

IN THE COURT OF APPEALS OF IOWA

No. 3-436 / 92-1856

FILED

FEB 28 1995

CLERK SUPREME COURT

IN RE THE MARRIAGE OF BARBARA A. COX AND MICHAEL F. COX

Upon the Petition of
BARBARA A. COX,

Appellee,

And Concerning
MICHAEL F. COX,

Appellant.

Appeal from the Iowa District Court for Wapello County,
Phillip R. Collett, Judge.

The respondent husband appeals a judgment of the district court refusing to declare certain amounts of his child support obligation satisfied. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

George S. Eichorn of Eichorn, Elverson & Vasey, Des Moines, for appellant.

Lance A. Grotewald of Heslinga, Heslinga, Dixon & Grotewald, Oskaloosa, for appellee Barbara Cox.

Bonnie J. Campbell, Attorney General; John M. Parmeter, Special Assistant Attorney General; Michael J. Parker, Assistant Attorney General; and Karla Jayne, Assistant County Attorney, for appellee State.

Considered en banc.

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DONIELSON, C.J.

Michael and Barbara Cox were divorced in 1984. The dissolution decree gave Barbara sole custody of the parties' two minor children, Paula, born in 1969, and Kelly, born in 1975. Michael was ordered to pay child support of \$75 per week per child, which is \$650 per month, until the oldest child reached the age of eighteen or finished high school, whichever occurred later, or the child was sooner emancipated. When only Kelly was under the age of eighteen, Michael was ordered to pay child support of \$125 per week, which is \$541.66 per month.

Michael made no appearance in the dissolution proceedings and the decree was entered by default against him. He claimed he did not know of his child support obligation until he received notification by the Child Support Recovery Unit. In any event, Michael paid no support until notified by the CSRU. Michael's tax returns have been applied to his obligation and he has been subject to mandatory income withholding.

In February 1985, the older daughter, Paula, left home and moved to Virginia for a year to live with her aunt and uncle. Paula returned in 1986 and lived with Barbara until 1987, when she moved out in order to live with her fiance. Paula married on October 3, 1987.

Barbara suffered a stroke in 1988. She receives public assistance and Michael's child support payments were assigned to the State. The Department of Human Services

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placed Kelly in foster care from July 29, 1988, to August 16, 1988. In August 1988, Kelly was placed in the guardianship of an older sister, Lisa Myers. Kelly lived with Michael from December 1988 to December 1991. While Kelly lived with Michael he paid all of her expenses, including expenses for hospitalization after a suicide attempt and expenses for extensive dental work. Kelly ran away from Michael's home in December 1991, and was again placed in a foster home.

On January 17, 1992, Michael filed an application for modification of the decree and satisfaction of past child support. At this point Michael owed \$51,705 for past due child support and \$9,998 for ADC paid by the State for the children. Michael claimed Paula and Kelly became emancipated when they moved out of Barbara's household, which was 1985 for Paula and 1988 for Kelly. Michael argued that under the terms of the dissolution decree he was not responsible for child support after the children became emancipated. He also claimed his child support obligation for Kelly should be considered satisfied for the three-year period she lived with him because he paid all of her expenses during that time. Both Barbara and the State resisted the application.

The district court found Paula did not become emancipated until she married and determined Michael's child support obligation for Paula ended on October 3, 1987. The court found there was no evidence to show Kelly

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was emancipated and denied Michael's request to terminate his child support obligation for her. The court concluded it was unable to retroactively reduce Michael's child support obligation for the three-year period Kelly lived with him.

Michael subsequently filed a motion for new trial. Barbara filed a motion pursuant to Iowa Rule of Civil Procedure 179(b), seeking an award of attorney fees. The court ordered Michael to pay attorney fees of \$500 and denied his request for new trial. Michael appealed.

I. In this equity action, our review 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. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981).

Our courts have repeatedly recognized that while in cases of equity the reviewing court is not bound by the fact findings of the trial court, factual disputes which depend heavily on the credibility of witnesses are best resolved by the trial court which has a better opportunity to evaluate credibility than we do.

Maisel v. Gelhaus, 416 N.W.2d 81, 86 (Iowa App. 1987).

II. Michael does not frame this appeal as a modification of the dissolution decree, but instead seeks a declaratory judgment that part of his child support debt has been satisfied and the payment record should be corrected to reflect that satisfaction. He does not want to modify the decree because of the statutory bar on retroactive modification found in Iowa Code section

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598.21(8) (1993). Modifying the decree would not eliminate Michael's existing debt. Instead he asserts parts of the debt have been satisfied during the periods in which his children were either emancipated or living with him.

