IN THE COURT OF APPEALS OF IOWA

No. 1-788 / 00-2003
Filed December 28, 2001

EUGENE CRISAFULLI,
Appellant,

vs.

PRESHIA MILLS, n/k/a **PRESHIA BULDHAUPT,**
Appellee.

FILED
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Eugene Crisafulli appeals a district court order requiring him to pay back child support and a portion of respondent's trial attorney fees. **AFFIRMED.**

Joseph G. Bertogli, Des Moines, for appellant.

Frank Steinbach III of McEnroe, McCarthy & Gotsdiner, P.C., West Des Moines, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

HECHT, J.

Eugene Crisafulli appeals from an order establishing an obligation to pay Preshia Mills $25,585.00 in back child support from September 20, 1982, through June 30, 1992, and which required him to pay $2000.00 in attorney fees. Because we believe the court properly ordered him to pay the support obligation and attorney fees, we affirm.

I. Background Facts and Proceedings.

Eugene Crisafulli and Preshia Mills had a child, Kenneth Paulding, who was born out of wedlock in 1982. Eugene refused to have contact with Kenneth and moved to Omaha, Nebraska, in 1983. He did not support Kenneth in any way until the State of Iowa filed a petition for paternity and support against him in July of 1992. Tests confirmed Eugene was Kenneth's father. Prior to a hearing on the support issue, Eugene received from his attorney and signed a proposed consent order that purported to settle various issues. On May 13, 1993, the order was presented to the district court for review and approval. The order was signed by Eugene, his attorney, the attorney for the State, and Judge Robert Hutchinson. Immediately preceding the judge's signature, a handwritten paragraph had been inserted which read, "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Order does not prejudice in any way Preshia Mills' right to back support."

In May of 1994, Eugene filed an action seeking the tax deduction for Kenneth. This proceeding did not address the handwritten portion of the 1993 order or the issue of back support. Then on February 2, 2000, Preshia

commenced an action asking, among other things, that Eugene be ordered to pay back child support from the date of Kenneth's birth to August 1, 1992. Following a hearing, the court ordered that Eugene pay child support in the amount of $50.00 per week commencing from Kenneth's birth through June 30, 1992, for a total of $25,585.00. It also ordered that Eugene begin paying at the rate of $639.00 per month commencing July 1, 2001. Eugene appeals from this order.

II. Scope of Review.

Our review of equity cases is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

III. Discussion.

Eugene first contests the validity of the May 1993 order which purported to preserve Preshia's claim for back child support. In its Findings of Fact, Conclusions of Law and Order, the district court found Preshia proved that Eugene was present and assented to the entry of the 1993 order, including the handwritten portion reserving Preshia's right to back child support. On appeal, Eugene contends the order he approved did not contain the handwritten provision, that he was not present at the hearing in which it was amended, and that he never assented to its inclusion. We disagree, and find that a preponderance of the evidence establishes that Eugene was present and assented to the entry of the 1993 order.

The attorney for the Child Support Recovery Unit, Christine Hansen, testified that per her standard practice she would not have added the handwritten provision until both the judge and Eugene approved the handwritten revision. She also testified that she recalled Eugene's attorney indicating that his client had approved it. Further, Eugene's attorney, James Piazza, testified he would never have allowed the addition of a provision to a consent decree without first obtaining the express consent of the client. Neither attorney testified to a certainty that Eugene was present at the hearing in which the consent order was approved, but more importantly neither could rule it out. There was general agreement he had been present at one of the hearings. Finally, Preshia testified to her recollection that Eugene was, in fact, present at the hearing in 1993 when the proposed order was approved by the parties. We believe the record fully supports the district court's conclusion that the 1993 order is valid and agree with the court's determination that Eugene is liable for back child support.

Eugene next asserts Preshia's application for back child support is barred by the doctrines of laches and waiver. The district court found that he was barred from asserting these defenses because Eugene failed to plead them. We conclude the merits of the defenses were tried by the consent of the parties, and therefore resolve them on their merits. *See Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1993). As to the laches defense, Eugene cannot show he was prejudiced by Preshia's delay in asserting her right to back support. *See State ex rel. Holleman v. Stafford*, 584 N.W.2d 242, 245 (Iowa 1998). As to the waiver/estoppel by acquiescence defense, we find Preshia exhibited no intent to

waive her right to back support. *See Humboldt Livestock Auction, Inc. v. B & H Cattle Co.*, 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967) (holding there must be an implication that party intended to waive or abandon right).

Finally, Eugene argues the district court lacked the statutory authority to award attorney fees to Preshia. In particular, he asserts the district court did not possess the authority to award attorney fees in an action in which his support obligation was originally established through a petition to establish paternity. We conclude the district court had statutory authority to award Preshia attorney fees, and that the court did not abuse its discretion in granting them. *See* Iowa Code § 600B.25 (1999).

Preshia requests an award of attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa Ct. App.1991). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We conclude that Eugene shall pay $1,000 toward Preshia's attorney fees on appeal.

AFFIRMED.