IN THE COURT OF APPEALS OF IOWA

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IN RE THE MARRIAGE OF GARY L. GOOD
AND DONNA JEAN GOOD

Upon the Petition of)	
GARY L GOOD,)	
Petitioner-Appellee,)	Filed April 22, 1987
vs)	
DONNA JEAN GOOD,)	6-539 / 86-686
Respondent-Appellant.)	

Appeal from the Iowa District Court for Story County (No. D 2281) - *Carl E Peterson, Judge.*

Respondent former wife appeals from the trial court's rulings on an application for modification of a dissolution decree and an "application to enforce decree" **REVERSED IN PART AND MODIFIED IN PART.**

Thomas J. Levis of Scalise, Scism, Sandre & Uhl, Des Moines, *for* appellant.

Donald R. Payer and Joseph W. Seidlin of Payer, Lathrop & Hunziker, Ames, *for appellee.*

Considered by Oxberger, C.J., and Donielson and Schlegel, *JJ.*

OXBERGER, C.J.

The appellant in this proceeding, Donna Good, challenges the trial court's rulings on both her application to enforce the child support provision of the decree dissolving her marriage, and on her application for modification of the decree. We reverse in part and modify in part.

The record discloses that a decree was entered dissolving the parties' marriage in June of 1979. Pursuant to the decree, Donna was awarded physical custody of the parties' two minor sons; appellee Gary Good was directed to pay monthly child support of $200 plus ten percent of any increase in his income above $20,000. A further provision of the decree stated, however, that Gary's obligations were not to exceed $175 per child, per month. The record reflects that Gary consistently paid Donna the $200 per month, but that she had some difficulty recovering the amounts allegedly due her under the ten percent escalating clause.

The underlying action ensued when Gary filed a petition to modify the decree, requesting that the court award him physical custody of the parties' older child, Jason. The record discloses that Jason had been residing with Gary since August of 1985. The court granted Gary's request for modification, and that ruling is not challenged in this appeal. The court also modified the child support provision of the decree by ordering Donna to pay Gary $100 per month for Jason's support; the court left Gary's $200 support obligation intact. In addition, Donna filed a counterclaim requesting that Gary be ordered to pay the amounts owing under the ten percent clause of the original decree. The trial court found that Donna had relieved Gary from his obligations under that provision by signing a release indicating that she had been paid in full; consequently, the court denied Donna's request. In addition, the court denied

Donna's application seeking to increase Gary's child support obligations. On appeal to this court, Donna challenges both rulings. We reverse the trial court's decision concerning Gary's delinquent support obligations, and modify its resolution of the latter issue.

Initially, we note that our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Accordingly, we review the facts and the law and determine the parties' rights anew where the issues have been properly presented and preserved. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa App. 1985). We are not bound by the trial court's findings of fact, but we do give them weight, particularly where the credibility of witnesses is implicated. In re Marriage of Bornstein, 359 N.W.2d 500, 502 (Iowa App. 1984).

We now turn to Donna's first assignment of error. The record discloses that although Gary earned in excess of $20,000 in 1982, 1983, and 1984, he did not pay Donna ten percent of this amount as required by the decree. Gary argues, and the trial court agreed, that Donna may not now seek to recover these sums because she "released" Gary from his obligations under this provision. While we acknowledge that in January and February of 1985, Donna signed two written documents indicating that Gary was current with his child support payments, we nevertheless conclude that these documents do not foreclose her from recovering the support Gary was required to pay pursuant to the decree.

We have recognized a great deal of discord among various jurisdictions concerning the validity of agreements between former spouses reducing or releasing an obligation to pay child support. See Herb v. Herb, 251 Iowa 957, 959, 103 N.W.2d 361, 362 (1960). The courts of this state have consistently held, however, that in order to be enforceable, such an agreement must be founded upon good and sufficient consideration. See Herb, 251 Iowa at 960-61, 103 N.W.2d at 363; see also Anthony v. Anthony, 204 N.W.2d 829, 833 (Iowa 1973). We think that the alleged agreement in the present case is deficient in this respect. Gary maintains that valid consideration exists because in 1982, he and Donna orally agreed that she would waive the ten percent provision if Gary would directly pay her an amount due under another provision of the decree. In passing upon this assertion, we note that the trial court did not recognize the existence of an oral agreement, nor do we find that it established by the evidence. Furthermore, Gary was already legally bound to pay Donna the amount due her under the other provision of the decree. As such, the "agreement" did not require him to do anything he was not already legally required to do and it gave nothing to Donna that she was not already entitled to receive. Consequently, it cannot reasonably be argued that sufficient consideration existed. See Herb, 251 Iowa at 961, 103 N.W.2d at 363.

The record is similarly barren of any evidence indicating that the documents which Donna signed in 1985 were predicated upon legal consideration. Quite to the contrary, Donna testified that she signed these documents only to allow Gary to clear the title to his property; Donna stated that she never intended to forego her right to the child support. We think this interpretation of the facts is supported by credible record evidence. Accordingly, we conclude that no valid agreement releasing Gary's support obligations existed.

