

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF NANCY A. LOUGEE AND FRANK F. LOUGEE

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UPON THE PETITION OF
NANCY A. LOUGEE,

Petitioner-appellee,

AND CONCERNING
FRANK F. LOUGEE,

Respondent-Appellant.

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Filed November 20, 1984

4-386
84-408

Appeal from the Iowa District Court for Pottawattamie County, Glen
M. McGee, Judge.

Former husband appeals from denial of his application for release of support obligation under decree of dissolution, asserting that: (1) the monthly payments which he made directly to his youngest child after she moved out of her mother's house should be credited as child support payments against the judgment awarded to his ex-wife; and (2) the order requiring him to pay for the remaining college education of his twenty-five-year-old daughter is contrary to Iowa Code section 598.1(2)(1977) and thus void. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Peter J. Peters, Council Bluffs, for respondent-appellant.

Robert J. Laubenthal of Smith, Peterson, Beckman & Wilson, Council Bluffs,
for petitioner-appellee.

Heard by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

Petitioner appeals from denial of his application for release of child support obligation ordered under a decree of dissolution. We affirm in part, reverse in part, and remand.

Frank Lougee and Nancy Lougee were divorced by entry of a dissolution decree on June 13, 1978. The couple had two children, Martha, born April 9, 1959, and Margaret, born October 9, 1962. The decree awarded custody of Margaret to Nancy and Frank was ordered to pay \$350 per month child support to Nancy until Margaret graduated from high school, but not later than May 1981. Margaret left Nancy's house in September 1980 and moved in with Martha. Up through that month Frank had been current with his child support payments to Nancy. From the time that Margaret stopped living with Nancy up to May 1981, Frank gave Margaret \$350 a month and made no child support payments to Nancy.

The dissolution decree further provided that Frank pay each of the two children \$3000 a year for a period not to exceed four years provided the child was enrolled in an institution of higher learning. Payments of \$1500 were to be made on September 1, and February 1 of each year. Martha attended Iowa State University for two years and Blair College for one semester. Frank paid Martha as required by the decree. Martha quit school after one semester at Blair College and never returned.

On October 31, 1983, Frank filed an application for release of support lien requesting that the district court acknowledge full payment of his child support obligations under the decree of dissolution. At the hearing on the application, Nancy testified that she had not known of the money that Margaret received from Frank and that she had continued to pay certain insurance expenses for Margaret. Frank stated that he made the payments to Margaret rather than Nancy after securing the advice of counsel. Finally, Nancy testified that the parties had agreed to provide for four years of college education for each child regardless of the child's age and that Martha now wished to return to college and finish her

degree. The district court denied Frank's application, entered judgment for \$2800 against Frank in favor of Nancy for unpaid child support and directed Frank to pay \$4500 into escrow to be paid to Martha according to the terms of the decree relating to college expenses.

Our review of the trial court decision is de novo. Iowa R. App. P. 14(f)(7). Essentially, two issues are presented for our consideration; (1) whether Frank should receive credit for the payments he made to Margaret instead of his ex-wife, contrary to the decree; and (2) whether the decree provisions regarding payment of support for Martha's college expenses past her majority are contrary to the requirements of Iowa Code § 598.1(2) and may be enforced.

The general rule is that once support payments become due, they are a judgment and cannot be changed, and that credit is not allowed when the support payments are voluntarily made in a manner other than specified in the decree. Roach v. Oliver, 215 Iowa 800, 803, 244 N.W. 899, 901 (1933); 47 A.L.R. 3d 1031, 1039. However, our court in Roach, and courts in other jurisdictions, have noted an exception where the nonpaying custodial parent in some manner consents to the payments made. Id.; 47 A.L.R. 3d at 1043. The court noted in Roach, "There is no claim by the petitioner that the payments made by him for the son, or that the aforesaid arrangements claimed to have been made by him in behalf of said son, were with her authority or consent." Id. The court later confirmed that it recognized an exception when the mother expressed such consent. Merkel v. Merkel, 247 Iowa 495, 499, 73 N.W.2d 75, 77 (1956).

In a later case the court distinguished between the defenses of acquiescence and laches. The court first noted that both doctrines might be invoked as a defense to an action to collect child support. Davidson v. Van Lengen, 256 N.W.2d 436, 438 (Iowa 1978). In the equitable defense of laches, the court is to focus on the respondent's position and decide if delay on part of the custodial parent has

resulted in material prejudice. Id. at 439. No such showing is necessary in the defense of acquiescence, where the court looks to the custodial parent's actions and decides if the right to collect the money has been waived. Id. The doctrine is used when a person knows or should know she is entitled to enforce her right and neglects to do so for a time that would imply she intended to waive or abandon the right. Id. at 438. The key factor emphasized by the court is the passage of time without attempts by the mother to collect on the claim. Id. at 439. When this occurs and the defendant relies on the parent's actions, she may be estopped by her acquiescence. Id.; Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973). Each case turns on its own peculiar facts. Davidson, 266 N.W.2d at 439.

