

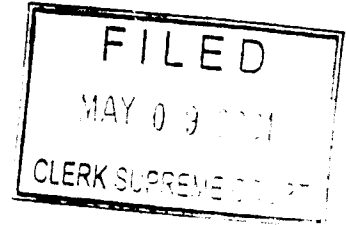
IN THE COURT OF APPEALS OF IOWA

No. 0-807 / 00-0241
Filed May 9, 2001

**IN RE THE MARRIAGE OF LORRIE D. TURVOLD
AND JAY M. TURVOLD**

Upon the Petition of
LORRIE D. TURVOLD,
Petitioner-Appellee,

And Concerning
JAY M. TURVOLD,
Respondent-Appellant.



Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey, Judge.

Jay Turvold appeals from the denial of his application for determination of partial or complete child support satisfaction. He contends the district court erred in determining it did not have jurisdiction to satisfy his child support obligation. Jay Turvold seeks appellate attorney fees and costs. Lorrie Turvold seeks appellate attorney fees. **AFFIRMED.**

Mark A. Young of Young Law Offices, Mason City, for appellant.

Brian D. Miller of the Drew Law Firm, P.C., Hampton, for appellee.

Considered by Sackett, C.J., Huitink and Streit, JJ.

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SACKETT, C.J.

Appellant Jay M. Turvold appeals after the district court failed to partially satisfy a judgment against him for child support in favor of Appellee Lorrie D. Turvold. The children subject to support were adults at the time Jay's action was filed. The district court determined it could not modify child support retroactively and denied Jay's request. On appeal Jay contends that (1) he should have been given credit for child support accrued while his son was living with him, and (2) he should have credit for child support accrued during the period his son was in foster care.¹ We affirm.

The parties' marriage was dissolved in 1991. Lorrie received custody of the parties' two children, Mindy, born October 19, 1979, and Jeremy, born March 29, 1981. The child support was to decrease when Mindy married, died or reached the age of eighteen years. The support was to terminate when Jeremy married, died or reached the age of eighteen years.

In March of 1994 Mindy, then fourteen, left Lorrie's home for Jay's. On March 2, 1994, an order was entered reducing Jay's child support because of Mindy's relocation. Meanwhile, Jeremy had problems in his mother's home and spent time in Jay's home² and in foster care. While Lorrie conceded that Jeremy spent time in Jay's custody, the amount of time he spent there is in dispute. At the time Jeremy graduated from high school he was living with his mother. Jay did file an application for modification of Jeremy's custody on June 1, 1994.

¹ It appears that child support was assigned to the state in this case on at least two occasions. Jay was the only parent ordered to pay child support. Any child support ordered to be paid to Lori but assigned to the state would be paid to the State and not to Lori.

² A juvenile court order dated May 13, 1996, found Jeremy had been living with his father since September of 1995.

Nothing happened on the application. Aside from the March 2, 1994 order modifying Jay's support there were no other orders either modifying his support or ordering Lorrie to pay Jay child support for either of the children.

In November 1999 Jay filed what was captioned "Application for Determination of Partial or Complete Child Support Satisfaction." He contended that by agreement of the parties Jeremy moved to his home in May of 1994. Jay contended that in the following five years Jeremy was in the custody of the Department of Human Services and was in his care or in foster or shelter care for which Jay was charged. Jay further contends that for four years both children lived in his home, and he received no child support from Lorrie. Among other things, Jay contended that under the equitable powers of the court he was entitled to a reduction in past child support.

A hearing was held and Jay testified substantially in support of his petition. He contended that once he tried to modify the child support but was not able to tender the payment requested by his attorney. Jay contends on appeal that this court should exercise its equitable powers. Lorrie contends the district court's ruling is correct. She further contends that the facts of the case do not support an award of equitable relief.

The district court correctly held that although a support order may be retroactively increased, it may not be retroactively decreased. *In re Marriage of Barker*, 600 N.W.2d 321, 324 (Iowa 1999); *In re Marriage of Lee*, 486 N.W.2d 302, 306 (Iowa 1992); *In re Marriage of Shepherd*, 429 N.W.2d 145, 146-47

(Iowa 1988); *In the Matter of Evans*, 267 N.W.2d 48, 51-52 (Iowa 1978); *Wren v. Wren*, 256 Iowa 484, 489, 127 N.W.2d 643, 646 (1964).

Jay contends that while the judgment cannot be modified this does not preclude him from being granted equitable relief. We agree with Jay that a court in equity may take jurisdiction of a case in equity if the allegations of the petition state a claim cognizable in equity. See *Bruce v. Sarver*, 472 N.W.2d 631, 632 (Iowa Ct. App. 1991). While an arrearage in a child support judgment cannot be modified retroactively to alter the debt due, equitable defenses may still be interposed, to bar collection of the debt. See *Cullinan v. Cullinan*, 226 N.W.2d 33, 36 (Iowa 1975).

Laches or estoppel by acquiescence may be interposed in a proper case in defense of proceedings to collect unpaid support payments. *Cullinan*, 226 N.W.2d at 36. Laches applies only where there has been an unreasonable delay in asserting the remedy. *Thurn v. Thurn*, 310 N.W.2d 539, 540 (Iowa Ct. App. 1981). Laches is an equitable doctrine premised on unreasonable delay in asserting a right, which causes disadvantage or prejudice to another. *State ex rel. Holleman v. Stafford*, 584 N.W.2d 242, 245 (Iowa 1998); *First Fed. Sav. & Loan Ass'n v. Blass*, 316 N.W.2d 411, 414 (Iowa 1982); *Davenport Osteopathic Hosp. Ass'n v. Hospital Serv., Inc.*, 261 Iowa 247, 261, 154 N.W.2d 153, 162 (1967). The party asserting the defense has the burden to establish all the essential elements thereof by clear, convincing, and satisfactory evidence. *Moser v. Thorp Sales Corp.*, 256 N.W.2d 900, 908 (Iowa 1977). Prejudice is an

essential element of laches. *Blass*, 316 N.W.2d at 415; *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978).

Equitable estoppel by acquiescence is applicable where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right. In *Anthony v. Anthony*, 204 N.W.2d 829, 834 (Iowa 1973) a mother sought to enforce a child support judgment entered for the benefit of her daughter who was then an adult. The court found the mother knew of her right to child support for the seventeen years and failed to pursue it, leading the father to believe she intended to waive or abandon it. *Id.* The court found it obvious that the father had relied on this acquiescence and ruled the mother to be equitably estopped from enforcement of the child support judgment. *Id.*

Jay did not plead either laches or estoppel by acquiescence, nor has he shown that either theory was advanced in the district court. He does not advance either theory here other than through a general claim for equitable relief. The party asserting the defense of equitable estoppel has the burden of establishing all of these essential elements by clear, convincing, and satisfactory evidence. *Incorporated City of Denison v. Clabaugh*, 306 N.W.2d 748, 754 (Iowa 1981); *Cranston v. Saggau*, 526 N.W.2d 338, 341 (Iowa Ct. App. 1994). The burden of pleading and proving the elements of equitable estoppel is on Jay. See *Folkers v. Britt*, 457 N.W.2d 578, 582 (Iowa 1990); *Khabbaz v. Swartz*, 319 N.W.2d 279, 286 (Iowa 1982). Jay has not pled and proven a theory upon which

equitable relief can be granted. We deny either party attorney fees. We affirm the district court.

AFFIRMED.