

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001400-MR

TONY MAYFIELD EMERSON

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 01-FC-001628

SANDRA LAFAVORS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

DYCHE, JUDGE: Tony and Sandra Emerson were married in 1977 and separated in 1987. In 1990 the Jefferson Circuit Court entered its Decree of Dissolution, which incorporated by reference an earlier Property Settlement Agreement. In that document it was agreed that Tony would pay child support of \$50 per week for each of the parties' two children. It was further agreed that Tony owed an arrearage of \$7,280 for the three previous years;

he was to pay \$1,000 up front and add \$50 per week until he was caught up on the remaining \$6,280.

In 2001 Sandra (now LaFavors) moved the court to calculate Tony's arrearages. A hearing was held before the domestic relations commissioner, and the matter was continued in the hopes that the parties would come to an agreement. When the commissioner heard nothing further from either party, in spite of his reminder to both after an earlier imposed deadline, he returned the file to the court without further report or recommendation. Sandra's motion was denied.

In May 2002 Sandra filed another motion to settle the issue of unpaid arrearages and maintenance; she also sought interest at the legal rate of 12% from the date of dissolution to present. After two hearings, the commissioner filed a report on January 7, 2003, to which Tony filed exceptions. The Jefferson Family Court denied Tony's exceptions and affirmed the commissioner's report in its entirety. Tony was ordered to pay the \$6,280 arrearage plus 12% interest from April 1990 "until the obligation is paid in full."

On appeal, Tony's first of three arguments is that the family court abused its discretion in its refusal to allow Tony to supplement the record with video and audio tapes relating to the 1990 decree. The evidence was offered by Tony to challenge the decree's silence regarding interest on the arrearage. His

problem, though, is that he presented the evidence for the first time at the hearing on exceptions, albeit he had ample opportunity over the two year span that he and Sandra argued over these issues (and since the original decree was entered in 1990). The family court did not abuse its discretion in denying Tony's attempt to supplement the record and properly relied on the 1990 written decree to find that there was no waiver of interest on the arrearage.

Appellant next argues that the family court likewise abused its discretion in refusing to grant Tony an additional ten days to supplement the record with his summary of child support payments. Again we find no abuse of discretion. Appellant missed every deadline given him to introduce the evidence in a timely fashion. The family court had the prerogative to limit extensions at some point, and it chose to do so.

Appellant lastly contends that there was insufficient evidence for the court to find that the parties had reached an oral modification of child support. We have examined the record and can find no error in the family court's determination that, pursuant to the standards enunciated in Whicker v. Whicker, 711 S.W.2d 857 (1986), and its progeny, the parties agreed that Tony would continue to pay \$100 per week once the older child was emancipated.

The judgment of the Jefferson Family Court is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I fully concur with the reasoning and the result of the majority opinion, but I write separately to raise an additional point. Tony asserts that, since the decree was silent concerning interest on the child-support arrearage, the video and audio tapes should have been admissible to show that the parties had agreed that no interest would run on the arrearages. However, past due payments for child support become vested when due. Each payment is a fixed and liquidated debt which a court has no power to modify.

Pursley v. Pursley, 144 S.W.2d 820, 828-29 (Ky. 2004), *citing* Stewart v. Raikes, 627 S.W.2d 586, 589 (Ky. 1982); Dalton v. Dalton, 367 S.W.2d 840, 843 (Ky. 1963); Whitby v. Whitby, 306 Ky. 355, 208 S.W.2d 68, 69 (1948); and Heisley v. Heisley, 676 S.W.2d 477 (Ky.App. 1984).

The trial court in this case did not award pre-judgment interest on the arrearage, but KRS 360.040 requires the imposition of interest on a judgment unless there are factors which would make an award of interest inequitable. Stone v. Kentucky Insurance Guaranty Association, 908 S.W.2d 675, 677-78 (Ky.App. 1995), *citing* Courtenay v. Wilhoit, 655 S.W.2d 41, 42

(Ky.App. 1983). At the very least, Tony had the burden to bring forward evidence in a timely manner showing that the parties had agreed to waive post-judgment interest on the arrearage. I agree with the majority that the trial court did not abuse its discretion by excluding the evidence which Tony belatedly offered.

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