IN THE COURT OF APPEALS OF TENNESSEE

LEMUEL A. DUCKETT,	)	C/A NO. 03A01-9506-CV-00198
	)	HAMILTON COUNTY CIRCUIT COURT
Plaintiff-Appellant,	)	
	)	
	)	
	)	
	)	HONORABLE ROBERT M. SUMMITT,
v.	)	JUDGE
	)	
	)	
	)	
	)	
SHEILA ANN DUCKETT,	)	AFFIRMED IN PART
	)	VACATED IN PART
Defendant-Appellee.	)	REMANDED WITH INSTRUCTIONS

GLENNA M. RAMER, Chattanooga, for Appellant

HARRY BERKE of BERKE, BERKE & BERKE, Chattanooga, for Appellee

O P I N I O N

Susano, J.

This appeal arises out of post-divorce proceedings. The issues raised by the appellant, Lemuel A. Duckett (Father), cause us to focus on a hearing before the trial court on October 24, 1994. At that hearing, the court received proof with respect to two pleadings--a petition for contempt filed by Sheila Ann Duckett (Mother), and a petition to modify filed by Father. In her petition, Mother claimed that Father was in contempt because of his failure to make payments on a child support arrearage of $7,650 established by an order entered April 20, 1994. Father, on the other hand, sought the custody of the parties' only child, Lee Belton Duckett, who was 17-1/2 years old at the time of the hearing.

Following the hearing, the trial court entered an order on November 22, 1994. As pertinent here, the order found Father in contempt; decreed that he was to pay $100 per week on the $7,650 arrearage; directed that he "serve two (2) days in jail for each week [in the future] that he fail[ed] to make" a payment on the arrearage; awarded[1] Mother's attorney a fee of $2,000 to be paid by Father; and stated that the court "makes no orders with respect to the custody relief sought by" Father.

Father appeals, raising issues that present the following questions:

[1]Actually, the order of November 22, 1994, only awarded a fee of $1,000. This was raised to $2,000 by an order entered June 26, 1995. The additional award was made "during a conference hearing to release [Father] from confinement." We do not have a transcript of that "conference hearing." In the absence of a record, we conclusively presume that the facts before the court justified its decision to increase the attorney fee award. *See* ***Sherrod v. Wix***, 849 S.W.2d 780,783 (Tenn. App. 1992).

1. Does the evidence preponderate against the trial court's finding, in its order of April 20, 1994, that Father was $7,650 in arrears in his child support?

2. Is Father entitled to a credit against his child support arrearage for payments made by him for the benefit of his son?

3. Did the trial court abuse its discretion in awarding Mother's attorney a fee of $2,000?

4. Is Father entitled to a credit against his child support arrearage for support Mother should have been ordered to pay following the hearing of October 24, 1994?

I

The parties were divorced on February 2, 1984. Mother was awarded custody of the parties' minor child. At the time of the most recent hearing, Father was subject to a court-ordered child support obligation of $62 per week.

The record reflects previous attempts by Father to obtain custody of his son. All of those attempts were rebuffed by the trial court, except on one occasion when Father was awarded custody for a brief period of time on an *ex parte* application.

On April 20, 1994, the court entered an order awarding Mother a judgment for a child support arrearage in the amount of $7,650. Father filed a motion to alter or amend that award, but that motion was denied by order entered May 25, 1994. The petition for contempt now before us came next. It was filed by

Mother on June 22, 1994. Father's petition to change custody was filed on August 2, 1994.

II

Father seeks to challenge the correctness of the order of April 20, 1994, finding an arrearage of $7,650. He seeks to do this via a notice of appeal filed December 20, 1994. This he cannot do. In order to contest that determination, Father had to file a notice of appeal within thirty days of the entry of the order denying his motion to alter or amend. *See* T.R.A.P. 4(a) and (b). Since that order was entered May 25, 1994, Father had until June 24, 1994, to file his notice of appeal. His notice of appeal filed December 20, 1994, came too late as far as the order of April 20, 1994, was concerned. It became final[2] and is not subject to challenge on this appeal. The first question raised by Father's appeal is found adverse to him.

