[Cite as *McKay v. McKay*, 2010-Ohio-3348.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

KATHLEEN G. McKAY nka GLASS :

Plaintiff-Appellee : C.A. CASE NO. 23702

v. : T.C. NO. 98 DR 879

JOHN T. McKAY : (Civil appeal from Common Pleas Court, Domestic Relations)

Defendant-Appellant :

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O P I N I O N

Rendered on the 16th day of July, 2010.

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FROELICH, J.

{¶ 1} John McKay appeals from a judgment of the Montgomery County Court of Common Pleas, Domestic Relations Division, which adopted a magistrate's decision that resolved several disputes related to payments owed under the parties' 2001 decree of divorce. For the reasons that follow, the judgment of the trial court

will be affirmed.

I

{¶ 2} When the parties divorced in 2001, they entered into an agreement regarding the division of their assets and spousal support. The relevant provisions of the agreement include that each party held a Merrill Lynch account; the account of Kathleen McKay (n.k.a. Glass) was valued at approximately $603,000, and McKay's was valued at approximately $718,000. Pursuant to the agreement read into the record in July 2001, Glass's "account would transfer" to McKay. Glass agreed to pay McKay two lump-sum payments of spousal support: $70,000 on January 1, 2003, and $70,000 on January 1, 2004. Glass also agreed to pay McKay $2,100,000 "as and for the property settlement in addition to the other division of assets ***." The $2,100,000 was to be paid as follows: $50,000 upon execution of the judgment entry; $500,000 on December 1, 2001; $550,000 as of December 1, 2002; $500,000 on December 1, 2003; and $500,000 on December 1, 2004.

{¶ 3} Although the Final Judgment and Decree of Divorce was filed on November 28, 2001, Glass did not receive a copy of the divorce decree until December 8, 2001. On December 27, 2001, she paid McKay the $500,000 that had been due on December 1, and she transferred the securities held in her Merrill Lynch account to McKay. At the time of the transfer, Glass's Merrill Lynch account was valued at $558,000. See *McKay v. McKay*, Montgomery App. No. 19848, 20238, 2005-Ohio-910, at ¶9-10 ("*McKay I*").

{¶ 4} In early 2002, McKay filed in the trial court a motion to show cause

why Glass should not be held in contempt, and Glass filed a motion for contempt against McKay. After a hearing, the magistrate denied both motions. In response to McKay's motion, the magistrate concluded that Glass should not be held in contempt for her failure to pay $500,000 on December 1, 2001, because she made the payment as soon as she received a copy of the decree. The magistrate also concluded that Glass was not in contempt for the manner in which she transferred assets from the Merrill Lynch account; in the magistrate's view, it was not shown that Glass had intended to violate the court's order when she transferred the securities in the account rather than the sum of $603,000.[1] However, the magistrate ordered Glass to pay McKay "a sum sufficient to insure that [McKay] receives $603,000.00 from [Glass's] account" within thirty days. Id. at ¶12. The court granted McKay's request that he be reimbursed "for all commissions and other related costs for the transfer of securities to [McKay] instead of the $603,000" within thirty days, but it could not "make a specific dollar determination." The issues raised in Glass's motion were either withdrawn or found to be not well taken.

{¶ 5} Both parties filed objections to the magistrate's decision, and Glass filed a motion to vacate the decree. The trial court overruled the objections and the motion to vacate. McKay appealed from the trial court's judgment overruling his objections, and Glass appealed from the denial of her motion to vacate. The appeals were consolidated for our review (Montgomery App. Nos. 19848 and 20238,

[1]Although the parties' agreement, as described by the judge at the hearing, provided that Glass's "account would transfer," the decree of divorce stated that she "shall transfer *** the sum of $603,000 from her account" to McKay.

McKay I).

{¶ 6} In *McKay I*, we reached several conclusions that are relevant to the current appeal. First, we observed that the divorce decree required Glass to transfer "the sum of $603,000 from her [Merrill Lynch] account;" "[i]t further appeared from the transcript of the settlement conference that the parties and the court intended that Glass would transfer the entire account to McKay." When Glass transferred the entire account on December 28, 2001, it was valued at approximately $558,000. We held that the trial court did not abuse its discretion when it refused to find Glass in contempt, because she had a "good faith belief" that she was only required to transfer the securities. Id. at ¶23. (Glass did not specifically contest the trial court's order that she compensate McKay for the difference between the amount transferred and $603,000.)

