FILED
FEB 28 1978
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

EDGAR MERRIFIELD,	)	Filed February 28, 1978
Appellant,	)	
	)	
v.	)	
CLAUDIA TROUTNER, f/k/a CLAUDIA MERRIFIELD,	)	368
	)	2-60208
Appellee.	)	

Appeal from Polk District Court - Dale S. Missildine, Judge.

Plaintiff appeals trial court's refusal to grant a declaratory judgment that defendant is estopped to demand back child support payments. Affirmed.

Andrew J. Sonderman and Patricia A. Shoff, of Thoma, Schoenthal, Davis, Hockenberg & Wine, of Des Moines, for appellant.

Amanda M. Dorr, of Payton & Hearn, P.C., of Des Moines, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

CARTER, J.

This appeal arises out of an action by Edgar Merrifield for a declaratory judgment that Claudia Troutner is equitably estopped to assert her right to accrued but unpaid child support under a divorce decree of March 15, 1962. At the close of plaintiff's evidence, which consisted primarily of his own testimony, defendant moved for dismissal, claiming plaintiff had failed to satisfy his burden of proof. Trial court granted the motion to dismiss, finding that estoppel had not been shown. Because defendant offered no evidence, her motion to dismiss having been sustained, the case is here for de novo review upon plaintiff's evidence alone. Amdor v. Cooney, 241 Iowa 777, 779, 43 N.W.2d 136 (1950).

Plaintiff contends that his evidence established his right to relief based upon the doctrine of equitable estoppel recognized in Anthony v. Anthony, 204 N.W.2d 829 (Iowa 1973). While **Anthony** clearly recognizes such a doctrine, the subsequent decision in Cullinan v. Cullinan, 226 N.W.2d 33, 36 (Iowa 1975) limits its application. In **Cullinan** the court stated:

> While recognizing such a possible defense these authorities make it clear the father must show he has been materially prejudiced by the mother's delay in asserting her rights. Prejudice cannot be inferred merely from the passage of time.

Our review of the evidence presented by plaintiff in the present case causes us to conclude that here, as in **Cullinan,** there has been an insufficient showing of prejudice to invoke the doctrine of equitable estoppel.

The trial court's judgment was correct and is affirmed.

All judges concur except ALLBEE, C.J. and SNELL, J., who dissent.

ALLBEE, C.J. (dissenting)

The dispute between the parties at this juncture is whether defendant's claim against plaintiff has been barred by equitable estoppel by acquiescence. The application of that doctrine in situations such as the present was discussed in Cullinan v. Cullinan, 226 N.W.2d 33 (Iowa 1975), and Anthony v. Anthony, 204 N.W.2d 829 (Iowa 1973). The doctrine is applicable "where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right." Anthony v. Anthony, supra at 834 (citing authorities).

Cullinan v. Cullinan, supra at 36, considered the requisites for raising claims of laches and estoppel by acquiescence, and discussed the need for a showing of material prejudice to the individual attempting to escape his obligations. In support, the court cited Anthony v. Anthony, supra; 24 Am. Jur. 2d, Divorce and Separation, § 874, pages 994-95; and 27B C.J.S. Divorce § 321(5)b, pages 650-53. As can be seen from the foregoing quotation, Anthony v. Anthony did not recite material prejudice as a requirement of estoppel by acquiescence. Examination of the encyclopedic references reveals that material prejudice is required in cases where laches is the defense asserted. This is to be expected, in light of the fact that prejudice is generally included as an element of laches, wherever applied. See, e.g., Chadek v. Alberhasky, 253 Iowa 32, 40, 111 N.W.2d 297 (1961). Prejudice, however, is not discussed in acquiescence cases. See, e.g., Olson v. Clark, 252 Iowa 1133, 1138, 109 N.W.2d 441 (1961). I therefore conclude that the discussion of material prejudice in Cullinan v. Cullinan was directed at the laches claim. The acquiescence claim in that case was defeated by reference to facts demonstrating that the plaintiff there had done all in her power to enforce her claim.

The distinction between estoppel by acquiescence (a finding of waiver) and laches is reasonable when considered in light of the different focuses of, and different policies served by, the two concepts. Estoppel by acquiescence is based upon an examination of the actions of the individual holding the right, to determine whether that right has been waived. It advances a policy of stability and conclusiveness. See D. Dobbs, Handbook on the Law of Remedies, § 2.3, page 43 (1973). The application of laches requires focusing on the defendant's position and whether the delay has harmed him, or resulted in material prejudice. The doctrine was developed to serve in the stead of a statute of limitations, at a time when such statutes did not apply in equity.

