*, 266 S.W.3d 245, 248 (Ky. App. 2008). *See also* KRS 403.250. Only open-ended maintenance awards are appropriate for modification. *Id.* Awards that are based upon an agreement of the parties are modifiable when that agreement is merged into the final decree. *See Pegram v. Pegram*, 310 Ky. 86, 219 S.W.2d 772 (1949). However, modification will not be permitted if the parties’ agreement expressly precludes or limits the ability to modify. *Roberts v. Roberts*, 744 S.W.2d 433, 437 (Ky. App. 1988).

In support of his motion to modify, Jeff cited to *Roberts v. Roberts*. The receiving party in *Roberts* filed a motion to modify the maintenance payments based, in part, on the paying party’s enhanced economic circumstances, due to an inheritance. This Court held that interest income derived from an inheritance served as a sufficient showing of changed circumstances so substantial and

continuing as to make the terms of the award unconscionable. *Id.* More specifically, the Court held that the interest income could be considered in determining the paying party's ability to pay increased maintenance and affirmed the trial court's order increasing the amount of maintenance. *Id.* In so holding, the Court focused on the fact that modifying maintenance based on this new income created an equitable outcome for the parties. *Id.*

In the case *sub judice*, the trial court supported its decision to deny Jeff's motion to modify by stating:

[t]he Court does not find the *Roberts* case to be dispositive on this issue. *Roberts* concerns the payor[']s ability to pay not the payee[']s ability to receive. Additionally, when the agreement was made the Respondent was aware of the Petitioner's non-marital interest in her mother's estate. The Court finds that there has not been a material change in circumstances, which would warrant a modification or termination of the maintenance.

We disagree with the trial court's narrow interpretation of *Roberts*.

Although the facts of *Roberts* pertain to a payor's ability to pay, the Court used the factors of KRS 403.250 as a platform to determine whether the changed circumstances would make the current award unconscionable. Specifically, the *Roberts* Court based its analysis upon the language of KRS 403.250 that requires the trial court to consider "all relevant factors" when making an initial award of maintenance. Although KRS 403.200 does not expressly state that the total estate of the paying party is a major factor, the *Roberts* Court concludes that it goes straight to the heart of whether the paying spouse has an "ability" to meet his or

her own needs while also providing for the receiving spouse. If we were to follow through with the analysis of *Roberts*, then we can easily conclude that KRS 403.200's specifically stated factor of whether the "spouse seeking maintenance [l]acks sufficient property . . . to provide for his reasonable needs" should also be considered when determining whether continuing the original award would be unconscionable. This Court recently held that a maintenance award was ripe for termination after a showing that the receiving party had become self-sufficient and no longer needed the maintenance to provide for her reasonable needs. *Daunhauer v. Daunhauer*, 295 S.W.3d 154 (Ky. App. 2009). A new source of income<sup>3</sup> in the suggested amount of \$40,000.00 to \$45,000.00 per year would certainly appear to alter a party's ability to provide for his/her reasonable needs.<sup>4</sup> Accordingly, such a change is a sufficient showing of changed circumstances that at the very least would warrant the trial court's consideration for modification or termination.

We also disagree with the trial court's conclusion that Jeff was not entitled to modification or termination because he was aware of Karen's non-marital interest in her mother's estate when the parties divorced. This concept fails to abide by the statutory requirements for modification. At the time the parties were divorced, Karen only held a non-vested, future interest in her mother's estate. That interest has since vested and has only now become a relevant factor. KRS

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<sup>3</sup> The parties do not argue as to whether or not the actual inheritance is a financial resource to be considered, only whether the *interest income* from that inheritance is. Accordingly, this opinion does not reach that issue.

<sup>4</sup> While we recognize that the trial court cited to the payee's "ability" to receive, we translate this to mean the payee's *need* to receive.

403.250 does not require that the changed circumstances which allow for modification be unknown at the time the original award is made. “To determine whether the circumstances have changed, we compare the parties’ *current* circumstances to *those at the time the court’s separation decree was entered.*” *Block v. Block*, 252 S.W.3d 156, 160 (Ky. App. 2007) (emphasis added). Because Karen’s current circumstances are different than those at the time the decree was entered, they are changed.

For the foregoing reasons, we reverse and remand for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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