{¶ 7} We also held that the trial court did not abuse its discretion in denying McKay's request for interest on the shortfall in the Merrill Lynch transfer. Because Glass had acted in good faith, "it was not clear that the trial court intended to reduce [the obligation to transfer the Merrill Lynch account] to a lump sum judgment," and it did not specify a date for the transfer. Id. at ¶31. We therefore concluded that the trial court acted within its discretion in denying McKay's request for an award of interest on the amount that had not yet been paid. Id. at ¶30.

{¶ 8} Second, we concluded that the trial court's award of $2,100,000, to be paid by Glass to McKay over time, was intended as a distributive award, rather than a lump sum judgment. We commented that R.C. 1343.03, which provides for interest on judgments, does not apply to distributive awards; we concluded that the

trial court did not abuse its discretion in denying McKay's request for interest. There was no assignment of error relating to the two $70,000 payments that were designated as spousal support in the decree, and our opinion did not address them.

{¶ 9} Shortly after our decision in *McKay I*, McKay requested a hearing in the trial court on several issues, including a request for a finding of contempt on two untimely spousal support payments of $70,000 each, Glass's failure to pay "the $603,000 cash sum" owed to McKay from her Merrill Lynch account, and a request by McKay for an award of attorney fees incurred in the collection of court-ordered payments from Glass. The magistrate held a hearing on October 20, 2006.

{¶ 10} At the hearing, the parties stipulated that the two $70,000 payments "were intended to be interest on the 2.1 million dollar property settlement," although they were characterized as spousal support in the divorce decree. McKay stated that the first $70,000 payment, which had been due on January 1, 2003, was made two or three weeks late, and the second payment, which was due on January 1, 2004, was made in April 2005. McKay's motion did not seek interest on these sums, nor was this issue discussed at the hearing. The magistrate found Glass in contempt for failure to make the two $70,000 payments in accordance with the decree of divorce; he fined her $500 and allowed Glass to purge the contempt by "paying all remaining property payments within thirty days."

{¶ 11} With respect to the $603,000 owed from the Merrill Lynch account, McKay claimed that he had not yet been paid the $45,333 difference between the value of the account when it was transferred to him and the $603,000 that Glass

was required to pay pursuant to the decree of divorce.[2] Glass claimed that she made a lump sum payment of $765,500 to McKay on May 4, 2005, and that she believed this payment had settled "all outstanding claims regarding the division of the marital property." McKay denied that this payment was full and complete settlement of the agreement under the terms of the divorce decree, and the magistrate found no documentation of such an agreement. The magistrate found that Glass had not paid the additional $45,333 owed with respect to the Merrill Lynch account and ordered her to pay this amount, plus interest from the date of our opinion in *McKay I* (March 4, 2005). Although McKay also sought costs associated with liquidating the account, the magistrate was "unable to determine from the documentation exactly what those figures may be," and McKay had not, in fact, liquidated the account. Thus, the magistrate did not award any amount for the cost of liquidating the account. The magistrate found Glass in contempt, sentenced her to three days in jail, and stated that Glass could purge the contempt by paying $45,333, plus interest, within thirty days.

{¶ 12} McKay also claimed that $104,500 of the property settlement remained unpaid. Glass maintained that, pursuant to an agreement with McKay, her lump sum payment in May 2005 had satisfied the terms of the parties' property settlement. Again, the magistrate found no evidence of such an agreement; the

[2]McKay also claimed that he was entitled to diminution in value of the account from the time of the transfer (approximately $558,000) until the time of the hearing ($518,008.34). The magistrate rejected this argument, finding that the reduction of value after the transfer was not Glass's responsibility, and this finding has not been assigned as an error.

magistrate found Glass in contempt, sentenced her to three days in jail, and ordered that she could purge the contempt by paying $104,500 within thirty days. The magistrate ordered that she pay interest on this sum from December 1, 2004, which was "the last day that a property settlement payment was due under the parties' Final Judgment and Decree of Divorce."