The distinction between estoppel by acquiescence and laches is important in this case, because plaintiff can show no material prejudice other than that which might arise from the passage of time. However, an examination of defendant's actions, she being the individual who failed to enforce her right, shows that she has indicated, by those actions, an intention to abandon her right. Plaintiff ceased making child support payments in the spring of 1963, after discussing his financial plight with defendant. Defendant affirmatively indicated that she was not going to seek enforcement of the support obligation.[1] Plaintiff moved to Utah in the fall of 1963, and lost touch with defendant until his return to Des Moines in June of 1966. Upon his return, plaintiff contacted defendant[2] and the parties have remained in contact with each other since

[1] Q. Okay. Let's talk about that a while then. What did you tell Claudia when you called her in the spring of 1963?
A. Told her I was out of work and that I would miss this month's payment.
Q. Did Claudia insist that you continue making the payments at that time?
A. No, at that time she said that she had remarried and that they were getting along fine and the kids were taken care of, so she said to -- if they got in a bind she would ask me to resume later if they got in a bind.
Q. So after Claudia indicated to you that they were not in a bind and that she understood your situation you stopped making the child support payments, is that correct?
A. Yes.

Tr. 7-8; X. 9-10.

[2] Q. When did you return to Iowa then, Mr. Merrifield?
A. June of '66.
Q. And you moved to what city?
A. To Des Moines.
Q. Did you get in touch with Claudia at that time and let her know you had come back to Des Moines?
A. Yes.
Q. When was that; how soon after you returned?
A. I think within about a week after I came back.
Q. Do you remember that telephone conversation at all?
A. I remember I called her up and asked her how the kids were, and I asked her if I could see the kids and she said that her husband was gone to work that night and the kids were in bed; that if I came over I could look in and see them sleeping.
Q. Did you in fact go over and see the children that night?
A. Yes, I did.
Q. You didn't speak with them?
A. No, they were asleep.

Tr. 9; X. 11.

that time.[3] Defendant made no attempt to collect the support until May 20, 1976.[4] In fact, the record reveals that defendant disclaimed responsibility for the May 20 demand.[5] It suggests, instead, that the demand was made on the instigation of

[3] Tr. 9-11; X. 11-12.

[4] Q. In the years from 1963 until the date of your first visit - I'm sorry, I misstated the date the first time - 1974, up through including that time, did you ever discuss child support payments with your ex-wife Claudia?
A. No.
Q. In that eleven year period did Claudia, to the best of your recollection, ever request or demand that you contine your child support payments and make up the back payments that you had missed?
A. No.

Tr. 11; X. 13.

* * * *

Q. Did Claudia ever personally talk to you about the back child support payments from 1963 through 1976?
A. No.

Tr. 13; X. 14.

* * * *

Q. Would you tell us what that letter is, please?
A. It is a letter requesting that I make child support payments.
Q. Okay. What is the date on that letter, sir?
A. May 10, 1976 — or May 20th, excuse me.
Q. 1976. After receiving that letter on May 20th, did you start making child support payments to Claudia?
A. Yes.

Tr. 13; X. 14.

[5] Q. After you received this letter dated May 20th, did you get in touch with Claudia?
A. Yes.
Q. Was this by telephone?
A. Yes.
Q. What did you say to Claudia during that telephone call?
A. I asked her how come she got an attorney to get child support, why didn't she just ask me to resume child support, and she said that she didn't know anything about it until she got the same — a copy of the same letter I did.
Q. When you talked to Claudia that day, did she mention anything about the back child support payments at all?
A. No.

Tr. 14; X. 15.

defendant's present husband, Donald Troutner, as a quid pro quo for plaintiff's continued visitation of the children.[6]

This case closely parallels the facts of Anthony v. Anthony, supra. The policies which are implicated in the two cases are identical. Because I do not understand Cullinan v. Cullinan, supra, to limit Anthony v. Anthony in any way, the relief granted in this declaratory judgment action ought to be identical to that found in the latter case.[7]

Apropos here is this declaration from Anthony v. Anthony, supra at 834:

> Plaintiff knew of her right to child support for the [13] years she failed to pursue it. She led defendant to believe she intended to waive or abandon it. It is obvious defendant relied on this acquiescence. Plaintiff is equitably estopped from enforcement of the child support judgment.

This case should be remanded, and trial court should enter a decree of declaratory judgment consistent with this dissent.

SNELL, J., joins in this dissent.

[6] Q. Now one time in '74, when you were attempting to get the children to come up to visit you in Fort Dodge, you had several phone calls with Claudia at that time to try to arrange some visits, is that correct?
A. Yes.
Q. Did she make any reference at that point to child support payments?
A. She said that Don was against my seeing the kids, that he didn't want me to see the kids.
Q. Now you mentioned Don. Who is that?
A. Her husband.
Q. Donald Troutner?
A. Yes.
Q. Okay, go ahead.
A. And that she had been trying to get him to let me see the kids but every time she would bring it up he would get mad and say no, and she said it might be that if I would make some child support payments he might reconsider.
Q. Mr. Merrifield, would you say at that time then that she requested that you start making payments or did she suggest?
A. She didn't request. She just suggested.
Q. At that time did she say anything about the back child support payments?
A. No.

Tr. 12; X. 13-14.

[7] Defendant also contends that plaintiff had waived the defense of equitable estoppel, and reaffirmed his support obligation by entering into a "Memorandum of Understanding" on October 4, 1976. An examination of that instrument demonstrates that no such waiver could be implied. Her contention in this regard is without merit.