

RENDERED: NOVEMBER 15, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2018-CA-001166-MR

MICHAEL DALE CRUMP

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE  
ACTION NO. 13-CI-00823

TENA LYNN CRUMP

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Michael Crump appeals from an order entered on June 6, 2018, awarding Tena Crump maintenance and an order denying his motion to alter, amend, or vacate the June 6, 2018 order, entered by the Bullitt Circuit Court on July 10, 2018. Following review of the record, briefs, and law, we affirm.

This case was previously appealed to another panel of our Court.

That panel summarized the relevant facts, as follows:

Michael and Tena were married on March 17, 1977, and had three children, who are now adults. Currently, they have joint custody of a twelve-year-old granddaughter. Tena filed a petition for dissolution of the marriage on August 8, 2013. In the petition, she did not seek an award of maintenance. Later, on February 26, 2014, Tena filed a motion to amend the petition and sought both temporary and permanent maintenance. The family court granted the motion to amend the petition. A hearing was set for July 3, 2014.

The parties' marriage was dissolved on July 7, 2014, by the entry of an agreed findings of fact, conclusions of law, and judgment. The agreed judgment resolved all property issues and specified that the only remaining issue was whether Tena would receive maintenance. When the parties proffered the agreed order to the family court, Michael supplemented it with a document, entered into the record, which was titled "Stipulation of Respondent Concerning Distribution of Marital and Non-Marital Assets of Petitioner and Respondent." The document showed the division of the marital and non-marital funds. The document stated that both Michael and Tena received from the division of the marital estate approximately \$115,000 in cash [sale of the marital home], and \$108,000 [one-half of Michael's 401-K and Roth IRA accounts.] The document also cites the value of Tena's non-marital assets, \$153,000, which was an inheritance she received in 2013. This valuation is found on her August 8, 2013 Verified Disclosure Statement.

A hearing was held on July 3, 2014, on the issue of maintenance. Both parties testified. Pertinent testimony revealed that the granddaughter, with whom they share joint custody, receives \$327 from Social Security based

on her mother's disability. The parties agreed that Tena would receive this check.

Regarding employment, Tena works approximately 20 hours per week as a housekeeper at Country Inn and Suites earning \$7.25 per hour. She is looking for a full-time position possibly as a medical assistant. The family court found that Tena could work full-time, which would provide her with a monthly gross income of \$1,256.67. Michael works for Ruan Logistics, and his gross weekly income is \$860 per week or \$3,726.67 per month.

The parties also provided information about their monthly expenses. Tena listed monthly expenses of \$2,402 per month. Michael's monthly expenses are \$2,938.67. Regarding Tena's inheritance, at the time of the hearing, the funds in the inheritance had been exhausted, but Tena used \$90,000 of it as a down payment on a \$220,000 home.

On October 30, 2014, the family court entered findings of fact, conclusions, and judgment, which required that Michael pay Tena monthly maintenance of \$975, retroactive to July 7, 2014. Michael appealed this judgment.

*Crump v. Crump*, No. 2014-CA-001895-MR, 2016 WL 1558339, at \*1-2 (Ky. App. Apr. 15, 2016). Ultimately, the prior panel of this Court vacated the judgment of the Bullitt Circuit Court and directed the trial court to consider the impact of the proceeds of the parties' marital residence, Tena's inheritance, and the Social Security check received on behalf of the parties' grandchild in its determination of whether Tena has sufficient means to support herself. The matter was remanded for further proceedings.

After the matter was remanded, on February 28, 2017, another hearing was held in which the parties offered additional testimony as to their incomes, post-decree assets, and expenses. Evidence was presented that Tena is over sixty years old, a high school graduate, and has no specialized training and little work experience. Evidence was also presented that Tena's monthly gross income is approximately \$1,500; her monthly expenses are \$2,342;<sup>1</sup> she receives a Social Security check on behalf of the parties' grandchild which she uses for the present needs of that child;<sup>2</sup> nearly all of her share of the proceeds from the sale of the parties' marital home was applied to a down payment on her new residence; approximately \$94,000 of her inheritance was used to pay off the mortgage on her new residence; approximately \$30,000 of her inheritance was stolen; and the remaining \$30,000 of her inheritance is in an account used for present and future anticipated expenses, such as the eventual purchase of a new vehicle. Tena testified that, because her monthly expenses have exceeded her monthly income since the parties' separation, she has used her cash reserves to cover the difference.

At the hearing on remand, Michael testified that, due to an injury, he was currently not working but was receiving workers' compensation benefits.

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<sup>1</sup> Tena's monthly expenses decreased from the previous hearing.

<sup>2</sup> Tena testified that monthly expenses incurred on behalf of the child exceed the amount of the Social Security check received on her behalf. As such, the trial court subsequently found the child's Social Security check does not constitute a financial resource that can be applied to Tena's monthly expenses.

