



135

IN THE COURT OF APPEALS OF IOWA

MARY JOAN BINGHAM,)

Plaintiff-Appellee,)

vs.)

DONALD LEE McGLOTHLEN,)

Defendant-Appellant.

Filed November 19, 1979

260
2-62979

Appeal from Union District Court - M. C. Herrick, Judge.

Defendant appeals from judgment ordering him to pay back child support owed under a Colorado divorce decree. - AFFIRMED.

Thomas E. Mullin, of Mullin, Mullin, McLaughlin, Harvey & McConville, Creston,
for defendant-appellant.

Gene W. Glenn, Ottumwa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from a judgment ordering him to pay \$16,800 back child support owed under a Colorado divorce decree. We affirm.

Plaintiff and defendant were divorced pursuant to a Colorado divorce decree issued April 15, 1963. Plaintiff was awarded custody of the parties' three minor children and defendant was ordered to pay child support in the amount of \$150 per month. The record shows that defendant has only paid a total of \$400 toward his child support obligation to date. The record also shows that plaintiff brought an action for contempt against defendant in 1965 for failure to pay child support to which was attached a motion to modify the decree by defendant. However, there is no record of any resolution of either action. The trial court concluded, and we have no reason to conclude otherwise, that the actions were abandoned.

At the time of the commencement of this action for back child support, one of the three children had reached the age of majority and by this time, the other two have also reached that age. Plaintiff has taken this into account in computing the total amount of child support owed, as well as the time one of the children spent with defendant. The trial court adopted plaintiff's computations and adjudged that she was entitled to recover \$16,800 in unpaid child support along with interest due thereon.

I. Defendant contends that the Colorado divorce decree was not a final judgment to which an Iowa court can give full faith and credit since the Colorado court expressly retained jurisdiction of the action for purposes of modification and, furthermore, the motions for contempt and modification, having never been completely resolved, are still pending. With regard to the latter contention, we reiterate our agreement with the conclusion of the court below—that those motions have been abandoned and are no longer pending. Defendant's other contention, that the Colorado divorce decree was not a final judgment since it was always subject to modification by the Colorado court that rendered it, presents a more interesting question.

We disregard any issue of mootness with regard to this contention because of the reaching of the age of majority by all three children and directly address whether an Iowa court could give the Colorado decree full faith and credit. Defendant cites Restatement of Judgments § 41 (1942) for the proposition that if a judgment for the

payment of alimony in installments is subject to modification by the court that rendered it, it is not a final judgment and an action cannot be maintained thereon. While we concede that such a statement may have been the view of the American Law Institute at one time, we take note of the deviation from that view as found in the more recent restatements.

Restatement (Second) of Judgments § 41 (Tent. Draft No. 1, 1973) states that a "final judgment" includes any prior adjudication of an issue . . . that is determined to be sufficiently firm to be accorded conclusive effect." Comment c to that section states that a judgment concluding an action should not be denied finality by reason of its granting or denying of continuing relief such as child support. Restatement (Second) of Judgments § 47, Comment d (Tent. Draft No. 1 1973) says that a sister state has the option of according or denying finality to a judgment for support if subject to modification in the state of rendition. That comment then refers to Restatement (Second) of Conflict of Laws § 109 (1971). Comment b to that section states in pertinent part:

The local law of the state of rendition will be applied to determine whether the judgment is modifiable and, if so, in what respects. This law will determine whether the judgment is modifiable with respect to past due installments and with respect to future installments. As between States of the United States, full faith and credit requires application of the local law of the State of rendition to determine whether the judgment is modifiable and, if so, in what respects.

Accord, 3 W. Nelson, Divorce and Annulment §§ 33.46, 33.51 (2d ed. 1945) (enforceable as final judgment regarding accrued payments if only modifiable prospectively; not enforceable as final judgment regarding accrued payments if modifiable retroactively). Accordingly, if Colorado law allows retroactive modification, we may not accord the decree full faith and credit as a final judgment. However, if Colorado law only allows prospective modification, we may treat the decree as a final judgment with respect to accrued payments.

