IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

December 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

GEORGE WASHINGTON WILKERSON	)	LOUDON COUNTY
	)	03A01-9604-CH-00149
Respondent-Appellant	)	
	)	
	)	
v.	)	HON. FRANK V. WILLIAMS, III,
	)	CHANCELLOR
	)	
VICIE MARIE BROWN WILKERSON	)	
	)	
Petitioner-Appellee	)	AFFIRMED AND REMANDED

JAMES HARVEY STUTTS OF SWEETWATER FOR APPELLANT

MARY KATHERINE LONGWORTH OF LOUDON FOR APPELLEE

OPINION

Goddard, P.J.

This is an appeal by the Respondent, George Washington Wilkerson, from the Trial Court's judgment entered in favor of the Petitioner, Vicie Marie Brown Wilkerson in the amount of $1873.60 for half of their unemancipated child's funeral bill and $350 in attorney fees.

The parties to this action were divorced in 1971. Ms. Wilkerson was awarded custody of their minor child, Angela. In 1983 Angela was found to be unemancipated due to her multiple sclerosis and mental retardation. Mr. Wilkerson was ordered to pay $30 a week child support. Angela died on September 23, 1994, due to a brain hemorrhage and complications of multiple sclerosis.

Ms. Wilkerson filed a petition claiming Mr. Wilkerson was in arrears in his child support payments from February 10, 1992, until the date of Angela's death, and also sought one-half of the funeral expenses for Angela's funeral. Ms. Wilkerson further alleged that she was entitled to attorney fees.

A default judgment was entered against Mr. Wilkerson with the issue of damages being reserved. After the hearing on damages, the Trial Court granted Ms. Wilkerson relief with respect to the funeral bill and attorney fees, but denied relief on the child support claim.

Mr. and Mrs. Wilkerson both raise issues on appeal, which in substance are as follows:

Mr. Wilkerson

1. Did the Trial Court err in granting judgment against him for one-half the funeral bill?

2. Did the Trial Court err in assessing attorney fees against him?

Ms. Wilkerson

1. Did the Trial Court err in failing to award her support arrearages where no petition to modify was filed and when the child received Social Security retirement benefits?

2. Is the appeal taken by Mr. Wilkerson frivolous?

Mr. Wilkerson's appeal of the Trial Court's grant of one-half of the funeral expenses is without merit. He stated in the hearing before the Trial Court that he did not object to paying half of his deceased daughter's funeral bill but stated that he did not want to pay the child support. "An interested party is bound by his testimony which contains a material statement of fact negating his right of action or defense if no more favorable testimony appears on the same subject." Johnson v. Steele, 541 S.W.2d 795 (Tenn.App.1976). A defendant who does not dispute a plaintiff's claim before the trial court cannot dispute it on appeal. Mr. Wilkerson is bound by his agreeing to pay one-half of the funeral expenses.

Mr. Wilkerson also contends that he should not have to pay Ms. Wilkerson's attorney fees. The trial court has wide discretion in such matters and this Court will not interfere unless this discretion is abused. Threadgill v. Threadgill, 740 S.W.2d 419 (Tenn.App.1987). Because Mr. Wilkerson has failed to

show such an abuse, we affirm the Trial Court's grant of attorney fees.

We now turn to whether Ms. Wilkerson is entitled to child support arrearages. As noted earlier, she contends that the Trial Court erred in finding that Mr. Wilkerson's child support obligation was offset by Social Security Retirement benefits paid to the child on behalf of Mr. Wilkerson, which slightly exceeded the monthly support ordered. Ms. Wilkerson argues that failing to award her child support amounted to retroactive modification of Mr. Wilkerson's child support obligation in violation of T.C.A. 36-5-101(a)(5) which 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.

