

IN THE COURT OF APPEALS

**FILED**  
November 21, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

GLEENDA LEE LOWE,

Plaintiff - Appellant

vs.

ROBERT WILLIAM LOWE,

Defendant - Appellee

) HAMILTON CIRCUIT  
) C. A. NO. 03A01-9607-CV-00233

) HON. SAMUEL H. PAYNE  
) JUDGE

) AFFIRMED AND REMANDED

MICHELL AARON BYRD, Chattanooga, for Appellant.

ROBERT WILLIAM LOWE, Pro Se.

O P I N I O N

McMurray, J

This is an appeal wherein the appellant (plaintiff) complains of the action of the trial court in making a determination as to

the amount of child support arrearage owed by the appellee (defendant). We affirm the judgment of the trial court.

The plaintiff was awarded a divorce by the Hamilton County Circuit Court on December 3, 1982. Pursuant to the decree, the defendant was ordered to pay \$30 per week for child support. On May 22, 1995, the plaintiff petitioned the trial court asking the court to find the defendant in contempt for failure to abide by the orders of the court. The plaintiff claimed that the defendant owed \$22,590.00 in arrearage, plus interest and sought to collect that amount. In addition to seeking the collection of the alleged arrearage, she asked the court to increase the amount of child support which the defendant was required to pay. The defendant filed an answer wherein he denied that he was in arrears.

The plaintiff prepared a statement of the evidence ostensibly pursuant to the provisions of Rule 24, Tennessee Rules of Appellate Procedure (T.R.A.P.). The trial judge rejected the statement of the evidence as presented by the plaintiff and prepared his own. The statement of the evidence, thus prepared, relates that the plaintiff had no substantial explanation as to how the plaintiff arrived at the figure of \$22,590.00 as the amount of arrearage. When asked by the court, the plaintiff admitted that "it was a guess." The statement further recites that the plaintiff had no records to indicate what payments, if any, had been made, although

she did agree that some payments were made. The defendant likewise had no proof as to the amount of money that he had paid. There was some evidence that the defendant was under the impression that the minor child had been adopted by the plaintiff's new husband. The statement of the evidence reflects that during the time within which the defendant labored under that impression, he had failed to make child support payments as required. Plaintiff admitted that her husband had contemplated adopting the child, but that the adoption never took place. The court stated it "determined, as best it could, that Robert William Lowe was in arrears \$10,000.00."

The plaintiff appealed, claiming that the defendant was in arrears in the amount of \$22,590.00, plus interest in the amount of \$10,701.42, for a total of \$33,291.42, and submits the following issue for our consideration:

Did the Judge err in holding that payment of child support arrearage as required by T. C. A. § 36-5-101 could be reduced and amounts of indebtedness forgiven by the trial court?

We first note that our standard of review is de novo upon the record accompanied by a presumption of the correctness of the trial court's findings unless the evidence preponderates otherwise. Rule 13(d), T. R. A. P. No presumption of correctness applies to conclusions of law. Hill v. Tennessee Rural Health Improvement Ass'n.,

882 S.W2d 801 (Tenn. App. 1994). Additionally, we should note that the credibility of witnesses is peculiarly within the province of the trier of fact. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded to the trial judge on review. McCaleb v. Saturn Corp., 910 S.W2d 412 (Tenn. 1995). A trial court "on an issue which hinges on witness credibility, will not be reversed unless, other than the oral testimony of the witnesses, there is found in the record clear, concrete and convincing evidence to the contrary." Tennessee Valley Kaolin Corp. v. Perry, 526 S.W2d 488, 490 (Tenn. App. 1974).

Plaintiff is arguing, as best we understand, that the trial court reduced the amount of child support by, in effect, forgiving the amount of child support that the defendant had failed to pay over the years. There is language in the recitations or preamble to the court's order which suggests that the court was, in fact, forgiving some past arrearage.

Tenn. Code Ann. § 36-5-101 provides that child support orders cannot be retroactively modified. The statute in pertinent part reads as follows:

Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state and shall be entitled to full faith and credit in this state and in any other state. Such judgment 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 and notice of the action has been mailed to the last known address of the opposing parties.

T. C. A. § 36-5-101(a)(5).

This court has held that the statute [T. C. A. § 36-5-101(a)(5)] clearly renders orders for child support judgments "entitled to be enforced as any other judgment of a court of this state" and removes the power of modification from the courts for any amounts due prior to the date an action for modification is filed. Bloom v. Bloom 769 S.W2d 491 (Tenn. App. 1988). See also Vickers v. Scinta, an unreported case from this court, opinion filed at Nashville, November 9, 1995. We are of the opinion, however, that Bloom and Vickers do not address the issue presented in this case. Here, the issue presented when considered in pari materia with the record is simply a challenge to the sufficiency of the evidence.

The trial judge is the final arbiter of the statement of the proceedings. Rule 24(b)-(f), T.R.A.P.; Artrip v. Crilley, 688 S.W2d 451 (Tenn. App. 1985). Under Rule 13(d), T.R.A.P, it is our duty to examine the record and determine whether the evidence preponderates against the finding of the trial court. In so doing, we are confined to the statement of the evidence as approved by the

trial judge. As we earlier noted the judgment of the trial court contains in the recitation or preamble, language suggesting that the court was in fact forgiving some arrearage. We are of the opinion, however, that since the preponderance of the evidence must support the trial court's judgment, the statement of the evidence must prevail over the recitations or preamble to the court's order. We find that there was no effective forgiveness of any past due child support payments.

In this case the amount of the arrearage is disputed. Here, the plaintiff claims that the defendant owed \$22,590.00. The defendant denies that he owed that amount. The record contains no proof from either party as to the proper amount of child support due. The statement of the evidence reflects that the trial court rejected the plaintiff's "guess" as to the amount of arrearage. A spouse attempting to recover a judgment for unpaid child support or alimony has the burden of proving the amount due. Woodard v. Woodard, 783 S.W.2d 188 (Tenn. App. 1989), Pirrie v. Pirrie, 831 S.W.2d 296 (Tenn. App. 1992). We are of the opinion that the plaintiff failed to prove by a preponderance of the evidence that the amount of the arrearage was \$22,590.00 and further, that the evidence does not preponderate against the judgment of the trial court.

The judgment of the trial court is affirmed in all respects.  
Costs are taxed to the plaintiff-appellant and this case is  
remanded to the trial court for the collection thereof.

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Don T. Murray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge

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vs .	)	HON. SAMUEL H. PAYNE
	)	JUDGE
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ROBERT W LLI AM LOWE,	)	AFFI RMED AND REMANDED
	)	
Defendant - Appellee	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Hamilton County, briefs and argument of counsel for the appellant and the appellee, pro se. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court.

The judgment of the trial court is affirmed in all respects. Costs are taxed to the plaintiff-appellant and this case is remanded to the trial court for the collection thereof.



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