Frank made payments directly to Margaret after she moved out of her mother's home and had turned eighteen. Nancy claims she did not know the payments were being made to Margaret instead of her. However, Nancy knew she was not receiving the monthly checks, but made no attempts in that time to recover the money. In fact, she admits she contacted her attorney during the period about the delinquencies and decided not to take any action. We believe the evidence shows that Nancy was aware the payments were being made to Margaret, that she chose not to protest or collect on the claim, and that her actions resulted in justifiable reliance on the part of Frank. She made no claim for the payments until the action for release of the support lien was commenced two and one-half years after the last child support payment was due. While this length of time is not as long as that found by the court to constitute acquiescence in other cases, we believe that this conclusion is particularly warranted in light of the fact the payments are to be collected on behalf of an adult child. Authorities have distinguished the situation where payments are to be collected on behalf of minor children in need of the money, and where they would be made to the mother for adult children who will not be affected by enforcement of the payments:

In order that equitable results be reached . . . , it is imperative that the courts keep in mind the true purpose for which the divorced father is required to pay support money. That purpose obviously is to mollify, pecuniarily at least, the disruptive effect of divorce upon minor children. Although the divorced mother may or may not be entitled to alimony in her own right, she has no interest in support money except as she may collect it on behalf of the children in her custody. Therefore, her ability to collect for child support should always be limited by commensuration with the present and expected future needs of the children. Even where there has been no assumption of the support obligation by the ex-wife, it seems difficult to justify a monetary realization by her personally of a benefit intended to be conferred upon the minor children.

46 Iowa Law Review 675, 680 (1961)(citing Ditmar v. Ditmar, 48 Wash. 2d 373, 374, 293 P.2d 759, 760 (1956)). Here, to order payment when Nancy has appeared to acquiesce in the payments directly to Margaret, and where no benefit is to be conferred on Margaret would be inequitable. We hold she is estopped from collecting these payments under the doctrine of estoppel by acquiescence.

Frank has addressed a number of other possible exceptions to the general rule that payments must be made in strict compliance with the decree. Because of our decision here, we find it unnecessary to address these arguments.

Frank also says that the portion of the decree entered in July 1978, which requires him to pay sums for college education for each child, regardless of age, is void as contrary to Iowa law. He points to Iowa Code § 598.1(2), which says:

"Support" or "support payments" means any amount which the court may require either of the parties to pay under a temporary order or a final judgment or decree, and may include alimony, child support, maintenance, and any other term used to describe such obligations. Such obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school in pursuance of a course of study leading to a high school diploma or its equivalent, or regularly attending a course of vocational technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in a college, university, or area school; or has been accepted for admission to a college, university, or area school and the next regular term has not yet begun; or a child of any age who is dependent on the parties to the dissolution proceedings because of physical or mental disability.

Our courts have held trial court orders invalid which attempt to extend child support payments past age twenty-two or where the child is not in school under the requirements of the Code. Chambers v. Chambers, 231 N.W.2d 23 (Iowa 1975); In re Marriage of Briggs, 225 N.W.2d 911 (Iowa 1975). In those cases the court was dealing with the actions of the court where there had been no agreement regarding support between the parties. Id. Our courts have not addressed the specific issue of whether an agreement between the parties that is incorporated in the divorce decree is invalid if it goes beyond the restrictions of the Code. The Iowa Supreme Court has noted that parties may contract between themselves regarding support of a minor child if the best interests of the child are not injured. Erwin v. Erwin, 251 Iowa 1344, 1350, 105 N.W.2d 489, 491 (1960). The court did not indicate its opinion on whether these agreements could enlarge parental obligations regarding an adult child.

This issue appears to be well settled in jurisdictions that have directly addressed the question. The general rule is that the parties may contract to provide more support for their children than the law requires. 67A C.J.S. Parent and Child § 60 (1978). Further, a parent may contract to support his adult child. Id. at § 62. In upholding a decree incorporating such an agreement, one court noted:

It would be unreasonable for this Court to render invalid or unenforceable, the provisions of a divorce decree offered by one party and accepted by the trial court, although unsought by the other party, when those provisions invest benefits to the children. A parent who offers to put his children through college, for example, rather than pay the entire amount of support sought by the other parent should be held to that agreement once it is incorporated into the decree. Or a parent who offers to pay medical/dental bills until his children are 21, rather than pay full support asked until their majority, should not be able to escape that bargain, once his offer has been accepted by the court.

Herrig v. Herrig, 648 P.2d 758, 764 (Mont. 1982). This viewpoint has been widely adopted. Worthington v. Worthington, 207 Ark. 185, 188, 179 S.W.2d 648, 649

(1944); Kamper v. Waldon, 17 Cal. 2d 718, 720, 112 P.2d 1, 2 (1941); Gaddis v. Gaddis, 20 Ill. App. 3d 267, 273 314 N.E.2d 627, 632 (1974); St. Joseph's Hosp. v. Woloson, 41 11 Misc. 2d 1057, 1059, 177 N.Y.S. 2d 39, rev'd on other grounds 7 A.D. 2d 696, 179 N.Y.S. 2d 506 (1958); Cutshaw v. Cutshaw, 220 Va. 638, 641, 261 S.E.2d 52, 54 (1979); Matter of Marriage of Olsen, 24 Wash. App. 292, 296-97, 600 P.2d 690, 695 (1979).

We agree that a parent may extend his obligation to support his child beyond the limits imposed on a court in ordering support. The restrictions regarding Iowa Code § 598.1(2) apply to court orders made in the absence of an agreement between the parties. We can find no reason why parents may not decide that they want more for their children, agree to it as incorporated in the decree, and be held to that agreement. We hold Frank responsible for Martha's further education.

We release the support lien for the \$2800 paid directly to Margaret and affirm the trial court decision upholding the lien for the amounts for Martha's education. Frank shall pay \$4500 into escrow as ordered by the district court.

Since Frank has been current in all his child support payments, it is not clear why the trial court ordered the money put into escrow rather than paid when due. However, Frank has challenged the award as a whole, and not the escrow provisions, so we will not change the order in this respect. We remand for entry of an order consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.