{¶ 13} The magistrate set the issue of attorney fees for further hearing.

{¶ 14} The parties filed objections to the magistrates' decision, which the trial court overruled on April 3, 2008. McKay filed a notice of appeal, and Glass filed a notice of cross-appeal (Montgomery App. No. 22702). In October 2008, we dismissed the appeal for lack of a final appealable order, because the issue of attorney fees was unresolved.

{¶ 15} On September 29, 2009, the magistrate ordered that Glass pay $25,000 toward McKay's attorney fees incurred "to ensure that [McKay] collected that which he was entitled to under the parties' judgment and decree of divorce." Neither party filed objections to that decision. McKay filed a notice of appeal on October 22, 2009 (Montgomery App. No. 23702). Glass did not renew her cross-appeal.

{¶ 16} McKay raises two assignments of error on appeal.

II

{¶ 17} McKay's first assignment of error states:

{¶ 18} "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN DETERMINING THE MANNER BY WHICH KATHLEEN MAY SATISFY HER OBLIGATION TO PAY JOHN A SUM SUFFICIENT SO THAT HE

WOULD RECEIVE A TOTAL OF $603,000 FROM HER MERRILL LYNCH STOCK ACCOUNT."

{¶ 19} McKay asserts that the trial court's order that Glass could pay him $45,333, plus interest from March 4, 2005, to satisfy her obligation with respect to the transfer of the Merrill Lynch account was inadequate. He claims that he should have received interest from the date of the decree in November 2001. He also contends that he should receive credit for the costs incurred in liquidating the account, because Glass transferred securities to him, rather than cash.

{¶ 20} In *McKay I*, we concluded that the trial court had not abused its discretion in refusing to award interest on the unpaid portion of the Merrill Lynch account since the time of the decree of divorce because there had been some "understandable confusion" between the terms of the settlement read into the record at the settlement conference and the terms of the divorce decree that was subsequently entered. In subsequent proceedings, the magistrate and the trial court recognized that, although this Court concluded that the trial court did not abuse its discretion in not awarding interest previously, res judicata "did not preclude the award of interest for any portions that remain[ed] unpaid after the time" of *McKay I*. And, in the appeal now before us, the trial court did award interest from the date of our prior opinion.

{¶ 21} A trial court is not obligated as a matter of law to award interest on those monetary obligations which arise out of property divisions upon divorce. *Koegel v. Koegel* (1982), 69 Ohio St.2d 355, syllabus. If R.C. 1343.03 were applicable, as McKay alleges, it is only to specific amounts due and payable. While

the statute's language appears to be mandatory, this does not mean that a trial court is divested of all discretion; instead, there is discretion as to a determination of when money becomes "due and payable." *Textiles, Inc. v. Design Wise, Inc.*, Madison App. No. CA2009-08-015, CA2009-08-018, 2010-Ohio-1524, at ¶50 (internal citations omitted). Given the record and the law of the case as established in *McKay I*, the trial court did not abuse it discretion in awarding interest on the unpaid portion of the Merrill Lynch account only from the date of our decision in *McKay I*, as opposed to the date of the decree.

{¶ 22} McKay also contends that he should have received compensation for the cost of transferring the Merrill Lynch account from securities to cash because Glass was ordered to pay him a fixed sum of $603,000, not to transfer securities to him in that amount. In July 2007, McKay sold the assets transferred to him in December 2001 for $562,074.[3] He claims that he paid a $8,235 brokerage commission and incurred a "taxable gain" of $3,321. In his calculations, he "credits" his taxable gain against the brokerage commission, to reduce the costs "associated with the sale of the securities to $4,914." Thus, he claims that he was owed a total of $607,914 ($603,000 per the decree plus $4,914 in net costs of the sale), less the $562,074 in sale proceeds, for a total of $45,840 still owed. As noted above, the trial court found that it was unable to determine the costs associated with the sale of the securities.

