IN THE COURT OF APPEALS OF IOWA

No. 7-748 / 96-2256

000127

LARRY LEE GAPEN,

Plaintiff-Appellant,

vs.

JUDITH KAY HILLARD, f/k/a JUDITH KAY GAPEN,

Defendant-Appellee.

FILED
FEB 25 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Plaintiff appeals a district court ruling in a declaratory judgment action ruling defendant was not estopped from enforcing the child support provisions of the parties' 1977 dissolution decree. **AFFIRMED.**

Rande A. McAllister of McAllister Law Office, Mt. Pleasant, for appellant.

Steven R. Hahn of Bauer, Schulte, Hahn, Swanson & Brown, Burlington, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

MAHAN, J.

Larry Gapen appeals the decision of the trial court ruling he must pay back child support and he is not entitled to a credit for disability payments received by the children on behalf of their stepfather. We affirm.

The parties divorced in 1977. The trial court ordered Larry to pay $25 per week for each of the three children, or a total of $75 per week, commencing on May 2, 1977. The official child support records from the Des Moines County Clerk of Court's Office indicate Larry's last recorded voluntary payment was on January 5, 1979, in the amount of $80. On May 3, 1979, the sum of $92.10 was received as a result of a garnishment action. Larry has not made a payment since May 3, 1979.

Judith married Jack Cooper in 1977. That marriage was dissolved in 1981. Larry's three children were entitled to receive Social Security benefits of $263.40 per month because of Mr. Cooper's mental and physical disabilities. The benefits continued until the eligibility requirements ran out. The parties' children now range in age from twenty-seven to thirty-three.

In May 1995, Judith filed for bankruptcy. During those proceedings, she was informed she had a right to collect on the unpaid child support. On August 22, 1995, Judith filed an Application for a Lump Sum Child Support Judgment. The trial court entered judgment in the amount of $63,755.42. This sum represented delinquent support and interest. The amount of the judgment was later reduced to $53,776.45,

which includes $26,229.45 in interest since May 1979. Larry filed this declaratory judgment action on October 17, 1995.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. ESTOPPEL AND LACHES. Larry argues the district court erred in not estopping Judith from enforcing her 1977 child support judgment as reduced to a lump sum in 1995. Larry contends either estoppel or laches should bar Judith's claim.

Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right. *In re Marriage of Fields*, 508 N.W.2d 730, 731 (Iowa 1993). We must look at the right holder's acts to determine whether the right has been waived. *Id.* We note the supreme court has stated the doctrine of equitable estoppel should rarely be applied in cases of this kind. *In re Marriage of Harvey*, 523 N.W.2d 755, 756 (Iowa 1994).

Laches requires focusing on Larry's position and determining whether the delay has harmed him or resulted in material prejudice. *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978). The doctrine is a purely equitable one and applies

where there has been an unreasonable delay in asserting a remedy and is clearly demanded in the interest of justice. *Id.*

In making its ruling, the trial court stated:

> Judith was aware of Larry's alcoholism and related mental health condition. Judith knew of Larry's employment history and financial condition. Judith knew that Larry's mental health was such that any attempt to pursue the child support obligation would have a direct and adverse effect on the parties' children.

In the past, when the court garnished Larry's wages, Larry called Judy and told her, "Judy, the next time you garnish my wages, smell your car because that's going to be your life." Judith discovered her car had been soaked in gasoline. Larry was ultimately found guilty of tampering with a motor vehicle and sentenced to thirty days in jail. Judith also testified she believes she suffers from some form of battered woman's syndrome.

We give weight to the trial court's finding Judith feared Larry. We do not think this is one of the rare cases where equitable estoppel should be applied. Further, we cannot say it was unreasonable for Judith to refuse to attempt to collect the child support at an earlier time. We find the district court correctly ruled in favor of Judith on the issues of estoppel and laches.

III. SOCIAL SECURITY BENEFITS. Larry believes he is entitled to a credit for the amount the children received under Jack Cooper's disability benefits. The supreme court has allowed a credit for dependency benefits received from the account of a disabled parent who owed the support obligations. *Potts v. Potts*, 240

N.W.2d 680, 681 (Iowa 1976). The supreme court has also denied a credit to a stepfather when the children received social security benefits from their deceased father's account. *In re Marriage of Foley*, 501 N.W.2d 497 (Iowa 1993). In *In re Marriage of O'Brien*, 565 N.W.2d 619 (Iowa 1997), the supreme court allowed a mother credit against her child support obligation because her children received social security benefits from their stepfather. In making its decision, the court stated, "[The child] receives those benefits only because [her mother] is married to [the stepfather]. Thus, although the benefits are not directly attributable to [the mother], [she] is responsible for [the daughter's] receipt of the benefits." *O'Brien*, 565 N.W.2d at 622.

We find this case is similar to *Foley* and the trial court was correct in denying Larry's request for a credit for Jack's disability benefits. Unlike *O'Brien*, Larry is not responsible in any way for the children receiving the money. We find his argument to be without merit.

Larry argues the equities of this case are clearly in his favor. We disagree. It is hard to envision equities on the side of a father who has so completely failed to meet the child support obligation placed upon him by the trial court in 1977.

For these reasons we affirm the decisions of the trial court.

AFFIRMED.