

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

FILED

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MAR 31 1980

LORRAINE E. FOLEY,

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Petitioner-Appellee,

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Filed March 31, 1980

vs.

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JOHN J. FOLEY,

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2-63839

Defendant-Respondent-
Appellant.

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Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Respondent-father appeals trial court's judgment in favor of petitioner-mother in the amount of \$2,275 for accrued child support alleging trial court erred in 1) failing to find existence of an oral agreement modifying support provisions of the dissolution decree and 2) holding, even if a post-decretal oral agreement existed, it was not founded on good and sufficient consideration. AFFIRMED.

Upton B. Kepford of Waterloo, Iowa, for defendant-respondent-appellant.

Victor N. Kennedy of Smith & Kennedy, Waterloo, Iowa, for petitioner-appellee.

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

PER CURIAM

Respondent-father, John J. Foley, appeals trial court's judgment in favor of petitioner-mother, Lorraine E. Foley, in the amount of \$2,275 for accrued child support. On appeal, respondent alleges trial court erred in 1) failing to find existence of an oral agreement modifying support provisions of the dissolution decree, and 2) holding, even if a post-decretal oral agreement existed, it was not founded on good and sufficient consideration. We affirm.

I. The Facts. On March 27, 1978, Lorraine Foley filed a petition requesting her marriage to John Foley be dissolved. Three children had been born of the marriage and, on April 10, 1978, respondent was ordered to pay \$75 per week as temporary support. The decree dissolving the marriage was entered December 29, 1978, at which time two of the children were of college age and the third was a minor. Petitioner was awarded custody of the minor child. Respondent was ordered to pay, through the clerk of court, \$60 per week support which was to continue until a child attained the age of 22 years, became self-supporting, married, died, or stopped attending school as defined in section 598.1(2), The Code 1977. When only two children qualified for support, the amount was to decrease to \$50 a week, and when only one child qualified, to \$40 per week. On April 17, 1979, trial court determined only two children qualified for support after January 25, 1979, and, accordingly, decreased the amount due for child support payments from that date to \$50 per week. On May 9, 1979, petitioner filed a request for execution against respondent for \$1,865 delinquent child support payments for the period April 10, 1978, through April 28, 1979. Respondent, on May 24, 1979, filed a motion for application to set aside the judgment and the matter came on for hearing June 8, 1979. At the hearing, respondent presented evidence he had paid, directly to petitioner, \$1,575 as child support. Respondent also testified he and petitioner had orally agreed various other payments, including \$1,139 tuition for the two youngest children, made by him, would be credited against his child support payments. Petitioner, however, denied existence of any such agreement.

Upon consideration of the matter, trial court concluded, even assuming an oral post-decretal agreement as to the tuition payments existed, respondent had not shown the agreement was founded on good and sufficient consideration. Trial court consequently determined respondent owed petitioner \$3,850 child support, had paid \$1,575 of that amount, and was delinquent in payment of the \$2,275 balance.

Respondent appeals from judgment in favor of petitioner for this amount.

Respondent alleges trial court should have found 1) an oral agreement modifying the dissolution decree existed and 2) the agreement was founded on good and sufficient consideration. While trial court's findings centered on the determination of consideration, we will not review that issue as our finding respondent failed to prove existence of any agreement between the parties is dispositive.

II. Scope of Review. Appellate review of a suit to collect judgment for child support is *de novo*. Iowa R. App. P. 4; Anthony v. Anthony, 204 N.W.2d 829, 831 (Iowa 1973). While weight will be given to the findings of trial court, we will not abdicate our function as triers *de novo* on appeal. In re Marriage of Hitchcock, 265 N.W.2d 599, 606 (Iowa 1978).

III. Applicable Law. It is well settled divorced parties may contract between themselves as to support of their minor child. Anthony, 204 N.W.2d at 831; Denning v. Denning, 185 N.W.2d 238, 240 (Iowa 1971). The best interest of the child must be protected, however, at all times. Anthony, 204 N.W.2d at 831; Denning, 185 N.W.2d at 240. Proof of a post-decretal agreement regarding support may be shown by conduct and circumstances of the parties, but the agreement must be proven with reasonable certainty and founded on good and sufficient consideration. *Id.*

IV. Discussion. Based on the facts in this record, we cannot hold respondent proved existence of the oral post-decretal modifying agreement with reasonable certainty. Although respondent presented cancelled checks as evidence he made payments in behalf of the children for various items, including tuition, he has not shown petitioner agreed these payments would be credited against his weekly child support obligations. Without more exact proof of when and why the alleged agreement was made or what was said by the parties regarding the agreement, we conclude the payments by respondent were voluntary and cannot serve as a credit against his obligation to pay as required by the decree of dissolution. Costs of this appeal are assessed against respondent.

Judgment of trial court is affirmed.

AFFIRMED.