IN THE COURT OF APPEALS OF IOWA

No. 6-259 / 95-1192

IN RE THE MARRIAGE OF MARK WILLIAM MOORE AND JANET JORDAN-MOORE

Upon the Petition of
MARK WILLIAM MOORE,

Petitioner-Appellant,

And Concerning
JANET JORDAN-MOORE,

Respondent-Appellee.

FILED
AUG 30 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, William R. Eads, Judge.

Mark challenges the order denying his request and granting Janet's request to modify the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Steven L. Udelhofen, Urbandale, for appellant.

Janet Krengal f/k/a Janet Jordan-Moore, Boone, pro se.

Considered by Sackett, C.J., and Cady and Vogel, JJ.

SACKETT, C.J.

Petitioner-appellant Mark William Moore appeals from the trial court order refusing to modify his child support obligation and charging him for health insurance and medical bills. We affirm as modified.

Mark's marriage to respondent-appellee Janet Jordan-Moore was dissolved in June 1989. Mark and Janet have two children and they were awarded joint custody of them. Janet was awarded primary physical care. Mark was ordered to pay child support of $390 per month, maintain health insurance on the children, and pay one-half of uncovered medical expenses. In subsequent modifications, the support was increased to $598 and then decreased to $462.

The petition originating this appeal was filed when Mark sought to reduce his child support obligation contending his income had decreased. Janet then asked for reimbursement for health insurance premiums and medical bills.

The trial court refused to reduce Mark's child support. The trial court further found Mark had not carried the required health insurance and the children were covered under Janet's policy. The trial court found covering the two children of this marriage did not increase Janet's premiums for the policy Janet carried to cover her husband and another child. The court entered judgment against Mark for $2608.68 for health insurance premiums. It also entered judgment against Mark for $265.38 in unpaid medical bills for the years 1991 and 1992.

On appeal, Mark contends (1) his child support obligations should have been reduced; (2) he should not have been required to pay Janet for the health insurance as they had acquiesced in her providing coverage as there was no additional cost to her; and (3) he should not have been ordered to pay the uninsured medical costs because this issue was litigated in a prior proceeding. We affirm as modified.

Janet has not filed an appellee's brief. The failure of appellee to file a brief does not entitle appellant to a reversal as a matter of right, but does provide a basis for sanctions. *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209 (Iowa 1982); *In re Marriage of Okonkwo*, 525 N.W.2d 870, 871 (Iowa App. 1994); *Pierre v. Iowa Dep't of Social Servs.*, 334 N.W.2d 359, 360 (Iowa App. 1983).

We have a number of options available upon such a failure. *Bosch v. Garcia*, 286 N.W.2d 26, 27 (Iowa 1979); *Jefferson County v. Barton-Douglas Contractors, Inc.*, 282 N.W.2d 155, 157 (Iowa 1979); *see also Bowen v. Kaplan*, 237 N.W.2d 799 (Iowa 1976).. Ordinarily, we will not search the record for a theory upon which to affirm the trial court. We may confine our consideration to issues raised in appellant's brief or treat appellee's failure to file a brief as a concession of claims made by appellant, depending upon their apparent merit. *Barton-Douglas*, 282 N.W.2d at 157. We limit our consideration to matters raised in Mark's brief. *Okonkwo*, 525 N.W.2d at 871.

Mark claimed a decrease in child support because he contended his net monthly income as defined by the child support guidelines had decreased. The trial

court found the decrease in income was because of increased tax withholding. The trial court found there was not sufficient evidence in the record for it to determine current net monthly income as defined by the child support guidelines. The trial court found Mark, who was claiming a modification, had the burden of supplying this information and, because he had not supplied it, his application for modification to decrease child support should be denied.

Mark has the burden of showing a change in circumstances. Circumstances which have changed so as to warrant a modification must be those which were not in contemplation of the trial court when the original decree was entered. *Thayer v. Thayer*, 286 N.W.2d 222, 223 (Iowa App. 1979). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. *In re Marriage of Skiles*, 419 N.W.2d 586, 588 (Iowa App. 1987).

