FILED
MAR 21 1977
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

PAMELA JEAN COONFARE, A MINOR BY HER MOTHER AND NEXT FRIEND, MARY I. COONFARE,

Appellee,

v.

JERRY A. FROME,

Appellant.

Filed March 21, 1977

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2-57598

Appeal from Polk District Court - John N. Hughes, Judge.

Defendant in paternity action challenges sufficiency of evidence to support trial court's award of child support. Affirmed in part, reversed in part, and remanded.

Robert D. Hall, of Des Moines, for appellant.

Richard C. Turner, Attorney General, Lorna Lawhead Williams, Special Assistant Attorney General, Donald Starr, Assistant Polk County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Jerry Frome challenges the sufficiency of the evidence to support trial court's judgment directing him to pay support for his illegitimate child, Steven.

Mary Coonfare as next friend for Pamela Coonfare, a minor residing in Pennsylvania, brought a paternity action against Jerry Frome seeking to establish that he was the father of Pamela's illegitimate child, Steven. A jury so found and no issue of the correctness of that determination is raised here. After a finding of paternity, an evidentiary hearing was held to determine the level of support necessary for Steven. Pamela, and her mother, Mary Coonfare, both testified, but neither was able to even estimate the amount of money necessary for Steven's support.

The only fact established by the plaintiff's evidence was that Mary Coonfare was receiving ADC payments of $69.50 every two weeks to aid in Steven's support. Defendant pointed to plaintiff's failure of evidence to establish the amount of support necessary. Plaintiff's counsel urged, and, apparently trial court did, take judicial notice of the amount of money necessary to support a child. Trial court ordered defendant to pay $25 per week until Steven is five; $35 per week until Steven reaches ten; and $50 per week thereafter until Steven becomes 16. Additionally trial court ordered defendant to pay the expenses of Steven's birth totalling $865.30. Defendant does not contest that competent proof of these expenses was presented during the paternity trial, correspondingly, trial court's order directing defendant to pay $865.30 hereby is affirmed.

As to the support issue, before a court can take judicial notice of any fact, that fact must be a matter of common and

general knowledge, well established and authoritatively settled, and the test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof. Bervid v. Iowa State Tax Commission, 247 Iowa 1333, 1339, 78 N.W.2d 812 (1956). On appeal, plaintiff urges us to take judicial notice of the level of support as set by the Iowa Department of Social Services in ADC payments. While judicial notice is taken of departmental rules and regulations adopted pursuant to statutory authority, Socony Vacuum Oil Co. v. State, 170 N.W.2d 378, 381 (Iowa 1969), we do not believe these tables can tell us the level of support specifically needed by Steven. The proper level of support for any given child always is pecularly dependent on the particular facts in each case. In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). Any other approach is not only unfair to the parties, but, worse, may ignore a child's individualized needs. See Lennon v. Walrod, ___ N.W.2d ___, (Iowa February 16, 1977).

While we sympathize with trial court's predicament because of the total failure of proof by plaintiff after a substantial expenditure of judicial resources, plaintiff's counsel, Donald Starr, best summarizes the problems in setting the level of child support in a vacuum:

> I suppose we could guess right along with the court as to what her rent would be if she moved out of her mother's home; we could guess what it would cost to feed this child if she moved out of her mother's home; we could guess what possibly she would incur for medical expenses. (emphasis added.)

Counsel's guesses do not suffice for the presentation of competent evidence.

Affirmed in part; reversed and remanded for a re-determination of child support from the date of judgment of paternity.

SNELL, OXBERGER and CARTER, JJ., concur; DONIELSON, J., dissents.

DONIELSON, J. (dissenting)

I dissent. The trial court had before him the complete income of Jerry Frome and the income of his wife, so income availability is not an issue in this appeal.

The trial court had the undisputed income from Aid to Dependent Children of Mary Coonfare from the State of Pennsylvania as being $69.50 every two weeks. I see no reason why the trial court could not take judicial notice of the level of support set by the Iowa Department of Social Welfare in ADC payments.

In the absence of any evidence showing a particularized or individualized need by the parties as mentioned by the majority, I would hold that the trial judge could take into account the level of support set by the Iowa Department of Social Welfare.

In this particular case, he had the amount of ADC payments from Pennsylvania, he could take judicial notice of the ADC level of support payments in Iowa, he has the multitude of appellate decisions in support cases available to him, and he can draw upon his experience as a judge. I would hold that to be enough.

Relating again to the ADC payment level set by the Iowa Department of Social Services, I would go one step further and use the old well-worn phrase that it has a circumstantial probability of reliability by its nature in the scope of its use. I would hold that he could take judicial notice of this whether it was technically adopted by the Department Rules and Regulations or not. I believe by its nature, its reliability could well be higher than perhaps other departmental rules and regulations that the trial court would be bound to take judicial notice of in other cases.

In this instance, the trial court ordered support of the child to $25 per week until age 5, $35 until age 10, and $50 a week until he is 16 years of age. This comports well with the guidance given trial judges in Iowa appellate court decisions as

it relates to child support.

Therefore, if there is no individualized or particularized needs shown or presented to the trial court, I would hold that the judges may use appellate court decisions and as in this case, the evidence of the ADC payments she was receiving, take judicial notice of the Iowa ADC tables and apply his experience as a trial judge.

I see no need to send this case back and force evidence in a case where the result may be the same. I view this as an unproductive and fruitless use of judicial time and energy.