

RENDERED: AUGUST 22, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2012-CA-001577-MR

GARY DAVID HARTMAN

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 05-CI-00387

MARSHA FAYE HARTMAN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Gary David Hartman has appealed from the Greenup Circuit Court's denial of his motion to terminate his obligation to pay maintenance to his ex-wife, Marsha Faye Hartman. We affirm.

Gary and Marsha divorced in August 2006 following a thirty year marriage. Gary was ordered to pay Marsha \$300.00 per month in maintenance

until the parties' minor son reached the age of majority and Gary's child support obligation was thereby terminated, upon which occurrence the maintenance award would "be automatically increased to \$500.00 per month and continue pending further orders of this court." On May 7, 2010, Gary moved to terminate the maintenance award based on a forty percent decrease in his income. Following a hearing, the trial court denied the motion upon finding the reduction in Gary's income was temporary and he maintained the ability to afford the maintenance payments to Marsha.

On May 9, 2012, Gary again moved the trial court to terminate his maintenance obligation alleging his financial circumstances had substantially changed such that the maintenance award was rendered unconscionable, essentially parroting the language of KRS<sup>1</sup> 403.250, the maintenance modification statute. He contended he had become disabled and his sole sources of income were his pension and Social Security Disability benefits. On June 29, 2012, following a hearing, the trial court determined Marsha still needed maintenance and, although his income had decreased, Gary could "adequately afford to still pay the maintenance." Gary's subsequent motion to alter, amend or vacate the June 29, 2012, order was denied and this appeal followed.

Gary now contends the trial court abused its discretion in denying his motion to terminate his maintenance obligation. He contends he satisfied his statutory burden under KRS 403.250 of proving substantial and continuing changes

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

in his circumstances rendering the maintenance award unconscionable. He alleges his permanent income reduction has impacted his ability to meet his own needs, and his poor financial situation was compounded by the burden of the maintenance award. Finally, he contends the trial court improperly considered his new spouse's income in making its determination.

It is axiomatic that the amount and duration of a maintenance award is within the sound discretion of the circuit court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). Maintenance payments may be modified “upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.” KRS 403.250(1). “Unconscionable” means “manifestly unfair or inequitable.” *Shraberg v. Shraberg*, 939 S.W.2d 330, 333 (Ky. 1997); *Wilhoit v. Wilhoit*, 506 S.W.2d 511, 513 (Ky. 1974). Since the policy of the statute is for relative stability, evidence for the movant must be compelling for the trial court to grant the relief requested. *Bickel v. Bickel*, 95 S.W.3d 925, 927–28 (Ky. App. 2002).

We review a trial court's decision to decline modification of a maintenance award for an abuse of discretion. *Block v. Block*, 252 S.W.3d 156, 159 (Ky. App. 2008). The court's conclusion may only be disturbed on appeal if it “abused its discretion or based its decision on findings of fact that are clearly erroneous.” *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). A trial court abuses its discretion when its decision is “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010). We cannot substitute our judgment for that of the trial court if substantial

evidence supports its decision. *Bickel*, 95 S.W.3d at 928. While factual findings are given deference, questions of law are reviewed *de novo*. *Block*, 252 S.W.3d at 159.

In the case *sub judice*, the trial court was clearly aware of and considered the circumstances of both Gary and Marsha. It determined Marsha's expenses were reasonable and she needed continued assistance from Gary. The trial court further examined Gary's income and ability to meet his own needs in light of the monthly obligation to Marsha and determined he remained financially capable of paying the maintenance award. Although it noted circumstances had changed since the 2010 denial of Gary's motion to terminate the maintenance award, it did not deem the change sufficient to render the award unconscionable. Based on the record before us, we cannot say this decision constituted an abuse of discretion.

The trial court carefully considered the parties' relative financial positions in denying Gary's motion. It clearly weighed the evidence presented prior to making its decision. Although not specifically set forth in the order, the trial court determined Gary failed to meet his burden of proving his circumstances had become so dire as to render the maintenance award unconscionable. The decision was supported by substantial evidence and we are therefore constrained to defer to the trial court's discretion. *Bickel*, 95 S.W.3d at 928.

Finally, Gary argues the trial court improperly considered his current spouse's income in reaching its conclusion. He contends the record is devoid of

evidence regarding his current spouse's employment status or income. Thus, he believes the trial court's decision is rendered infirm based on the complete lack of evidence on this issue and the improper reliance thereon. We disagree. While he cites no authority supporting his position, we are aware that only days before Gary filed his brief in this matter, we rendered an opinion in *Tudor v. Tudor*, 399 S.W.3d 791 (Ky. App. 2013). In *Tudor*, the panel determined it was improper for a trial court to rely on the income of a maintenance obligor's new spouse in deciding whether to modify a maintenance award to the former spouse. If applicable to the case at bar, the holding in *Tudor* would clearly require reversal. However, we believe *Tudor* is inapplicable because the record before us is insufficient to determine that the trial court did, in fact, consider Gary's spouse's income in reaching its decision.

In discussing the current income status of the parties in its order dated June 29, 2012, the trial court stated Gary was "married and his wife works."<sup>2</sup> No further mention of Gary's current spouse appears anywhere in the order. Citing no authority in support of his contention, Gary insists the trial court's entire decision is tainted by this singular statement. Unfortunately for Gary, his contention garners no support from the record and he has failed to show he is entitled to relief. A passing reference to the employment status of Gary's spouse is simply insufficient to conclude the trial court somehow based its decision on her income—a matter about which it had absolutely no evidence. Such a conclusion on our

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<sup>2</sup> The 2010 order indicated Gary's spouse was disabled.

part would necessarily be based on mere conjecture and supposition. To do so would unmistakably be improper. “We will not engage in gratuitous speculation as urged upon us by appellate counsel, based on a silent record.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

For the foregoing reasons, the decision of the Greenup Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANT:

Robin L. Webb  
Grayson, Kentucky

BRIEF FOR APPELLEE:

No brief filed.