After the hearing, however, evidence was presented that Michael had returned to work at Ruan Logistics prior to the hearing.<sup>3</sup> Although Michael testified at the hearing that his monthly expenses were \$2,938.67,<sup>4</sup> evidence presented after the hearing demonstrated that Michael's monthly expenses no longer included monthly payments for his truck in the amount of \$268 or health insurance premiums in the amount of \$578.<sup>5</sup> While the parties' monthly expenses were similar in most aspects, Michael's monthly rent payment was \$1,050—more than twice Tena's prior mortgage payment of \$560 per month. While Tena's cash reserves decreased since the parties' separation, Michael's bank account increased during this time.

On June 6, 2018, the trial court entered its order awarding Tena \$800 per month in maintenance. Michael moved the trial court to alter, amend, or vacate this order. On July 10, 2018, the trial court denied Michael's motion. This appeal followed.

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<sup>3</sup> Although Michael had only returned to work on a part-time basis, his earnings statement for the pay period before, during, and after the hearing indicates that he had earned \$3,410.65 year-to-date. The earnings statement for the two-week pay period before, during, and after the hearing indicates that Michael earned \$820.84 for that pay period. This extrapolates to an additional gross monthly income of \$1,833.65 from that part-time employment.

<sup>4</sup> This amount is the same as the monthly expenses Michael claimed at the prior hearing.

<sup>5</sup> The truck was paid off and the lien against it released on November 21, 2016. The earnings statement for the pay period before, during, and after the hearing indicates that Michael was receiving free insurance. Removal of these two payments from Michael's proffered monthly expenses reduces them to \$2,092.67.

On appeal, Michael raises only one argument. Michael claims that the trial court erred when it awarded Tena “permanent open-ended maintenance in the sum of \$800.00 per month, retroactive to July 3, 2014.”<sup>6</sup>

We begin our review by commenting on the proper structure of an appellate brief. CR<sup>7</sup> 76.12(4)(c)(iv) requires a statement of the case which contains “ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary.” Michael has no statement of his case.

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<sup>6</sup> The trial court provided “[t]ermination or modification of the maintenance award shall be pursuant to KRS 403.250 and relevant caselaw.” This duration comports with the prior panel of our Court’s direction that “[u]pon remand, the family court, if it should again ascertain that maintenance is necessary, should clearly enunciate the duration of the maintenance.” *Crump*, 2016 WL 1558339, at \*3.

Kentucky Revised Statutes (KRS) 403.250 provides:

(1) Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

<sup>7</sup> Kentucky Rules of Civil Procedure.

CR 76.12(4)(c)(v) also requires each argument to contain “ample supportive references to the record and citations of authority pertinent to each issue of law[.]” The only citation to the record in Michael’s brief is to the notice of appeal. This is a far cry from the “ample supportive references to the record” required by CR 76.12(4)(c)(v).

It is dangerous for counsel to ignore the rules of appellate procedure. We have three options: “(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990).” *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Because these errors were made by counsel, we will not punish the client. We will review the alleged deficiencies as best we can but warn counsel that the Court may not be so lenient in the future. The rules are “lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated.” *Louisville and Jefferson County Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)).

On review, “we defer to the trial court’s factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court’s identification and application of legal

principles.” *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). “Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.” *Bowling v. Natural Resources & Env’tl. Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994).

As the previous panel of our Court pointed out, while an award of maintenance comes within the sound discretion of the trial court, a reviewing court will not uphold the award if it finds that the trial court abused its discretion or based its decision upon findings of fact that are clearly erroneous. *Perrine v. Christine*, 833 S.W.2d 825, 826 (Ky. 1992). The decision to award maintenance is within the sound discretion of the family court. *Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. App. 1977). Additionally, an award of maintenance must satisfy the statutory provisions of KRS 403.200, which provides:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, 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 or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(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.

Thus, to properly award maintenance under KRS 403.200, a court must find the spouse seeking maintenance: (1) lacks sufficient property, including the marital property apportioned to her, to provide for her reasonable needs; and (2) is unable to support herself through appropriate employment.

Michael asserts that, “[i]f income from [Tena’s] non-marital property and her proportion of marital property would provide for her[,] maintenance should not be awarded.” Michael cites to *Colley v. Colley*, 460 S.W.2d 821 (Ky. 1970).

However, that Court held:

Whether she has sufficient estate of her own depends upon what she owns and what she has been awarded as her part of the division of property acquired by the joint efforts of the parties. Her estate as thus determined is insufficient unless it will yield income or profits sufficient for her comfortable maintenance in a style suitable to the social standing established by the parties during marriage without her being required to consume the principal.

