IN THE COURT OF APPEALS OF IOWA

No. 9-960 / 09-0015
Filed March 10, 2010

KATHY F. SLADE,
Plaintiff-Appellee,

vs.

BRYAN L. FOUGNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

A father appeals a district court order requiring him to pay $61,032.60 in past child support. **AFFIRMED AS MODIFIED.**

Christopher B. Coppola of Coppola, McConville, Coppola, Hockenberg & Scalise, P.C., West Des Moines, for appellant.

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, and Ronald Rieper, Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

A father appeals a district court order requiring him to pay $61,032.60 in past child support.

I. Background Facts and Proceedings

Bryan Fougner and Kathy Slade met in Iowa and began an on-again-off-again relationship that spanned several years and two states. After a period of separation, Bryan, who had settled in California, returned to Iowa and reunited with Kathy for a night. A few weeks later, Kathy discovered she was pregnant.

Kathy gave birth to a daughter in August 1989. Bryan returned to Iowa for the birth but refused to sign the birth certificate. He told Kathy he did not want to pay child support.

Bryan periodically saw Kathy and the child over the next six months but curtailed contact with them after that point. Kathy maintained good relations with Bryan's mother and sister in Iowa and allowed them to spend extended periods of time with the child up to her teen years. Kathy did not discuss Bryan's location with them because she believed that type of conversation would poison their relationship with the child.

Kathy financially supported the child with the help of her parents and with public assistance for two to three years in the 1990s. When she obtained public assistance, State personnel informed her they would try to find the child's father in an effort to collect child support. They also informed her the support would be turned over to the State. *See* Iowa Code § 600B.38(1) (2007) (authorizing assignment by operation of law of all rights to child support where public assistance provided, not to exceed the amount of public assistance paid for or on

behalf of child); *State ex rel. Mack v. Mack*, 479 N.W.2d 327, 329 (Iowa 1992) ("The payment of public assistance 'to or for the benefit of a dependent child or a dependent child's caretaker' creates a support debt due and owing to DHS by a responsible person in the amount of the public assistance payments."). Kathy advised the State that Bryan lived in the Los Angeles, California area.

The Iowa Child Support Recovery Unit (CSRU) did not find Bryan until 2003. At that time, CSRU initiated an administrative proceeding to establish paternity and child support. A paternity test confirmed that Bryan was the father. He was ordered to pay $578 per month in child support beginning in May 2003. The issue of "[a]ccrued support" was reserved because the State had not made any public assistance payments to Kathy over the previous thirty-six months.

In 2007, Kathy filed a "petition to judicially establish child support arrearages." She sought child support from the child's date of birth. *See State ex rel. Hammons v. Burge*, 503 N.W.2d 413, 416 (Iowa 1993) ("The date of birth, which is the date when expenses begin to accrue for the child, is the logical starting point for reimbursement. . . ."). That petition was dismissed because Bryan could not be located to serve him with process.

In 2008, Kathy filed a second petition requesting the same relief. This time, Bryan was located and served. He filed an answer, raising the affirmative defenses of "laches, waiver, estoppel and acquiescence." Following trial, the district court rejected these defenses and ordered Bryan to pay $61,032.60 in back child support "from [the child's] birth through and including April of 2003."

On appeal, Bryan takes issue with the district court's treatment of his affirmative defenses and its calculation of the support award. He additionally

claims Iowa Code section 600B.25(1), under which support was ordered, violates the equal protection clauses of the federal and state constitutions. Our review is de novo. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005).

II. Affirmative Defenses

Section 600B.25(1) authorizes a court to order the payment of retroactive child support in an amount "the court deems appropriate." On the preliminary question of whether Bryan had any responsibility to retroactively support his child, the district court found "incredible" Bryan's assertion that he thought the child was not his daughter. The court stated Bryan had "ample opportunity to care for, be involved with, and support a child he knew was his from the day she was born." We defer to this credibility finding. *See In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (noting this court affords "considerable deference to the district court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses").

After making this preliminary determination, the district court turned to what it characterized as "[t]he only real question," whether Kathy's delay in seeking retroactive support justified Bryan's failure to pay it. The court found that Kathy had good reasons for the delay, namely (1) her fear of alienating Bryan's family members and destroying her daughter's relationship with them if she pressed the issue of support, (2) the improbability of compliance had she pursued the issue with Bryan's attorney in the 2003 CSRU proceeding, and (3) her financial inability to pursue a claim. With respect to the third reason, the court stated, "[I]t is not a little paradoxical that [Kathy's] shortage of funds was due in part to the lack of child support during the first fourteen years of [the

child's] life." On our de novo review, we find these reasons fully supported by the record.

This brings us to the court's legal conclusions concerning Bryan's affirmative defenses of laches, waiver, and estoppel by acquiescence. The law on these defenses was explained in the strikingly similar case of *Markey*. We will not repeat it here. Suffice it to say that the district court accurately cited and explained this law.

