FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-339 / 89-1682

STATE OF IOWA, ex rel., DEANNA L. WILEY,

Appellant,

772

vs.

DAVID L. WILEY,

Appellee.

Appeal from the Iowa District Court for Jefferson County, Robert Bates, Judge.

The State appeals from the district court's dismissal of its petition seeking reimbursement of expenditures for public assistance to support David Wiley's minor son. **AFFIRMED AND REMANDED.**

Thomas J. Miller, Attorney General; Gordon E. Allen, Deputy Attorney General; and E. Dean Metz, Assistant Attorney General; for appellant.

James W. McGrath, Keosauqua, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM 773

David and Deanna were married in 1975. They had three children: Timothy was born in 1976, Joshua in 1980, and Brandon in 1984. The parties' marriage was dissolved in 1986 by a decree which adopted the parties' stipulation. The decree awarded the parties joint legal custody of the children, primary physical care of Timothy and Joshua to David, and primary physical care of Brandon to Deanna. The decree did not order either party to pay child support.

In 1986, Deanna began receiving public assistance to support Brandon and herself. In 1987, the State filed a petition for reimbursement of expenditures for public assistance in the past and future. Following a hearing, the district court dismissed the State's petition because it was unable to determine whether David had the ability to reimburse the State. The court found evidence of David's gross monthly salary of $1,400 was insufficient to show his ability to pay without a showing of his current expenses.

On appeal, the State contends that it presented sufficient evidence David had the ability to pay. It claims the district court erred by not following the support guidelines set forth in Iowa Code § 252C.10 and established by the Iowa Supreme Court. The State also points out the lack of a support order in the parties' dissolution decree does not extinguish David's obligation to reimburse the State for support of his child.

As this case is in equity, our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings, but are not bound by them. Iowa R. App. P 14(f)(7).

The State's authority to seek reimbursement for ADC child support payments is statutory. The Iowa Code provides the State has the same right to support as the dependent for whom support was furnished. Iowa Code § 252A.5(5) (1989).

> . . . [I]f the liable parent is possessed of sufficient means or able to earn such means, the liable parent may be required to pay for the support of such child or children a fair and reasonable sum according to the parent's means, as may be determined by the court having jurisdiction of the respondent in a proceeding instituted under this chapter.

Iowa Code § 252A.3(2) (1989).

The trial court did not disagree with the State's authority to demand payments, nor with David's duty to pay them if the court found it within his means to do so. The problem, according to the trial court, was the State did not present any solid evidence concerning either David's earnings or his expenditures for himself and his two children in his custody.

Our review of the record leads us to agree with the trial court. Other than vague statements concerning what David's present earning might be, no other evidence on either his income or expenses is present. The Code clearly places the job of presenting such evidence on the State at the direction of the court. Iowa Code § 252A.7 (1989).

Neither this court nor the trial court takes issue with the fact David may indeed be liable for some or all of the amount claimed by the State. The problem is no evidence was presented as to "a fair and reasonable sum according to the parent's means, as may be determined by the court having jurisdiction of the respondent . . . ." Iowa Code § 252A.3(2) (1989).

David's argument he already provides support for two children in his custody, so he should not have to pay support for the third child, is without merit. The third child, Brandon, is also his, although she remains in his former wife's custody. He has an obligation to support Brandon in accordance with his ability to pay. Iowa Department of Human Services v. Stewart, 435 N.W.2d 749, 751 (Iowa App. 1988).

The trial court found the obligation to provide support was present, provided David was able to pay. This court remanded a similar case to the trial court for a determination of the father's obligation and ability to repay and provide support. State v. Fink, 432 N.W.2d 700, 700 (Iowa App. 1988). That case is controlling here. We remand this case to the trial court for a determination of David's ability to make support payments.

Either party may appeal an adverse trial court decision on the amount, if any, of support due. This court does not retain jurisdiction.

David is to pay costs of this appeal.

AFFIRMED AND REMANDED.