{¶ 23} McKay presented statements and printouts at the hearing

[3] Even this fact, which was in McKay's objections to the magistrate's decision, was not in evidence at the magistrate's hearing, held in October 2006.

documenting his holdings and their value as of December 27, 2001, when the assets were transferred to him, the value of those holdings in March 2003, and what the commission would have been on the sale of those securities if they had been sold in April 2003. He also submitted a letter and attachments from Linda Stukey, his former attorney, which stated that the total commission that would have been paid on the sale as of April 3, 2003, would have been $8,219.98. Neither Stukey nor anyone from Merrill Lynch testified about these calculations.

{¶ 24} The trial court did not abuse its discretion in concluding that McKay presented insufficient information upon which to award costs associated with the proposed liquidation of the securities. The documentary evidence related to commission on the sale dated back to 2003, but the securities were not sold at that time. There is no evidence about what the commission would have been at the time of the hearing or how that commission would have been calculated. Further, the trial court reasonably concluded that Glass was not responsible for downward fluctuations in the price of the securities between the time they were transferred to McKay and the time of the sale, which resulted from McKay's "inactivity." In sum, other than the $603,000 that Glass was ordered to pay in the divorce decree, the numbers used in McKay's calculation to establish the cost of the sale were insufficiently documented to support a monetary award. Thus, the trial court did not abuse its discretion in refusing to award costs and expenses associated with the sale.

{¶ 25} The first assignment of error is overruled.

III

{¶ 26} McKay's second assignment of error states:

{¶ 27} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO DIRECT KATHLEEN TO PAY INTEREST ON COURT ORDERED AMOUNTS DUE AND OWING, BUT UNPAID OR PAID LATE."

{¶ 28} McKay contends in his briefs and at oral argument that he was entitled to interest on the two $70,000 "spousal support" payments that were not timely made and on all of the late property settlement payments "from the time that each became due and continuing until each is paid in full."

{¶ 29} As discussed above, the two $70,000 payments required by the divorce decree were characterized as spousal support in the decree, but at the October 2006 hearing, the parties stipulated that they "were intended to be interest on the 2.1 million dollar property settlement." The first payment was made two or three weeks late,[4] and the second payment was made fifteen months late. The magistrate fined Glass $500, with the provision that the fine could be "purged" if all remaining "property payments" were made within thirty days of its decision; he did not award or even address interest attributable to the lateness of these payments. In his objections to the magistrate's decision, McKay argued for the first time that he was entitled to interest due to the late payments, but the trial court adopted the magistrate's decision without specifically addressing this issue. McKay claims that R.C. 1343.03 required the trial court to award him interest on the late payments.

{¶ 30} As a preliminary matter, we reiterate that McKay did not request

[4]The magistrate's decision says two weeks; McKay says three weeks.

interest on the $70,000 payments in his motion or at the hearing. An appellant cannot assign as error the trial court's failure to grant relief which was never sought. *Brewer v. Brewer*, Franklin App. No. 09AP-146, 2010-Ohio-1319, at ¶24. On this basis alone, we conclude that the trial court did not abuse its discretion in failing to award interest on these particular payments.

{¶ 31} At oral argument, Glass argued, for the first time and in the alternative, that McKay had elected to address Glass's late payment of the $70,000 payments required by the divorce decree through a motion for contempt, rather than a request for interest. Glass suggested that the doctrine of election of remedies precluded McKay from seeking relief both through a motion for contempt and a request for interest. In response to this argument, we note that the doctrine of election of remedies is disfavored in Ohio; it is "harsh" and "technical" and does not reflect "the liberalizing flexibility effected by the rules of civil procedure." *Singer v. Scholz Homes, Inc.* (1973), 36 Ohio App.2d 125, citing 18A Ohio Jurisprudence 2d 637, Election of Remedies, Section 7. Moreover, the doctrine is inapplicable where the available remedies are concurrent, or cumulative and consistent. *Welch v. Welch* Lake App. No, 2006-L-35, 2006-Ohio-7013, at ¶13, citing *Riad v. Riad* (Oct. 9, 1986), Montgomery App. Nos. 9589 and 9572. "Where the remedies are neither inconsistent not repugnant, a party may pursue each separately until [he] receives satisfaction of a judgment from one of them." Id., citing *Land v. Berzin* (1938), 26 Ohio Law Abs. 703. In our view, it is not inconsistent for a trial court to find a party in contempt and to award interest, if it chooses to do so and if such a remedy has been litigated.