This issue was considered in Netherton v. Netherton, an unpublished opinion of this Court filed in Nashville on February 26, 1993. In that case, two weeks after entry of the divorce decree, Mr. and Ms. Netherton resumed living together as a couple with their children. Ms. Netherton sought child support arrearage for Mr. Netherton's failure to pay child support while they lived together. During that period, Mr. Netherton

contributed to necessary household expenses and provided all necessities for his son. In denying Ms. Netherton's child support claim by allowing Mr. Netherton a credit for his expenditures during the period of resumed cohabitation, the Court reasoned as follows:

> While the statute clearly prohibits a reduction of child support payments due prior to a request for modification being filed, that is not the situation in the instant case. There is a distinction to be made between a court modifying a prior order of child support, which was frequently done prior to the 1987 amendment,[1] and providing a credit to determine the arrearage actually due on accrued child support. A modification entails adjusting the amount of child support the non-custodial parent is ordered to provide. As noted by the Tennessee Supreme Court, the 1987 amendment was enacted to comply with federal law. The new statute made retroactive modifications impermissible and allows prospective modifications only after notice, as required by § 36-5-101(a)(5), has been provided. Rutledge v. Barrett, 802 S.W.2d 604, 606 (Tenn.1991).
>
> However, as we consider the facts of the instant case, neither the 1987 amendment nor Rutledge prohibit the granting of credit we are ordering today. The amount of support he was originally ordered to provide is not being changed.

Thus, the rule can be stated that when the amount of child support a husband or wife was originally ordered to provide is not being changed, neither T.C.A. 36-5-101(a)(5) nor Rutledge prohibit the granting of credit. See also Hartley v. Thompson, an unpublished opinion of this Court filed in Nashville on May 17, 1995. We hold that an offset by Social Security retirement benefits paid to the child on behalf of the parent is a credit

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[1] The Court was referring to T.C.A. 36-5-101(a)(5).

and does not violate T.C.A. 36-5-101(a)(5). See also Griffin v. Avery, 424 A.2d 175 (N.H.1980) (holding that although child support obligations are not subject to retroactive modification, the trial court has discretion to allow credit toward arrearages under certain circumstances, including social security payments that are credited toward overdue installments of child support).

Ms. Wilkerson also relies on T.C.A. 36-5-101 (a)(4)(E)(ii) which provides that "no credit for child support payments shall be given by the court for payments by the social security administration to the obligor's child pursuant to a claim based on the work-related disability of the obligor." However, Social Security payments based upon the work-related disability of the obligor should be distinguished from Social Security payments based upon the retirement of the obligor. The Legislature could have prohibited retirement benefits just as they prohibited disability benefits but they chose not to. As a result, we hold that credit shall be given by the Court for payments by the Social Security Administration to the obligor's child pursuant to a claim based upon the retirement of the obligor. Other states who have considered this issue have also allowed a credit for Social Security retirement benefits. Cash v. Cash, 353 S.W.2d 348 (Ark.1962); Lopez v. Lopez, 609 P.2d 579 (Ariz.App.1980); Childerson v. Hess, 555 N.E.2d 1070 (Ill.App. 1990).

The reasons for allowing credit are evident. The United States Congress has seen fit to place the Federal Government in the role of insurer in order to afford members of the work force support when they retire. Because the law has created a contributory retirement system, the employee who, throughout his working life, has contributed part of the premiums in the form of deductions from his wages or salary, has earned the benefits. In other words, the Social Security benefits are not a gift. This Court can see no reason why, in discharging the obligation to pay child support, Social Security payments should not be credited. The Trial Court's decision to allow Mr. Wilkerson's child support arrearages to be offset by Social Security retirement benefits paid to the child on behalf of Mr. Wilkerson is affirmed.

Ms. Wilkerson has moved for damages pursuant to T.C.A. 27-1-122 for a frivolous appeal. Although Mr. Wilkerson's issue as to funeral expenses is totally without merit, we decline to find the appeal frivolous in light of the fact that the other issue as to attorney fees was not, and the further fact that in all likelihood Ms. Wilkerson would have appealed the Trial Court's decision as to the child support benefits if Mr. Wilkerson had not.

For the reasons stated above, the judgment of the Trial Court is affirmed and the cause remanded for collection of costs

below. Costs of appeal are adjudged one-half against Mr. Wilkerson and his surety and one-half against Ms. Wilkerson.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.