Father next argues that he is entitled to a credit against his arrearage for payments made by him for the benefit of his son during extensive periods of time that his son was living with him from 1989 to October 24, 1994, the date of the most recent hearing. The bulk of the payments for which credit is sought were called to the trial court's attention in Father's motion to alter or amend filed subsequent to the arrearage order of April 20, 1994. The trial court rejected that argument when it refused to alter or amend the April 20, 1994, order. As

[2]Neither of the pleadings now before us had the effect of extending the time for filing the notice of appeal. *See* T.R.A.P. 4(b). Each raised a new matter.

previously noted, the order of April 20, 1994, and the order of May 25, 1994, denying Father's motion to alter or amend, were not appealed from, are now final, and are the law of this case.

Despite its earlier ruling on the "credit" issue, the trial court permitted Father to testify at the most recent hearing as to payments made by him since the entry of the May 25, 1994, order. There was minimal documentation as to those payments; however, because the trial court received evidence on the post-May 25, 1994, payments, we will review Father's issue as to those payments.

We start our analysis by observing that we cannot change a child support award for any period of time prior to the date of filing of a petition seeking a change in child support. *See* T.C.A. § 36-5-101(a)(5). ("Such judgment [for child support] shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed . . .") Father acknowledges our lack of power; but argues that we can allow a *credit* against a child support obligation for payments made by a non-custodial parent for the benefit of that individual's minor child. He relies upon the case of ***Freshour v. Aumack***, 567 S.W.2d 176 (Tenn. App. 1977).

Freshour is not controlling here. In that case, disability payments due an incompetent veteran were paid by the Veterans Administration (VA) to the veteran's former wife. The payments were made by the VA pursuant to a federal statute vesting it with discretion to make an incompetent veteran's

disability payments "for the use of . . . [the veteran's] dependents." This court approved the trial court's judgment allowing the veteran a credit for the VA payments against his child support obligation.

There are differences between ***Freshour*** and the factual pattern in the instant case. First, and foremost, the payments in ***Freshour*** were made to the custodial parent, the one to whom the child support was due. The payments in the instant case were not paid to the custodial parent. Second, even if we were to construe the judgment in ***Freshour*** as approving a retroactive modification of a child support award (which we are not inclined to do), that case was decided before the enactment of the quoted part of T.C.A. § 36-5-101(a)(5). When ***Freshour*** was decided, a trial court had discretion to retroactively modify a child support obligation. *See* ***Crane v. Crane***, 170 S.W.2d 663, 665 (Tenn. App. 1942).

While rejecting Father's reliance on ***Freshour***, we hasten to note that there is authority, even in light of T.C.A. § 36-5-101(a)(5), for allowing a non-custodial parent a credit against that parent's child support obligation "for the children's necessaries which are not being supplied by the custodial parent." ***Oliver v. Oczkowicz***, 15 TAM 26-4 (Tenn. App., May 18, 1990); ***Sutton v. Sutton***, 16 TAM 12-9 (Tenn. App., February 12, 1991); ***Netherton v. Netherton***, 18 TAM 11-7 (Tenn. App., February 26, 1993). However, before that principle is applicable, there must be a dual showing: (1) that the payments were made by the non-custodial parent for the child's

necessaries; *and* (2) that those necessaries were not being provided by the custodial parent. It is clear that some of the payments made by Father were not for necessaries. For example, he paid for his son's class ring and also contributed toward his son's vacation trip to Central America. Those payments are clearly not covered by the principle at issue.

Father did testify that he paid for items that would clearly be classified as necessaries; however, much of this testimony was disputed by Mother. The trial court resolved these issues of credibility in favor of Mother. The credibility of the witnesses in this case was for the trial judge, not us. ***Galbreath v. Harris***, 811 S.W.2d 88, 91 (Tenn. App. 1990).

We cannot say that the evidence preponderates in favor of a finding that Father provided necessaries that were not being provided by Mother. There was testimony from Mother that she provided these needs. The trial judge obviously credited this testimony. We are not in a position--based on a "cold" record--to disagree with his assessment of Mother's credibility. The second question raised by Father's brief is also found adverse to him.

Father questions the trial court's award of a $2,000 fee to Mother's attorney. This matter addressed itself to the sound discretion of the trial judge. ***Threadgill v. Threadgill***, 740 S.W.2d 419, 426 (Tenn. App. 1987); ***Dover v. Dover***, 821 S.W.2d 593, 595 (Tenn. App. 1991). With respect to $1,000 of the total fee, we are hindered in our review by the

lack of a transcript of the hearing at which it was awarded[3]. In any event, we do not find that the trial judge abused his discretion.

