

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

NO. 2006-CA-001837-MR

JEFFREY LYLE AUBREY

APPELLANT

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

KAREN BRADLEY AUBREY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Jeffrey Lyle Aubrey (“Jeff”) appeals from an order of the Madison Circuit Court denying his motion to set aside a separation agreement between Jeff and his former wife, Karen Bradley Aubrey (“Karen”). After carefully reviewing the record, we affirm.

Jeff and Karen were married in 1971. Karen, through counsel, initiated divorce proceedings in January 2004. Jeff, *pro se*, signed a settlement agreement resolving issues relating to marital property, assets, and debts. The agreement was filed with the court on February 27, 2004. On March 5, 2004, the circuit court rendered findings of fact, conclusions of law, and a decree of legal separation incorporating the settlement agreement.<sup>1</sup>

More than two years later, on May 15, 2006, Jeff, through counsel, filed a motion to set aside or modify the settlement agreement on grounds of unconscionability.<sup>2</sup> The court denied Jeff's motion on August 9, 2006. This appeal followed.

Jeff argues the trial court abused its discretion by denying his motion to set aside or modify the separation agreement. He contends the settlement agreement should be reopened pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(d) and set aside as unconscionable.<sup>3</sup> The rule states:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: \* \* \* (d) fraud affecting the proceedings, other than perjury or falsified evidence; \* \* \* The motion shall be made within a reasonable time . . . .

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<sup>1</sup> It is unclear why the court rendered a decree of legal separation rather than dissolution.

<sup>2</sup> Jeff also moved the court to convert the decree of legal separation into a decree of dissolution.

<sup>3</sup> Karen opines that Jeff's pleadings below failed to designate that he was seeking CR 60.02 relief. We conclude that it was not a fatal flaw, as "the name given to a pleading is not controlling, as its character is always to be determined by the averments in the pleading." *Powell v. C. Hazen's Store, Inc.*, 322 S.W.2d 483 (Ky. 1959).

Karen argues that Jeff failed to assert grounds that warrant reopening pursuant to CR 60.02(d). Jeff primarily relies on *Burke v. Sexton*, 814 S.W.2d 290 (Ky. App. 1991), where Ms. Sexton, *pro se*, signed an agreement that divided property in her husband's favor and waived further notice of all court proceedings. *Id.* at 291. Thereafter, Mr. Burke reconciled with his wife and told her that he had stopped the pending divorce. *Id.* In actuality, Mr. Burke went forward with the divorce, and the decree was granted without notice to Ms. Sexton. *Id.* at 291-92. On review, a panel of this Court concluded Mr. Burke's behavior amounted to "fraud affecting the proceedings" pursuant to CR 60.02(d) which justified reopening the judgment. *Id.* at 292.

Likewise, in *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002), the Court concluded reopening pursuant to CR 60.02(d) was proper where Mr. Terwilliger knowingly undervalued marital assets for the purpose of decreasing his wife's share in the settlement agreement. *Id.* at 818.

In contrast to the facts of *Burke* and *Terwilliger*, Jeff does not allege his wife made material misrepresentations or that he was unaware of the terms to which he agreed. The record shows he signed an agreed order to submit the case for final adjudication after the settlement agreement was tendered. Now, Jeff, without elaboration, asserts he was at a disadvantage without counsel, and he was under duress when he signed the agreement.

In its order denying relief, the trial court noted Jeff had complied with the agreement for two years, and he did not allege malfeasance on the part of Karen in his failure to litigate the case.

In sum, we are not persuaded that Jeff's allegations amount to "fraud affecting the proceedings" warranting reopening of the judgment pursuant to CR 60.02(d).

Nevertheless, we also conclude Jeff has failed to show the separation agreement is unconscionable. Kentucky Revised Statutes (KRS) 403.180(4) requires the trial court to consider whether a settlement agreement is unconscionable prior to incorporating it into a decree of dissolution. *See Peterson v. Peterson*, 583 S.W.2d 707, 711 (Ky. App. 1979). "A separation agreement which was originally determined not to be unconscionable may later be modified if due to a change in circumstances the agreement has become unconscionable." *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007) (citing *Peterson, supra.*).

Here, in the decree of legal separation, the trial court concluded the separation agreement was conscionable; consequently, "modification is [] impermissible absent a showing of a change in circumstances." *Id.* at 797.

Jeff contends the settlement agreement was unfair and lopsided at its inception. He does not allege a change in circumstances warranting modification of the agreement. The record shows that Jeff willingly entered into the settlement agreement, which addressed disposition of significant marital debts that the parties agreed to pay jointly. While Jeff is clearly disappointed with the result of his

agreement, it cannot be found “unconscionable solely on the basis that it is a bad bargain.” *Peterson*, 583 S.W.2d at 712.

Finally, Jeff alternatively argues that the court should have modified his maintenance obligation. However, the circuit court’s order only addressed Jeff’s request to set aside the entire agreement. The court did not specifically address the alternative theory of maintenance modification, and Jeff did not request specific findings. Consequently, we are precluded from reviewing this alternative claim for relief. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

For the reasons stated herein, the order of Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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