{¶ 32} McKay also contends that the trial court failed to award interest on the untimely property settlement payments. This argument relates to the $2.1 million that was payable by Glass to McKay in five payments over three years, with the last payment due on December 1, 2004. At the time of the hearing in October 2006, the trial court concluded that $104,500 remained unpaid. McKay argued that some of the other payments had been made late. The trial court ordered Glass to pay interest "from December 1, 2004 onward" ("the last day that a property settlement payment was due under the parties' Final Judgment and Decree of Divorce") on the outstanding $104,500, but it did not award interest on any late payments prior to that date.[5]

{¶ 33} We discussed the issue of interest in *McKay I*, as follows:

{¶ 34} "Pursuant to R.C. 1343.03(A), 'when money becomes due and payable upon *** any settlement between the parties, *** and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money ***, the creditor is entitled to interest at the rate of ten percent per annum.' 'This Court stated in *O'Quinn v. Lynn* (Nov. 20, 1998), Montgomery App. No. 17023, that a party

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[5]As discussed above, the schedule of payments set forth in the decree was $50,000 upon execution of the judgment entry; $500,000 on December 1, 2001; $550,000 as of December 1, 2002; $500,000 on December 1, 2003; and $500,000 on December 1, 2004, for a total of $2.1 million. Glass made the first two payments in 2001. She paid $750,000 on April 11, 2005, and $765,000 on May 4, 2005. McKay viewed the April payment as covering the amount due in December 2002 ($550,000), the second interest payment of $70,000, and a portion ($130,000) of the property settlement owed in December 2003. He viewed the May payment as satisfying the remaining payment owed in December 2003 ($370,000) and part of the amount owed in December 2004 ($395,000). This left a shortfall of $104,500 on the property settlement at the time of the hearing in October 2006.

that receives a "definite money judgment" with respect to obligations arising from a divorce decree is entitled to interest under [R.C. 1343.03] as a matter of law only if the obligations have been reduced to a lump sum judgment.' *Cronin v. Cronin*, Greene App. Nos. 02-CA-110, 03-CA-75, 2005-Ohio-301, ¶25. 'If R.C. 1343.03 does not apply to the judgment, then the trial court has the discretion whether or not to award interest and to determine the interest rate.' Id. at ¶26, citations omitted. 'A trial court is not required to award interest on the payment of a property division over time, but may exercise its broad discretion in determining whether interest is appropriate and in choosing the amount.' Id., citation omitted." *McKay I* at ¶28.

{¶ 35} As noted by the Tenth District in *Meeks v. Meeks*, Franklin App. No. 05AP-315, 2006-Ohio-642, ¶18, the "issue of interest on property divisions pursuant to a decree of divorce is somewhat unsettled." Unfortunately, it is apparent from the briefs and oral argument that we have further "unsettled" the issue and/or counsel have read too much into our probably-overbroad language in two or three paragraphs of the seventy paragraph decision of *McKay I*.

{¶ 36} Specifically, our citation in *Cronin* to *O'Quinn* for the proposition that a party is entitled to R.C. 1343.03 interest only when the obligations have been reduced to a lump sum judgment is misleading. Although *Cronin* dealt with a property division, several of the cases upon which it relied involved periodic support arrearages and, in turn, relied on *Dunbar v. Dunbar* (1994), 68 Ohio St.3d 369.[6]

[6]The overbreadth of this language is not unique to the Second District. See, e.g., *Marder v. Marder*, Clermont App. No. CA2008-11-108, 2009-Ohio-3420, at ¶17, citing *Dunbar* and holding that it "is well-established that any unpaid and delinquent installments in a domestic relations proceeding which

Indeed, it is very possible in situations where the trial court finds that an "order distributing marital assets from one party to another has the force of a money judgment *** [that] the recipient is entitled to interest on any amount due and owing under the order but unpaid, pursuant to R.C. 1343.03." See, e.g., *Meeks*, supra, at ¶18 or our decision in *Woloch v. Foster* (1994), 98 Ohio App.3d 806, 812.