Finally, Father argues that he is entitled to a credit against his child support arrearage for child support that Mother should have been ordered to pay at the October 24, 1994, hearing. Before we can reach this issue, we must "tackle" a more fundamental question--what did the trial court do at the October 24, 1994, hearing, or what should it have done, regarding the custody of Lee Belton Duckett for the short remainder of his minority? The answer to the first part of this question is difficult to ascertain; the second part of the question is more easily answered and that answer is the key to resolving Father's last issue.

We have a transcript of the trial court's remarks following the hearing of October 24, 1994. Actually, those remarks are found at two places in the record. They are a part of the transcript of evidence signed by the trial judge on June 28, 1995; those identical remarks are also found in the memorandum opinion filed in what used to be referred to as the "technical record"--the various papers filed with the trial court other than the transcript of evidence and the exhibits. Those remarks include the following colloquy:

> MS. RAMER: Your Honor, are you transferring custody [to Father]?

[3]See footnote 1 to this opinion.

THE COURT: Temporarily.

This, of course, is different from the court's decree in the order entered following the hearing:

> The Court makes no orders with respect to the custody relief sought by Lemuel Duckett.

What are we to make of the contradiction in these two documents, each of which was signed by the trial judge? It would be easy to simply refer to the well known rule that a court speaks through its judgments and orders entered upon its minutes, and dismiss, out of hand, the trial judge's comment in the transcript/memorandum opinion. *See* ***Palmer v. Palmer,*** 562 S.W.2d 833, 837 (Tenn. App. 1977); ***Rogers v. Sain***, 679 S.W.2d 450, 452 (Tenn. App. 1984). The problem with this approach is that it ignores the fact that the transcript is certified by the trial judge's signature to be a true transcription of his remarks; and it also ignores the fact that the transcript was signed some seven months *after* the order was signed, i.e., June 28, 1995, *vis-a-vis* November 22, 1994.

We note, in passing, that the order memorializing the action taken at the October 24, 1994, hearing was prepared by Mother's counsel and served on Father's counsel pursuant to Tenn. R. Civ. P. 58[4]. We also note that Father filed a motion

[4]We do not mean to imply that there was anything wrong with this procedure. We point it out simply to explain how the discrepancy, albeit innocent enough, might have occurred.

following the entry of that order that included the following request for relief:

> Lemuel Duckett seeks modification and alteration of the signed Order, pursuant to Rule 59 of the Tennessee Rules of Civil Procedure, to make it consistent with the actual decision of the Court. The Order as signed does not dispose of the issue of custody and the Court clearly awarded custody of the parties' minor son to Lemuel Duckett.

The record does not indicate that this request was ever acted upon by the trial court.

While we are not sure what, if anything, the trial court intended to do with respect to Father's request for a change of custody, we believe that the pleadings and proof require a disposition. *See* T.R.A.P. 36. The evidence clearly indicates that this 17-1/2 year old boy had lived the majority of the past few years with his father; that he was a senior at Ootewah High School, a school located in the area where Father resided; that he wanted to live with his father; and that there is no indication that a change of custody would be harmful, in any way, to the child's welfare. We find that the proof preponderates in favor of a finding that the child's best interest dictates that his custody be changed from Mother to Father, effective August 2, 1994, the date of filing of his petition to modify. Father clearly proved that a change of custody was appropriate.

For all of the foregoing reasons, so much of the trial court's order of November 22, 1994, as purports to take no action

with respect to Father's petition for change of custody is hereby vacated. This matter is remanded to the trial court with instructions to enter an order modifying the order of November 22, 1994, to accomplish the following:

1. Changing the custody of Lee Belton Duckett from Mother to Father effective August 2, 1994.

2. Relieving Father of his child support obligations to Mother effective August 2, 1994.

3. Establishing the child support due from Father for the period from April 20, 1994, to August 2, 1994.

4. Establishing all payments, if any, made by Father to Mother on the child support from and after April 20, 1994, and applying same against the total arrearage found by the trial court.

5. Determining, in compliance with the Child Support Guidelines, the child support that was due from Mother to Father for the period beginning August 2, 1994, and ending when the child reached his majority, or graduated from high school, whichever occurred last, pursuant to the provisions of T.C.A. § 34-11-102(b); and applying the amount so found as a credit against Father's child support arrearage.

Except as vacated by us, the trial court's order is affirmed. Costs on appeal are taxed one-half to each party.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Houston M. Goddard, P.J.

_____
Don T. McMurray, J.