Moreover, even if the parties had agreed to waive the amounts due under the ten percent provision, and their agreement was predicated upon sufficient consideration, we would decline from enforcing it because we find it contrary to the best interests of the children. See Anthony v. Anthony, 204 N.W.2d at 834; Herb v. Herb, 251 Iowa at 961, 103 N.W.2d at 363. Without dispute, the record indicates that Gary's earnings vastly exceed Donna's. In an attempt to adequately provide for the welfare of the children without unduly burdening

Gary, the court in the original dissolution action included the ten percent provision in the decree. In Herb v. Herb, 251 Iowa at 961, 103 N.W.2d at 363, the supreme court considered a case almost identical to that before us, and held that an agreement between former spouses reducing the amount of child support could not be said to have been in the best interest of the children. Similarly here, the complete waiver of a substantial portion of accrued child support does not in any respect promote the children's interests.

Gary additionally argues that Donna is estopped from attempting to collect the child support because of her long failure to exercise this right. In Anthony v. Anthony, 204 N.W.2d at 834, the supreme court applied such a theory of equitable estoppel in precluding the plaintiff from recovering past amounts of child support. In that case, the court found that the plaintiff had led her former husband to believe that she had waived or abandoned her right to collect the child support which she had failed to pursue for seventeen years. In so holding, the court also noted that the parties' child had attained majority and her interests were no longer implicated. Furthermore, the court found that the facts established the existence of an agreement to release the defendant from his obligations. Id. The same cannot be said of the matter before us; the interests of the children are indeed at issue and as discussed earlier, no valid agreement to waive Gary's support obligations is substantiated by the evidence. Accordingly, we think Anthony is factually distinct and conclude that the principle of equitable estoppel cannot be used to prevent Donna from enforcing the decree.

Having decided that Gary was not released from the ten percent provision, we must now ascertain the amount of his outstanding support obligation. Although the parties argue at length concerning the amount of Gary's earnings over the last three years, we think that the record contains substantial evidence supporting the trial court's valuation of Gary's income. As such, we decline from disturbing its calculations and use these figures in determining Gary's obligation. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). The trial court found that in 1982, Gary earned \$21,536, that in 1983 he earned \$36,524, and that his earnings in 1984 were \$41,844. Accordingly, pursuant to the original decree, Gary owes accrued child support of \$153.60, \$1,652.40, and \$1,800 for each of these years, respectively, or a total of \$3,606.00.[1] We therefore grant Donna a judgment against Gary in this amount.

This brings us to Donna's second argument. Donna contends that the trial court erred in modifying the support provision of the decree by requiring her to pay Gary \$100 per month for Jason's support; concomitantly, Donna argues that the court should have granted her request that Gary's support obligations be increased.

The following well-established principles govern our review of a petition for modification:

> The burden is on the party seeking modification to prove a substantial change in circumstances from the time the decree was entered making it equitable and just that different terms be fixed. A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of changed conditions.

Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). Moreover, the change in circumstance must be continuous, and not merely temporary in nature. In re Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983).

We have carefully reviewed the record in light of these principles, and conclude that the trial court committed no error in modifying the decree to require Donna to contribute to Jason's support; the court's decision to award

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[1] We agree with the trial court's finding that Gary's income in 1985 does not exceed the \$20,000 base, and that therefore, the ten percent clause is inapplicable.

Gary physical custody of Jason was indeed a substantial change in the circumstances of both parties. We are necessarily troubled, however, by the fact that the court's action left Donna with a net child support contribution from Gary of only $100. We think that this amount is insufficient to provide adequate care for Kelly. Accordingly, we think that Gary should be required to pay $300 total per month for the support of Kelly. In making this modification, we cite the trial court's ruling requiring Donna to pay Gary for Jason's support and the court's apparent suspension of Gary's future obligations under the ten percent provision as a substantial change in the parties' circumstances.

Lastly, Donna argues that the trial court should have awarded her attorney's fees in the modification action. Our ultimate inquiry in evaluating such a request involves an examination of the relative financial resources and obligations of the parties. In re Marriage of Fish, 350 N.W.2d 226, 231 (Iowa App. 1984). We have examined the record, and conclude that the trial court did not abuse its discretion in denying Donna's request. We engage in a similar inquiry in determining whether one party should be ordered to pay another's fees on appeal. See In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). Again, we have carefully scrutinized the record and feel that this is a particularly appropriate case to award attorney's fees, given the disparate earnings of the parties; the record discloses that Donna earns only $995 per month whereas Gary's earnings have averaged approximately $40,000 since the entry of the dissolution decree. Accordingly, we conclude that Gary should assume $600 of the attorneys fees which Donna has incurred in connection with this appeal. Costs are taxed to Gary.

REVERSED IN PART AND MODIFIED IN PART.