{¶ 37} This does not change the result of the *McKay I* decision, where the trial court did not order interest on either the Merrill Lynch "deficiency" or the late partial payments on the $2.1 million property division. As we discussed above, a court always has certain discretion under R.C. 1343.03 to determine *when* an amount became due and payable. For example, in *Kampf v. Kampf* (May 3, 1991), Ashtabula App. No. 90-A-1503, the trial court ordered that the $49,387.50 property division be paid at a rate of $1,000 per month without interest. Citing *Koegel*, the appellate court held that interest on such a property award is within the sound discretion of the trial court (although it found, based on the totality of the facts in the case, that the lack of interest was an abuse of discretion). Similarly, in *Watson v. Watson*, Franklin App. No. 04AP-1375, 2005-Ohio-4247, the defendant was ordered to refinance the marital residence and pay the plaintiff $57,000 within 95 days of the decree, but the payment was not made until 310 days after the decree. The plaintiff's claim for interest based on R.C. 1343.03 was rejected; the court found that it was not an abuse of discretion, under the circumstances in the record, to refuse to

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have not been reduced to a lump sum judgment are not subject to the interest provisions of R.C. 1343.03." (But both *Marder* and *Dunbar* involved child support arrearage.) Moreover, depending on the date of the order, R.C. 3123.18 may affect this line of cases.

award post-judgment interest. See, also, *Morningstar v. Morningstar* (Nov. 27, 1989), Greene App. No. 89-CA-10 and the general survey in Annotation (1993), 10 A.L.R.5th 191. The precise holding of *McKay I* was simply that, "*based on the record*, we cannot say that the trial court abused its discretion by denying McKay's request for an award of interest." (Emphasis added.)

{¶ 38} Likewise, we conclude that the trial court herein did not abuse its discretion in not awarding interest on the untimely periodic payments which were ordered toward the property division award due in total on December 1, 2004, and which included two separate interest payments.

{¶ 39} The second assignment of error is overruled.

IV

{¶ 40} The judgment of the trial court will be affirmed.

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FAIN, J., concurs.

GRADY, J., dissenting:

{¶ 41} I respectfully dissent from the majority's decision overruling the first assignment of error with respect to John McKay's contention that he is entitled to an award of interest pursuant to R.C. 1343.03 on the several past-due payments of the $2,100,000 award that Kathleen G. McKay nka Glass was ordered to pay for purposes of a division of the parties' marital property the court ordered.

{¶ 42} R.C. 1343.03(A) provides, in pertinent part, that "when money becomes due and payable . . . upon all judgments, decrees, and orders of any judicial tribunal for the payment of any money arising out of tortious conduct or a

contract or any other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5303.47 of the Revised Code . . .” R.C. 1343.03(B) states that the interest “shall be computed from the date the judgment, decree, or order is rendered to the date on which the judgment is paid. . .”

{¶ 43} We have held that R.C. 1343.03 authorizes a domestic relations court to order interest on an unpaid property division order for an amount which, per the decree, was due and payable “as soon as possible.” *Woloch v. Foster* (1994), 98 Ohio App.3d 806. We wrote: “An order distributing marital assets from one party to another has the force of a money judgment, and the recipient is entitled to interest on any amount due and owing under the order but unpaid.” *Id*., at p. 812.

{¶ 44} Subsequently, in *Cronin v. Cronin*, Greene App. Nos. 02CA110, 03CA75, 2005-Ohio-301, while we acknowledged our holding in *Woloch*, we held that a monetary property division order must also be reduced to a separate lump sum judgment in order for R.C. 1343.03 to apply. ¶25. We relied on the holdings in *Dunbar v. Dunbar* (1994), 68 Ohio St.3d 369; *Clymer v. Clymer* (Sept. 21, 2000), Franklin App. No. 99AP-924; *Rizzen v. Spaman* (1995), 106 Ohio App.3d 95; and *O’Quinn v. Lynn* (Nov. 20, 1998), Montgomery App. No. 17023.

{¶ 45} In *Dunbar*, the Supreme Court held: “Arrearages in child support which have not been reduced to a lump-sum judgment are not subject to the interest provisions of R.C. 1343.03.” Syllabus by the Court. The court relied on its prior holding in *Roach v. Roach* (1956), 164 Ohio St. 587. The question in *Roach* was whether execution could issue on an arrearage in periodic support payable over an indefinite period of time, upon proof of the amount of arrearage owed. The court

held that execution could not issue on that basis alone, because the prior judgment for periodic support contained no specification of a definite and certain amount of money to be recovered. For that, the amount of the arrearage must be reduced to a lump sum judgment.