First we consider emancipation. The trial court found Paula did not become emancipated until her marriage in October 1987, and Kelly could not be considered emancipated. Michael argues the trial court's definition of emancipation was faulty. We disagree.

The factors illustrative of emancipation are well established in Iowa case law. "Emancipation" as the term is used in the law of parent and child means the freeing of the child from the custody of the parent and from the obligation to render services to him. Vaupel v. Bellach, 261 Iowa 376, 379, 154 N.W.2d 149, 150 (1967). The fact alone that a child is living outside the home and expending the child's own money does not indicate emancipation. Id. at 381, 154 N.W.2d at 151. A parent has the rights of care, custody, control, and service during the child's minority, and may release one of the rights without waiving the others. Id., 154 N.W.2d at 151. There can be no emancipation except where it is done by the voluntary act of a parent shown by the parent's conduct that is inconsistent with the performance of the parent's rights and obligations. Brandhorst v. Galloway Co., 231 Iowa 436, 442, 1 N.W.2d 651, 654 (1942). Emancipation is not to be presumed. Vaupel, 261 Iowa at 381, 154 N.W.2d at 151.

Michael argues Paula has not lived with her mother since 1985, when she moved to Virginia and lived with relatives. Paula's absence from the home does not alone indicate her emancipation. There is no evidence to show Paula was completely self-sufficient and not dependent on the care of someone at all times. However, Paula did become emancipated when she married, because in Iowa all minors attain their majority by marriage. Iowa Code §599.1 (1993).

Michael further argues Kelly was emancipated during the periods in which she was placed in foster care. Placement in foster care clearly does not indicate emancipation. Kelly was still dependent upon a caretaker. Iowa Code section 234.39 states in part:

A person entitled to periodic support payments pursuant to an order or judgment entered in any action for support, who also is or has a child receiving foster care services, is deemed to have assigned to the department current and accruing support payments attributable to the child effective as of the date the child enters foster care placement.

Iowa Code §234.39(3) (1993). The child support obligation does not disappear. The duty exists to pay child support to whomever is caring for Kelly unless she is emancipated.

We conclude the district court properly found Michael had failed to show Paula was emancipated before she married or that Kelly was emancipated. We affirm on this issue.

III. Michael contends his expenditures during the three-year period in which Kelly lived with him should be

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considered to have satisfied a portion of his child support debt. He states that he paid all of her expenses during this time and his payments should be considered to be full payment of his child support obligation for the three-year period Kelly was in his physical care.

The district court determined it could not retroactively decrease Michael's child support for Kelly during the three-year period she lived with him. The court found it possessed no authority to make a retroactive reduction of child support.

The Iowa supreme court recently decided the case of In re Marriage of Harvey, 523 N.W.2d 755, 756 (Iowa 1994), in which it recognized the doctrine of promissory estoppel may be applied to cases of this kind. The supreme court held that where the elements of promissory estoppel are present, and where application of the doctrine promotes the legislative intent, the doctrine may be applied. Id. at 757.

We believe doctrine of promissory estoppel may be applied to the present case. The record shows Barbara allowed Kelly to live with Michael. There was no evidence to show Barbara sought the return of Kelly, or that she would have been able to care for Kelly if Kelly had been returned to her care. During this period of time Michael provided all of Kelly's support, including medical bills for hospitalization and dental work. Most importantly, as in Harvey, any amount now recovered would not inure for

Kelly's benefit, but solely for the benefit of Barbara and the State.

IV. Michael argues the trial court should not have denied his motion for new trial based on irregularities in the proceedings, insufficient evidence, mistakes of fact, and error of law. In ruling upon motions for new trial the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). We find no abuse of discretion here.

V. Michael challenges the trial court's award of attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We find the district court did not abuse its discretion in awarding Barbara trial attorney fees.

VI. We have reversed that portion of the district court opinion which addressed the issue of whether Michael had satisfied certain amounts of past due child support. We remand for a hearing to allow Michael to present evidence to show what amount of money he has spent for the children's expenses. We do not retain jurisdiction. We affirm the district court on all other issues. Costs of this appeal are assessed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

All judges concur except Huitink and Hayden, JJ., who specially concur.

HUITINK, J. (concurring specially)

While I agree Michael is entitled to relief, I specially concur to state my belief that Harvey does not authorize retrospective relief from child support arrearages through a balancing of accounts based on claimed subsistence expenditures. All I read Harvey to allow is estoppel of collection of past due child support under the most exceptional circumstances. In this case Barbara should be estopped from collecting the child support judgment for the three years in which Kelly was in Michael's physical care. To the extent the majority opinion provides otherwise, I disagree.

Hayden, J., joins this special concurrence.