We turn to the district court's application of the law to the facts. The court's rejection of Bryan's defenses flowed directly from its acceptance of Kathy's reasons for delaying her pursuit of back child support. The court's reasoning was not inconsistent with prior case law. *See Markey*, 705 N.W.2d at 21–24 (rejecting identical defenses under similar facts); *Cullinan v. Cullinan*, 226 N.W.2d 33, 35–36 (Iowa 1975) (denying defenses of laches and estoppel by acquiescence where obligee waited seventeen years to enforce back child support obligation after losing "track of defendant's whereabouts" following his move to California); *Thurn v. Thurn*, 310 N.W.2d 539, 540–41 (Iowa Ct. App. 1981) (rejecting laches and estoppel by acquiescence defenses where mother waited twenty-two years after dissolution decree to enforce back child support obligation); *cf. Davidson v. Van Lengen*, 266 N.W.2d 436, 438–440 (Iowa 1978) (finding parent equitably estopped from collecting child support where the parent delayed collection efforts for nineteen years even though parents lived in the same metropolitan area, worked for the same company, and "[b]y words and actions . . . led plaintiff to believe she intended to waive and abandon her right").

We conclude the district court acted equitably in ordering the payment of back child support.

III. Amount of Past Support

Bryan next takes issue with the district court's calculation of his past support obligation. He cites a variety of circumstances that he contends warranted a lesser amount.

The district court is authorized to consider all the surrounding facts and circumstances in determining the appropriate amount of support. *Markey*, 705 N.W.2d at 24. The court's analysis should begin, as it did here, "with the amount of support that would have been paid under the [child support] guidelines if no delay had occurred." *Id.* "This is an important starting point because the guideline amount is based on the usual needs of a child and the ability of parents to contribute to those needs under normal circumstances." *Id.*

In setting the amount of past support, the district court stated:

> In April 2003, [Bryan's] monthly current child support obligation was set at $578.00. This was 1.0308 percent of his earnings as reflected on the Social Security statement. Applying this percentage to each prior year's income, multiplied times twelve, renders the annual obligation as set forth in Attachment A.
>
> The Court credited him with eight months of payments in 2003 and imposed no obligation for 1989. Further, the records reflect that [Bryan's] annual income was always larger than [Kathy's]. Indeed, it was not until 2003 that any parity was evidenced.
>
> Were strict guideline percentages applied for the years before 2003, [Bryan's] arrearage would be even greater. Nor has the Court imposed any sum representing interest for lost use of the unpaid arrearage. To the extent that this calculation deviates from the child support guidelines, the Court concludes it benefits [Bryan]. The Court considers this calculation fair, reasonable and based on rational computation.

The court's appraisal is supported by the record and appropriately weighs the salient circumstances. *See State ex rel. Greenhaw v. Stewart*, 435 N.W.2d 749, 751 (Iowa Ct. App. 1988) ("Both parents have an obligation to contribute to their children's support not necessarily equally but in accordance with their ability to pay."). Our only quarrel with the calculation is that the court inadvertently charged rather than credited Bryan "with eight months of payments in 2003." Bryan was only obligated to pay back support for four months in 2003. Accordingly, we modify the judgment against Bryan by reducing the award by $2312 which, using the formula set forth by the court, is the monthly back child support amount of $578 multiplied by four. The resulting award to Kathy is $58,720.60 rather than $61,032.60.

IV. Equal Protection

Finally, Bryan argues that Iowa Code section 600B.25(1) violates the equal protection clauses of the federal and state constitutions because it distinguishes between children of married parents and children of unmarried parents. Error was not preserved on this issue as it was neither raised nor decided by the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *see also In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) ("Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal.").[1]

[1] Bryan's attorney made the following statement at trial,

V. Appellate Attorney Fees

Both parties request an award of appellate attorney fees. Appellate attorney fees rest in this court's discretion. *Markey*, 705 N.W.2d at 26. Although Bryan partially prevailed, the modification was minor relative to the appeal as a whole. Because Kathy was forced to defend a well-reasoned trial court opinion, we conclude Bryan should pay $1500 towards her appellate attorney fees.

Costs are taxed to Bryan.

AFFIRMED AS MODIFIED.

> [I]f Ms. Slade and Mr. Fougner would have eloped to Vegas and these same facts would have happened since then, she would have been precluded under Chapter 598 of the code from these retroactive child support payments. But because 600B does not address those issues, we're left with that law.

We are not persuaded this statement sufficiently alerted the district court to the constitutional claim Bryan now raises. *See Klobnock v. Abbott*, 303 N.W.2d 149, 153 (Iowa 1981) ("We will not allow a party to make a general reference to constitutional provisions in the trial court and then seek to develop the argument here [on appeal].").