If all legal conditions necessary for the allowance of permanent alimony are satisfied, then the trial judge is vested with a wide discretion to determine the amount and method of payment of the money damages awarded called ‘alimony.’ He shall make an award that is ‘equitable.’ There are so many considerations which are relevant that it would be pointless to attempt a complete enumeration of them. The amount of the husband’s estate and his ability to pay and the wife’s financial condition and her ability to maintain herself, in whole or in part, are material aspects. The ages, health, and prospects of the spouses, and the presence of infant children whose welfare must be considered are all elements of the problem.

*Id.* at 827 (citation omitted).

Herein, the February 28, 2017, hearing produced substantial evidence concerning the parties' income, assets, and expenses. Tena testified that her monthly expenses—which were reasonable in light of her customary expenditures during the parties' marriage<sup>8</sup>—exceeded her monthly gross income from all sources. The trial court did not err in determining that Tena's age and work experience make it unlikely that her ability to earn income will increase significantly. Although Michael misrepresented his income and expenses to the trial court during the hearing, evidence of record demonstrates that his monthly income was greater than his monthly expenses and he had sufficient monthly income to provide \$800 a month to Tena to assist with her monthly expenses.<sup>9</sup> Therefore, these findings were neither clearly erroneous nor an abuse of the trial judge's discretion.

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<sup>8</sup> Reasonable needs have been defined relative to the standard of living enjoyed during marriage. *Newman v. Newman*, 597 S.W.2d 137 (Ky. 1980).

<sup>9</sup> At the time of the first appeal, Michael's income was \$3,726.67 per month. At the rehearing, Michael testified that he was receiving \$656.26 per week in workers' compensation benefits, which amounts to \$2,843.79 per month. Michael had returned to work, on at least a part-time basis, at the time of the rehearing and was earning \$1,833.65 per month from that employment. Michael asserts in his brief that he has since retired and begun drawing Social Security benefits in the amount of \$2,232 per month.

Michael also takes issue with what he deems as Tena’s “investment strategy” of purchasing a home for \$220,000 with her post-decree funds. The previous panel of our Court pointed out:

the family court failed to consider the impact of the \$115,000 in cash received by Tena. . . .

Moreover, Tena’s inheritance, although greatly diminished by the time of the hearing, was used by her to make a \$90,000 down payment on a new residence, valued at \$220,000. The family court has dual responsibilities—to make relevant findings of fact and to exercise its discretion in making a determination on maintenance in light of those facts. *Powell v. Powell*, 107 S.W.3d 222, 227 (Ky. 2003). Kentucky law has stated that if income from a spouse’s non-marital property, combined with his or her proportion of marital property, would provide for his or her reasonable needs, then maintenance should not be awarded. *Owens v. Owens*, 672 S.W.2d 67, 69 (Ky. App. 1984); *Lampton v. Lampton*, 721 S.W.2d 736, 738-39 (Ky. App. 1986). The family court, in the case at bar, did not address the implications of Tena’s inheritance.

*Crump*, 2016 WL 1558339, at \*2. Therefore, at the panel’s direction, the trial court deliberately considered Tena’s use of her funds from the sale of the parties’ marital residence, as well as her inheritance.

As previously mentioned, both Michael and Tena received approximately \$115,000 in cash from the sale of the marital home. Tena also received approximately \$153,000 from an inheritance. At the hearing on remand, Tena testified that she spent nearly all of her share of the proceeds from the sale of

the parties' marital home on the down payment on her new residence, and she used the remaining proceeds toward her other expenses. Concerning her inheritance, Tena explained where those funds had gone, as previously noted.

Pursuant to this Court's previous direction, the trial court made the following findings:

The inheritance received by the Petitioner was a substantial sum of money to receive at one time. However, it does not come close to replacing what 37 years of earning a wage and a pension/retirement provides. That inheritance is exhausted by virtue of [Tena's] purchase of a residence for herself. The inheritance is the house that [Tena] lives in and some portion of her bank account. The Court finds that [Tena's] purchase of the residence was a reasonable action taken by [Tena] to provide for her needs and the grandchild that these parties have in their custody. As to the issue of housing security; this is a good choice by [Tena]. Instead of renting, she is getting a house, free and clear, which is a better return on investment than renting. On a monthly basis, [Tena] saved approximately \$560 per month by not having a mortgage payment. Additionally, she saved around \$3,000 by avoiding future interest payments. Whether she could have bought a different house for less money or rented and thereby had a large cash reserve is not relevant. Her decision was reasonable and economical under all circumstances of this case. Were [Tena] renting or making a monthly mortgage payment; that would increase her monthly expenses. The effect to [Michael] would be a higher monthly maintenance obligation. Despite his complaints as to the residence purchased; [Tena's] purchase of her house inures to the benefit of [Michael].

Our review of the trial court’s findings of fact and conclusions of law on these issues reveals that they are neither clearly erroneous nor an abuse of the trial court’s broad discretion. Further, the trial court’s factual findings are supported by substantial evidence.