Not every change in circumstances constitutes a sufficient basis for modification.. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983); *Simpkins v. Simpkins*, 258 Iowa 87, 90, 137 N.W.2d 621, 623 (1965). Provisions for child support payments in a decree are final as to the circumstances then existing. *Mears v. Mears*, 213 N.W.2d 511, 515 (Iowa 1973). The "then existing" circumstances are those which were known or, through reasonable diligence, should have been known to the court when the original decree was entered. *Harwell v. Harwell*, 253 Iowa 413, 417, 112 N.W.2d 868, 871 (1962). A trial court may not modify child support provisions in a decree simply on the ground they were originally

inequitable; but rather, relief from an inequitable provision may be effected only by appeal. *Smith v. Smith*, 257 Iowa 584, 591-92, 133 N.W.2d 677, 681 (1965). "Any other procedure would leave the matter open to the most undesirable result of endless litigation and continual uncertainty." *Simpkins v. Simpkins*, 256 Iowa 989, 992, 129 N.W.2d 723, 725 (1964).

The change in circumstances must not have been within the contemplation of the trial court when the original decree was entered. *Vetternack*, 334 N.W.2d at 762. Therefore, Mark must show by a preponderance of the evidence that the change in circumstances could not reasonably have been within the contemplation of the trial court at the time of entry of the original decree appealed from. We agree with the trial court Mark has failed to meet the necessary burden.

Mark next contends the trial court incorrectly entered judgment against him for insurance premiums. He contends the evidence is uncontroverted there were discussions about Janet carrying the insurance and, while these agreements were not reduced to writing, they caused him not to secure insurance. He further points out that carrying the two children of this marriage on Janet's insurance cost her nothing more than what she paid to carry her current husband and an additional child. He contends Janet should be estopped and barred from making a claim for these premiums at this late date.

Through two other modifications, the issue of insurance was not raised. 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); *Davidson v. Van Lengen*, 266 N.W.2d 436, 438 (Iowa 1978). Estoppel by acquiescence is based on an examination of the rightholder's acts to determine whether the right has been waived. *Davidson*, 266 N.W.2d at 439. Estoppel has been found where a former spouse failed, in a timely manner, to pursue a claim for reimbursement of child support. *Id.* at 438; *see Fields*, 508 N.W.2d at 732 (father shunned two clear opportunities to assert claim for reimbursement of child support and supreme court said trial court properly found he was estopped from asserting his claim); *see also In re Marriage of Harvey*, 523 N.W.2d 755, 757 (Iowa 1994) (court commented on mother's many opportunities to object or to press her right to a child's custody and finding her conduct consistent with the agreement). Janet had no out-of-pocket expense for the insurance. We agree with Mark the judgment for insurance should not have been entered against him. We modify to strike the judgment for the health insurance expense.

Mark next contends judgment should not have been entered against him for medical bills incurred in 1991 and 1992 where the issue of these bills was addressed in a modification action tried in April 1993. In the order, the trial court said, "Any nonpayment of medical expenses is the result of Respondent not submitting medical bills to Petitioner." The dissolution decree provided Janet should *promptly* submit

copies of statements Mark was to pay. Mark contends claim preclusion bars relitigation.

The adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. *Tigges v. Ames*, 356 N.W.2d 503, 509 (Iowa 1984); *Bagley v. Hughes A. Bagley, Inc.*, 465 N.W.2d 551, 554 (Iowa App. 1990). The issue of the payment of these bills was addressed in the earlier litigation. The trial court found Janet had failed to comply with the provisions of the decree requiring her to promptly submit these bills to Mark. We find the issue had been litigated and modify to strike the judgment against Mark for the unpaid medical bills.

The costs of the appeal are taxed to Janet.

AFFIRMED AS MODIFIED.