

RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001383-MR

SUSAN CAROL PANARIELLO (NOW MIXON)

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 97-FC-004727

ANTHONY ROBERT PANARIELLO

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Susan Carol Panariello (now Mixon) appeals from an Order of the Jefferson Circuit Court awarding maintenance arrearages and postjudgment

interest, but not awarding prejudgment interest. Mixon directs our attention to

Pursley v. Pursley, 144 S.W.3d 820 (Ky. 2004), in support of her contention that

she is entitled to prejudgment interest as a matter of law. We conclude that

Pursley stands for the proposition that a claimant is entitled to prejudgment interest

on maintenance arrearages, and accordingly Reverse the Order on appeal and Remand it for the calculation of prejudgment interest.

The parties were divorced by way of a Decree of Dissolution rendered in December, 1998. Anthony Panariello (hereinafter "Panariello") was ordered to pay to Mixon the sum of \$1,368 per month in maintenance for nine years.

Panariello failed to pay the maintenance as ordered, resulting in a Contempt Order, a sentence of 180 days in jail and his subsequent flight from the Commonwealth. Panariello maintains that he left the Commonwealth to pursue other employment opportunities.

In August of 1999, Panariello filed a motion to modify the maintenance award due to a change in circumstances. In March, 1999, Mixon had begun working at a new job earning more income, which Panariello argued was a change in circumstances so substantial as to make continued enforcement of the maintenance award unconscionable. Panariello's Motion resulted in a reduction of his maintenance obligation to \$750 per month.

Mixon appealed, and a panel of this Court rendered an Opinion on May 31, 2002, finding that *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982), held that a maintenance award for a term of years was the equivalent of a lump sum award that could not be modified. That panel reversed the September 23, 1999 Order reducing maintenance, and reinstated the March 19, 1999 Order fixing the maintenance award at \$1,368 per month for nine years.

On January 20, 2011, Mixon moved for an Order awarding a maintenance arrearage in the amount of \$113,139.31. A hearing on the Motion was later conducted, whereupon the Jefferson Circuit Court rendered a Judgment representing a maintenance arrearage in the amount of \$19,987.18. On September 19, 2011, Mixon moved to alter and amend the Order to reflect that interest accrued at the judgment rate on each maintenance installment at the time each installment became due. On July 12, 2012, the court rendered an Order denying the Motion, and this appeal followed.

Mixon now argues that the Jefferson Circuit Court erred in denying her Motion for prejudgment interest. In support of her claim of error, she directs our attention to *Pursley, supra*, which she contends stands for the proposition that a petitioner is entitled to prejudgment interest on maintenance awards as a matter of law, and that such an award of prejudgment interest is not discretionary. She argues that the instant facts mirror those of *Pursley*, and that the trial court erred in failing to so find. She seeks an Order reversing the matter on appeal and remanding for entry of prejudgment interest on each arrearage as it became due.

In response, Panariello contends that Mixon never raised this issue before the trial court; therefore, he contends that Mixon is barred from raising it for the first time on appeal, and that he is entitled to an Opinion sustaining the trial court's denial of Mixon's Motion to Alter and Amend Order Entered September 19, 2011.

We will first address whether Mixon raised this issue below, thus preserving it for review. We conclude that she did raise this issue below. In her Motion to alter or amend the order filed on September 19, 2011, Mixon alleged as follows:

The law of the Commonwealth is clear that arrearages that accrue on liquidated sum certain judgments for either maintenance or child support shall accrue interest at the judgment rate *from the date that each installment becomes due* and is unpaid until the date of that installment's collection. (Emphasis added).

Though Mixon does not employ the term "prejudgment interest" in her Motion, that is precisely what she was seeking. By alleging entitlement to "interest at the judgment rate from the date that each installment becomes due and is unpaid until the date of that installment's collection", Mixon is seeking prejudgment interest as to each unpaid installment. We conclude that the issue of prejudgment interest was raised before the circuit court, was denied by the court by way of its Order entered July 12, 2012, and is therefore preserved for appellate review.

The question then becomes whether the statutory or case law supports Mixon's claim of entitlement to prejudgment interest under the facts at bar. We conclude that it does. In addressing entitlement to prejudgment interest arising from maintenance arrearages, the Kentucky Supreme Court stated:

In awarding Sharen Pursley a judgment for the maintenance and child support arrearages, the trial court determined that the arrearages were subject only to postjudgment interest and declined to award prejudgment interest. It reasoned that arrearages were unliquidated until the judgment for the arrearages was entered. The

Court of Appeals agreed with the trial court's ruling, but we disagree and hold that Sharen Pursley was entitled to interest at the legal rate of eight percent (8%) per annum from the date that each payment was due and remained unpaid. Accordingly, we reverse the Court of Appeals.

Past due payments for child support and maintenance become vested when due. Each payment is a fixed and liquidated debt which a court has no power to modify therefore, Sharen Pursley was entitled to prejudgment interest as a matter of law from the date that each payment was due.

Pursley, 144 S.W.3d at 828-829 (citations and footnotes omitted).

Similarly in the matter at bar, each payment owed to Mixon is a fixed and liquidated debt which the trial court has no power to modify, thus entitling her to prejudgment interest as a matter of law from the date that each payment was due. Mixon preserved this issue by seeking interest "from the date that each installment becomes due", and is entitled to such interest by application of *Pursley* as a matter of law.

For the foregoing reasons, we Reverse the Order of the Jefferson Circuit Court, and Remand the matter for calculation of prejudgment interest.

ACREE, CHIEF JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the reasoning and the result of the majority opinion, but I write separately to add an additional point. As the majority correctly notes, past due payments for maintenance become vested when due. Each payment is a fixed and liquidated debt which a court has no power

to modify. Therefore, prejudgment interest on maintenance arrearages accrues as a matter of law from the date that each payment was due. *Pursley v. Pursley*, 144, S.W.3d 820, 828-29 (Ky. 2004). Furthermore, such interest accrues as a matter of law even if the issue is not raised to the court. *See Horvath v. Horvath*, 250 S.W.3d 316, 318 (Ky. 2008). Thus, Mixon did not waive the issue by failing to raise it until her CR 59.05 motion.

BRIEFS FOR APPELLANT:

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