{¶ 46} Two of the other decisions we cited in *Cronin* for the finding that a lump sum judgment is necessary in order for R.C. 1343.03 to apply to a property division award, *Rizzen, and O'Quinn*, like *Dunbar,* instead involved arrearages in periodic support orders. *Clymer*, on which we also relied, did involve a property division order. However, we obviously misread *Clymer*, because it held that R.C. 1343.03 applies to a property division order that "awarded a definite lump sum payment of $8,000 that was due and payable at the time of judgment." P. 4. In other words, the authorities on which we relied in *Cronin* don't support its holding.

{¶ 47} Our prior decision in *McKay I* followed *Cronin* and held that R.C. 1343.03 does not apply to the $2.1M marital property division award payable by Kathleen in definite amounts and at definite times, which were unpaid when they were due and owing, because an additional lump sum judgment was required. We further held that the $2.1M award was a "distributive award" instead of a lump-sum judgment. However, R.C. 3105.171(A)(1) defines a distributive award to mean "any payment or payments, in real or personal property, that are payable in a lump sum or over time, in fixed amounts . . ." That section further provides that distributive awards are made from separate property, not from marital property, which the $2.1M award concerned. The statutory definition of "distributive award" doesn't support the distinction we made.

{¶ 48} *Cronin* was wrong when it held that the lump sum judgment requirement that *Dunbar* applied to interest owed on arrearages in periodic support likewise applies to monetary awards of property division in a definite and certain amount and that are due, owing, and unpaid. Both the $2.1M award and the two $70K property division awards to John in the judgment and decree of divorce satisfy the test in *Roach*, on which *Dunbar* relied, because they are specifications on the face of that judgment of a definite and certain amount of money due at particular times. No additional lump sum judgment is necessary to satisfy the broad terms of R.C. 1343.03 regarding the availability of interest on the amounts due.

{¶ 49} The majority relies on *Koegel v. Koegel* (1982), 69 Ohio St.2d 355, to hold that R.C. 1343.03 does not apply. That misconstrues *Koegel*, which involved different facts. In *Koegel*, a spouse in a divorce action was awarded the marital residence. In return, she was ordered to execute a note, secured by a mortgage, for $9,200 in favor of the other spouse, due and payable in five years time. The other spouse asked the court to affix a rate of interest to the obligation on the note. The domestic relations court denied the request.

{¶ 50} On review, the Supreme Court affirmed, finding that to require the court to affix a rate of interest "would impose an unnecessary restraint on a trial judge's flexibility to determine what is equitable in a special set of circumstances." *Koegel*, p. 357. The Supreme Court further wrote:

{¶ 51} "Alternatively, appellant argues that he is entitled to an award of interest under R.C. 1343.03. Whether R.C. 1343.03 is applicable to cases involving the division of marital property is a question we need not resolve. R.C.

1343.03 is applicable only to obligations that are due and payable, and the obligation here will not become due and payable until the occurrence of a future event." (Emphasis supplied).

{¶ 52} The Supreme Court's having declined to decide in *Koegel* whether or not R.C. 1343.03 is applicable to cases involving the division of marital property, the majority's reliance on *Koegel* to hold that R.C. 1343.03 does not apply to awards dividing marital property is wholly misplaced. Further, the fact that the obligation in *Koegel* was not yet due and payable plainly distinguishes it from the present case, in which the obligations at issue have been or are owing and unpaid when due.

{¶ 53} Denying John the interest to which he is entitled by reason of Kathleen's failure to pay the amounts she owes would be an unjust result. We should therefore not be bound by our holding in *McKayl*. Also, following *McKayl* would perpetuate the error in *Cronin*, which we should likewise reverse with respect to the lump-sum judgment requirement it imposed. As between *Cronin and Woloch*, which *Cronin* did not expressly overrule, we have issued different and inconsistent decisions that confuse the question. We should clarify our position for the bench and bar in this district.

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Copies mailed to:

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