

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001364-MR

KEITH ALLEN MERSHON

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 05-CI-00415

SHEILA KAY MERSHON

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Keith Mershon appeals from an order of the Greenup Circuit Court overruling his motion to recoup money he overpaid to his ex-wife in maintenance. Mr. Mershon argues he was entitled to recover the money. Sheila Mershon did not file a brief. We believe that Mr. Mershon's motion should have been granted in his favor. We therefore reverse and remand.

The parties were married for 33 years. They were granted a dissolution in September of 2005. A settlement agreement was incorporated into the order of dissolution. The agreement stated that Mr. Mershon would pay Ms. Mershon \$1,000 in monthly maintenance payments for two years. After two years, the court would review the amount of maintenance. When the two-year mark approached, Ms. Mershon moved for a hearing on the maintenance issue. She wanted to continue the maintenance while Mr. Mershon wanted to discontinue it. After a hearing, the trial court ordered that Mr. Mershon continue to pay the full \$1,000 monthly maintenance.

Mr. Mershon appealed that order to a previous panel of this Court. During the pendency of the appeal, Mr. Mershon tried to stop paying maintenance until the appeal had been resolved. The trial court ordered him to continue paying maintenance to Ms. Mershon. The previous panel of this Court ultimately reversed and remanded the case because it found the trial court had been presented with no actual evidence of how much money Mr. Mershon earned each month, which affected his ability to pay.

On remand, the trial court held another hearing, but still no evidence of Mr. Mershon's income was presented. The trial court then found that Ms. Mershon was not entitled to further maintenance payments. Mr. Mershon then moved to recover the money he paid Ms. Mershon in maintenance during the period of the first appeal. The trial court denied that motion and this appeal followed.

It is clear that Mr. Mershon is entitled to recover his money. “The new judgment must be substituted and be effective as of the date of the original judgment as the amount which appellee was entitled to receive, and appellee must account to appellant for the overpayment.” *Wheeler v. Wheeler*, 579 S.W.2d 378, 380 (Ky. App. 1979). Once the trial court found that Ms. Mershon was no longer entitled to maintenance after the initial two-year period, any money Mr. Mershon paid during the pendency of the first appeal should be returned. Mr. Mershon claims this amount to be \$23,000. The exact amount, however, is an issue of fact for the trial court.

We therefore reverse and remand for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard A. Hughes
Ashland, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed