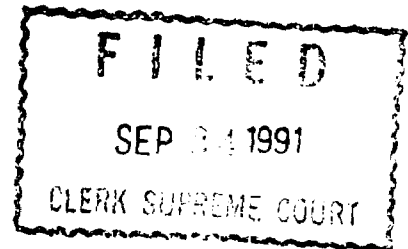


IN THE COURT OF APPEALS OF IOWA

No. 1-123 / 90-1104



MARK S. HATHAWAY,

Appellant,

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vs.

ILLENE HATHAWAY; JANE McHARG, THE LINN COUNTY FRIEND OF THE COURT; AND MARY ROSEBERRY, THE LINN COUNTY CLERK OF COURT,

Appellees.

Appeal from the Iowa District Court for Linn County,
George L. Stigler, Judge.

Former husband appeals district court order finding he had child support delinquency of \$11,116.88 under calculations of the Linn County Friend of the Court. He raises theories of equitable waiver, laches, and estoppel.
AFFIRMED.

Richard L. Boresi of King, Smith & Boresi, Cedar Rapids, for appellant.

Kathleen H. Chapman, Cedar Rapids, for appellee Hathaway.

Jane McHarg, Friend of Court, Cedar Rapids, for appellees Friend of Court and Clerk of Court.

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

HAYDEN, J.

Illene and Mark Hathaway were granted a decree of dissolution on June 10, 1977. The terms of the decree were based on a stipulation entered into by the parties. Mark was not represented by an attorney during the dissolution. Illene's attorney, Kathleen Chapman, drew up the stipulation. Illene was given sole custody of the parties' child, Brian Hathaway, born on January 10, 1972. The stipulation provided Mark would make payments of thirty dollars per week to the Linn County Friend of the Court. The stipulation also provided:

Said child support shall be adjusted in June of each succeeding year based upon the ratio of the Consumer Price Index for the Cedar Rapids Standard Metropolitan Area for June of 1977 to the Consumer Price Index for June of each succeeding year.

Over the years Mark faithfully paid his child support obligation of thirty dollars per week. However, he never increased his payments to reflect any cost of living adjustments. Illene contacted Mark several times about increasing his child support payments. She did not contact the friend of the court seeking to have the cost of living provision implemented.

On December 17, 1980, Illene signed a release, discharge, and satisfaction of judgment concerning the payment of any and all child support by Mark up to and including the date of the release. This was to release any judgment lien Illene may have had on a parcel of land owned by Mark.

On March 27, 1986, Mark received notice from the friend of the court his child support was overpaid twenty-five cents. In October 1987 Mark's current wife requested the friend of the court to calculate the cost of living adjustment to Mark's child support. Mark received notice from the friend of the court on February 8, 1989, his child support was delinquent \$9,666.98. This amount was \$11,980.06 through April 19, 1990.

Mark filed the present petition for declaratory judgment. He raised issues of waiver, laches, estoppel by acquiescence, and contract law. The district court found against Mark on all of these theories. The court did find Illene had waived her right to adjusted support for the period 1977 through 1980 by her signed release. The amount of increased support for that period would be \$774.08. The court entered judgment against Mark for \$11,116.88. Mark appeals.

I. The legal or equitable nature of an action for declaratory judgment turns on the nature of the case as well as the relief sought. Davidson v. Van Lengen, 266 N.W.2d 436, 438 (Iowa 1978). Mark's claims of waiver, laches, and estoppel by acquiescence are equitable in nature. The district court did not specifically state whether it was proceeding in law or equity. We determine this case is in equity, and our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of

witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Mark first claims Illene waived her right to collect the additional child support.

Waiver is the voluntary or intentional relinquishment of a known right. In re Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). It can be express or implied. Id. The essential elements of waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right. Heishman v. Heishman, 367 N.W.2d 308, 310 (Iowa App. 1985).

In this case there was no evidence Illene intended to give up her right to the increased child support. To the contrary, the evidence shows she contacted Mark several times in an effort to get him to increase his payments under the terms of the cost of living provision. Mark admits Illene's failure to initiate formal court action would not waive her rights. We hold Mark has failed to show his claim of waiver.

III. Mark also claims Illene should be barred from seeking the additional child support under the doctrine of laches.

Laches may be interposed in a proper case in defense of proceedings to collect unpaid support payments. Cullinan v. Cullinan, 226 N.W.2d 33, 36 (Iowa 1975). Laches consists of unreasonable delay in asserting rights which causes another undue prejudice, proven by clear and

convincing evidence. Henderson v. Millis, 373 N.W.2d 497, 505 (Iowa 1985). The defense of laches is available only where it would be inequitable to allow recovery. Thurn v. Thurn, 310 N.W.2d 539, 540 (Iowa App. 1981). It is well established one of the elements of laches is injury or prejudice to the party against whom judgment is sought to be enforced. Id. Mere passage of time does not constitute injury or prejudice. Id.

We agree with the district court's finding Mark did not show prejudice. Under the terms of the decree Mark had an obligation to pay the increased amounts of child support, as well as the base amount. The fact Mark's payment of these increased amounts has been delayed for twelve years does not prejudice him. We find Mark has not established his claim of laches.

IV. Mark claims the doctrine of estoppel by acquiescence is applicable in this case.

Estoppel by acquiescence may also be a defense to proceedings to collect unpaid support payments. Cullinan, 226 N.W.2d at 36. The doctrine of estoppel by acquiescence is applicable where a person knows or ought to know she is entitled to enforce her right, and neglects to do so for such length of time as would imply she intended to waive or abandon the right. Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973). Estoppel by acquiescence is based on an examination of the individual's actions who holds the right in order to determine whether the right has been waived. Davidson, 266 N.W.2d at 439.

The definition of estoppel by acquiescence shows it is similar in theory to the doctrine of waiver. The pertinent question is whether the person holding the right has acted in such a way as to show an intent to waive or abandon the right. In this case Illene's failure to enforce her right to increased child support payments through the friend of the court for twelve years does not show her intent to waive her right to the payments. Illene did seek to enforce her right by contacting Mark directly. We hold Mark has not established his claim of estoppel by acquiescence.

V. Finally, Mark raises a claim based on contract law. He points out Illene's attorney drafted the stipulation and any ambiguity in the document must be construed against Illene. See Village Supply Co., Inc. v. Iowa Fund, Inc., 312 N.W.2d 551, 555 (Iowa 1981). Mark states the method to implement the cost of living adjustment is ambiguous and Illene should not be able to enforce this provision.

We first observe the stipulation is not a contract. It is a proposal of the parties, subject to approval by the court. Secondly, the stipulation is not ambiguous on its face. We reject Mark's claims on this issue.

VI. In summary, we find against Mark on all of the theories he has raised. We find Mark failed to establish Illene had waived her right to additional child support. We also find Mark may not use the defense of laches; Mark

did not show he had been prejudiced or injured. Additionally, Mark's claim of estoppel by acquiescence must fail. Finally, we reject Mark's claim based on contract law.

We affirm the judgment of the district court.

AFFIRMED.