Colorado law with respect to modification was not pleaded or proved in this case. If foreign law was not pleaded and proved we presume it to be the same as the law of Iowa. Fetters v. Degnan, 250 N.W.2d 25, 27-28 (Iowa 1977) (quoting Zeman v. Canton State Bank, 211 N.W.2d 346, 349 (Iowa 1973)). In Iowa, decrees for child support may

only be modified prospectively, not retroactively. In re Marriage of Welsher, 274 N.W.2d 369, 372 (Iowa 1979); In re Evans, 267 N.W.2d 48, 51 (Iowa 1978). Consequently, since we determine that the Colorado decree was only modifiable prospectively, we conclude that the decree was a final judgment with respect to accrued child support payments and could properly be accorded full faith and credit by an Iowa court. The trial court did not err in according full faith and credit to the Colorado divorce decree.

II. Defendant next asserts that plaintiff's action for back child support should be barred by equitable estoppel since she failed to bring the action until fourteen years after the issuance of the divorce decree. Defendant further asserts in support of his estoppel argument that in 1964, the parties entered into an agreement under which defendant gave his consent to the adoption of two of the children by plaintiff and her second husband, and on which defendant apparently contends he relied in concluding that he was no longer obligated to pay child support for those two children. We reject this latter assertion since this agreement was not an adequate basis for defendant's alleged conclusion that he was no longer required to pay child support. We now turn to defendant's general equitable estoppel argument.

We are caught in a crosswind of cases in addressing the doctrine of equitable estoppel as applied to factual situations of this type. In Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973), the supreme court concluded that a mother who let seventeen years elapse before pursuing her right to child support was equitably estopped from enforcement of the child support judgment. It was noted that her motivation may have been to punish the father for visiting the child in violation of an agreement between the mother and father. Id. In Cullinan v. Cullinan, 226 N.W.2d 33, 36 (Iowa 1975), the court determined that the doctrines of laches and estoppel would not be applied to relieve a father from back support payments in the absence of a showing that the father was materially prejudiced by the mother's delay in asserting her rights. It was noted there that the mother had initiated court action at least once to compel payment. Id. at 35. This fact was used as a distinguishing factor in Davidson v. Van Lengen, 266 N.W.2d 436, 439 (Iowa 1978), wherein the supreme court stated that in the absence of any attempt to actively enforce a judgment for child support in nearly twenty years, the mother was equitably estopped from enforcement of the judgment.

Finally, in Merrifield v. Troutner, 269 N.W.2d 136, 138 (Iowa 1978), a case decided on further review from this court and factually similar to the case at bar, the supreme court concluded that in the absence of any showing of detrimental reliance or reliance to his prejudice and injury by the father, or any showing of false representation or concealment of material facts by the mother, neither the doctrine of promissory estoppel nor equitable estoppel would operate to bar the mother's right to back child support. The evidence in this case does not show a detrimental reliance by defendant on any promise made by plaintiff or that plaintiff falsely represented or concealed any material facts. Therefore, we hold that Merrifield is dispositive of the case at bar.

While we hold that Merrifield is dispositive, we deem it appropriate to comment on the equities of this case. On the one hand, we have an ex-wife who by her dilatoriness may have lulled her ex-husband into the false sense of security of believing that she has waived or abandoned her right to child support pursuant to a divorce decree issued in 1963. On the other hand, we have an ex-husband who wishes to forever escape his legal obligation of child support under a divorce decree, as well as his moral obligation to support the children he helped to bring into this world, thus burdening his ex-wife with that financial responsibility. The \$16,800 question thus becomes: Where is the injustice?; or perhaps more appropriately: Where is the greater injustice?

Without intending to minimize the difficulty of this question by answering it in a single paragraph, we note that the evasion of legal and moral obligations ordinarily results in greater injustice than allowing delay in the assertion of legal rights. Far too many fathers in this country purposely evade their obligations to support their children. Nagel & Weitzman, Women as Litigants, 23 Hastings L. J. 171, 189-90 (1971); Note, Equity and Economics: A Case for Spousal Support, 8 Golden Gate U. L. Rev. 443, 449 n.25 (1979). "Indeed, of all criminal and civil court orders, monetary divorce awards . . . are probably the least complied with and the least enforced." Nagel & Weitzman, supra at 191.

We affirm the judgment of the trial court.

AFFIRMED.