FILED
DEC 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JEFF RICHARD OPPENHEIMER AND TAMI JO OPPENHEIMER

Upon the Petition of	)	206
JEFF RICHARD OPPENHEIMER,	)	
Petitioner-Appellant/ Cross-Appellee,	)	
And Concerning	)	6-402
TAMI JO OPPENHEIMER,	)	86-229
Respondent-Appellee/ Cross-Appellant.	)	

Appeal from the Iowa District Court for Woodbury County (7429) - Richard F. Branco, Judge.

Petitioner husband appeals the trial court's order modifying the parties' original dissolution decree and respondent wife cross-appeals the trial court's denial of her application for modification of the child custody provision of the parties' original dissolution decree. **AFFIRMED AS MODIFIED.**

Eldon J. Winkel of Winkel & Winkel, Algaona, Iowa, for petitioner-appellant/cross-appellee.

Gregory N. Lohr of Carter, Sar, Edmonds & Green, Sioux City, Iowa, for respondent-appellee/cross-appellant.

Heard by Donielson, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

The marriage of petitioner, Jeff Oppenheimer, and respondent, Tami Oppenheimer, was dissolved by decree on October 16, 1981. The decree incorporated the parties' stipulation agreement which awarded petitioner permanent custody of the parties' minor daughter, Jami, subject to respondent's visitation rights. The decree also ordered respondent to pay monthly child support of $116 and provided for an automatic acceleration of the child support obligation after five years. On January 22, 1985, respondent filed an application to modify the parties' dissolution decree seeking physical custody of Jami.

The evidence presented at trial on August 22, 1985, showed petitioner had remarried following the dissolution. He and his second wife, Andrea, had a daughter, Aja'. Petitioner, Andrea, Jami, and Aja' lived together in Florida until he and his daughters returned to Iowa without Andrea in late 1984. Andrea eventually filed for divorce and acquired custody of Aja'. At the time of trial, petitioner and Jami were residing with his parents in Algona. Petitioner, who was working for his father, was earning $300 a month and receiving room and board for himself and Jami.

Respondent had also remarried. She and her second husband had a two and one-half year old son. They were living in Sergeant Bluff, Iowa, where they had purchased a home. Respondent had a net monthly income of $1,300. Both parties were 27 years old at the time of trial.

In its January 8, 1986, ruling the trial court found respondent had originally agreed to let petitioner have custody of Jami to keep petitioner from exposing her extramarital affair. It also found petitioner had made no attempt to collect child support from respondent, which allegedly totaled $5,336 at the time of trial. After concluding petitioner was estopped by acquiescence from claiming his right to the past-due, unpaid child support, the trial court declared the stip-

ulated child support provisions of the original dissolution decree void and unenforceable.

After finding Jami had enjoyed a stable environment in the home of her paternal grandparents during the year immediately preceding the trial, the court refused to change custody of Jami. It therefore ruled petitioner should retain custody of Jami and ordered respondent to pay monthly child support of $100 starting in February 1986. The trial court also refused to award attorney fees and ordered the parties to pay their own. Petitioner husband appeals from the trial court's order modifying the parties' original dissolution decree. Petitioner contends the trial court erred: (1) in decreasing respondent wife's stipulated monthly child support obligation from $116 to $100; (2) in voiding the stipulated child support provisions of the original dissolution decree and in forgiving accrued child support of $5,336 which was never paid by respondent; (3) in failing to order respondent to pay all or part of petitioner's attorney fees; (4) in disregarding terms of the parties' stipulation agreement which called for an automatic acceleration of respondent's stipulated child support obligation five years after entry of the original dissolution decree; and (5) in determining petitioner had waived his right to past due amounts of child support under the doctrine of estoppel by acquiescence.

Respondent wife has cross-appealed from the trial court's denial of her application for modification of the child custody provision of the parties' original dissolution decree. Respondent contends the trial court erred: (1) in failing to transfer primary physical custody of the parties' minor daughter from petitioner to respondent; and (2) in failing to order petitioner to pay respondent's attorney fees.

Our review of an appeal of a dissolution modification proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial

court, we do give weight to them, especially where credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

I.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

Regarding custody, we agree with the district court finding that respondent failed to carry her burden of proving an ability to minister more effectively to their daughter's well being. In her brief respondent asserts the court put too much evidence on the petitioner's mother's ability and should have concerned itself only with the parties' child rearing skills. As pointed out by this court in In re Marriage of Broyden, 344 N.W.2d 271 (Iowa Ct. App. 1983), the grandmother has no legal obligation to Jami; with this we agree. However, the trial court also looked to the current situation regarding petitioner's mother as a stabilizing factor and considered, in the record, the ability of petitioner in and of himself to care for the child.