We also look at prior case law in evaluating whether Tena’s “investment strategy” was reasonable and permissible.

When the evidence shows, as it does here, that appellant cannot meet her monthly living expenses, then she is justified in expending whatever sums she must from her marital settlement. Her failure or inability to invest the money at the highest rate of interest will not be used by appellee to deprive her of the maintenance to which she is entitled under the statute. The [amount] awarded appellant as marital property is simply insufficient to provide for her reasonable needs.

*Atwood v. Atwood*, 643 S.W.2d 263, 265-66 (Ky. App. 1982).

In the case at hand, although Tena received substantial lump sums from the sale of the parties’ marital residence and an inheritance, it was reasonable and permissible for her to invest those monies in the purchase of a home, which—as the trial court noted—reduces her monthly expenses by not having to make rent or mortgage payments. Regardless of whether Tena chose to invest her monies in a residence, as she did, or make monthly rent or mortgage payments, as Michael suggests she should have done, Tena’s monthly expenses are still more than her income. Due to Tena’s age, skills, and work experience, it was neither clearly

erroneous nor an abuse of discretion for the trial court to determine that maintenance is required to allow Tena to continue with a similar standard of living as was customary during the parties' marriage. Further, evidence supports the trial court's findings that Michael has sufficient income to cover his monthly expenses and maintenance payments to Tena in the amount of \$800 per month while continuing with a similar standard of living as was customary during the parties' marriage.

Michael concludes his argument by claiming that he presented evidence to the trial court at the February 28, 2017, hearing that he attained the age of 62 years on April 17, 2018—a claim not supported by the record. Nonetheless, Michael claims that he has now retired and is receiving Social Security benefits in the amount of \$2,232 per month and that Tena is entitled to receive Social Security benefits as well.

Michael asserts that the trial court refused to consider this issue; however, he fails to direct us to where this issue was presented to the trial court. We will not search the record to construct Michael's argument for him, nor will we go on a fishing expedition to find support for his underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

Nevertheless, it does appear that this issue was considered by the trial court in its order denying Michael's motion to alter, amend, or vacate its June 6, 2018, order. The trial court specifically found:

[Michael] states that he has recently retired. Accordingly, he will not be earning money through traditional employment but receiving a monthly social security payment that he alleges will be less than what he earned while working. This could be "newly discovered or previously unavailable evidence" as contemplated by CR 59.05. However, the Court will not modify or vacate its prior Order upon unsworn, bare allegations of these new facts. KRS 403.250 and relevant caselaw provide an avenue for [Michael] to advance this claim. Additionally, the issue of retirement and how it may impact a maintenance award has its own considerations that the court must examine.

The trial court did not err in its so-called refusal to consider Michael's claims concerning his retirement. A trial court is granted broad discretion in ruling on a CR 59.01 motion based on newly discovered evidence. *Glidewell v. Glidewell*, 859 S.W.2d 675, 677 (Ky. App. 1993). Michael's retirement could not constitute "[n]ewly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial" as found in CR 59.01(g), or as contemplated by CR 59.05, because it had not yet happened at the time of the rehearing. "[O]f course, the evidence could not have been obtained for the hearings, it did not exist at the time." *Stephens v. Kentucky Utilities Co.*, 569 S.W.2d 155, 158 (Ky. 1978).



The rehearing was held on February 28, 2017, and no evidence was presented that Michael had retired. Michael reached the age of 62—making him eligible to draw Social Security benefits—on April 17, 2018. The trial court entered its award of maintenance on June 10, 2018. On June 18, 2018, Michael moved the trial court, pursuant to CR 59.05, to vacate and set aside the maintenance order. Michael filed a memorandum in support of his CR 59.05 motion on June 28, 2018, stating he “recently retired” and applied to receive his Social Security benefits. It is unclear whether Michael’s retirement occurred prior to or after the trial court’s award of maintenance.

The trial court correctly discerned that a motion under KRS 403.250 provides the appropriate mechanism to petition a trial court concerning substantial and continuing changes after an award of maintenance has been granted. Factors such as whether retirement was reasonable may be considered by a court in determining whether maintenance payments should be modified. *Tudor v. Tudor*, 399 S.W.3d 791, 793 (Ky. App. 2013). A trial court must examine the totality of the circumstances surrounding the retirement to ensure that it is objectively reasonable, and the burden of proof falls upon the party seeking modification of a maintenance award. *Bickel v. Bickel*, 95 S.W.3d 925, 929 (Ky. App. 2002). However, in the absence of such a motion or corresponding proof, modification under KRS 403.250 was unwarranted on Michael’s CR 59.05 motion.

Therefore, and for the foregoing reasons, the orders entered by the Bullitt Circuit Court are AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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