Changes in custody which require removal of a child from the home of a parent with whom he or she has lived for a number of years is discouraged. In re Marriage of Mayer, 347 N.W.2d 681, 684 (Iowa Ct. App. 1984). Upon consideration of the record and the applicable legal principles, we affirm the custody

award to petitioner. Further, we recognize that petitioner has been very cooperative in insuring respondent has regular visitation.

II.

The next issue raised by both parties is support. Originally, in a stipulation dated July 16, 1981, respondent gave petitioner custody of Jami and agreed to pay reasonable support. In a default judgment, dated October 16, 1981, the district court approved this stipulation; giving respondent custody and providing for $116 per month support from respondent. Respondent did not retain counsel. From October 16, 1981, to the filing of the judgment on the modification proceeding on January 8, 1986, respondent failed to pay any of her support obligation; she once give petitioner $100 for clothing. The district court, on modification, retained custody with petitioner, reduced support to $100 per month, denied petitioner all back support, and struck an automatic acceleration clause. We disagree with this change and modify.

The trial court found that respondent entered into the July 16, 1981, stipulation because petitioner threatened her with disclosure of an extramarital affair to her parents. The only testimony regarding such a threat was in answer to a question from respondent's counsel as to why she allowed petitioner to have custody, she stated that she was afraid he would tell her family about the affair. Beyond this statement there is no evidence regarding any coercion by petitioner. Stipulations are favored by courts where they are shown valid; in fact, the settlement of family controversies is encouraged. Bergman v. Bergman, 247 Iowa 98, 103, 73 N.W.2d 92, 95 (1955). Here, we find, respondent entered into the original stipulation on her own volition. However, if she had been coerced into signing her rights away she could have appeared at the dissolution trial (in lieu of allowing a default) or should have appealed the decision.

The respondent has shown no change sufficient to modify the original support agreement. Therefore, the dissolution decree is reinstated to provide: (1) respondent shall be required to pay child support in the amount of $116 per month, and (2) in the event respondent's net income, adjusted for inflation, increases ten percent (10%) or more in the five (5) years following entry of this decree, petitioner shall—upon proper application, notice, and hearing—be entitled to receive an adjustment in the level of child support.

III.

The modification court denied petitioner back child support payments. The court's decision was based upon the principle of estoppel by acquiescence.

The rule of estoppel by acquiescence, as a defense, can apply where the person knows or ought to have known that he is entitled to enforce his right or to impeach a transaction and neglects to do so for such a period of time as would imply that he intended to waive or abandon his right. Davidson v. VanLengen, 266 N.W.2d 436, 438 (Iowa 1978). This defense is based on an examination of the individual's actions who holds the right in order to determine whether the right has been waived. Corsignlia v. Summit Center Corp., 348 N.W.2d 647, 650 (Iowa Ct. App. 1984).

The modification court felt this case fell into the defense as set forth in Anthony v. Anthony, 204 N.W.2d 829 (Iowa 1973), in which the plaintiff mother knew of her right to child support for seventeen years, she failed to pursue said right, and led defendant father to believe that she intended to waive or abandon said right. In the Davidson case the defendant mother was estopped from collecting back child support payments when she had never sought to enforce those rights over a twenty year period. Here, from the time of the dissolution decree, October 16, 1981, to the time of trial, August 22, 1985, petitioner received none of the scheduled monthly child support. Evidence of the parties'

continuing recognition of such an obligation is (1) the fact respondent gave petitioner $100 to buy Jami clothing, and (2) the attempt by respondent and her current husband to have petitioner sign a release from all back support. The evidence submitted by respondent is insufficient to warrant the finding of estoppel by acquiescence; petitioner never waived or abandoned his right. Respondent failed to pay child support of $116 per month for forty-seven months. This amounts to $5,452 in unpaid child support which is a judgment in favor of petitioner and against respondent.

IV.

Both parties request attorney's fees. Iowa Code section 598.36 (1985) provides "In a proceeding for the modification of an order or decree under this chapter the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court." The trial court did not err in denying both parties attorney fees at trial. However, we consider it only equitable that petitioner be granted fees on appeal. Petitioner is awarded $1,000 attorney fees on appeal.

AFFIRMED AS MODIFIED.