IN THE COURT OF APPEALS OF IOWA

No. 7-958 / 07-0554
Filed January 30, 2008

MARY LOU MORROW,
Petitioner-Appellant,

vs.

PATRICIA A. MORROW, Executor of the Estate of DARREL M. MORROW,
Respondent-Appellee.

Appeal from the Iowa District Court for Appanoose County, Annette J. Scieszinski, Judge.

A claimant in a probate proceeding appeals from a district court ruling granting summary judgment in favor of the estate and denying her claim. **AFFIRMED.**

Bradley M. Grothe of Grothe Law Firm, Centerville, for appellant.

James W. Carney and George W. Appleby of Carney & Appleby, P.L.C., Des Moines, and James R. Underwood, Centerville, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Mary Lou Morrow appeals from the district court ruling granting summary judgment in favor of the estate of Darrel M. Morrow (Darrel M.) and denying her claim for underpaid spousal support. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

The summary judgment record reveals the following undisputed facts: Mary Lou and Darrel M. divorced in 1982. Their dissolution decree provided Darrel M. would pay Mary Lou spousal support in the amount of $825 per month "for so long as she lives or remains unmarried." The decree further provided the spousal support payments would "be adjusted to reflect the percentage increase or decrease in the cost of living adjustment applied to [Darrel M.'s] military retirement pay."

Darrel M. increased his spousal support payments to Mary Lou to $1000 per month in January 1990. She filed a release and satisfaction in September 1991 indicating he had satisfied his spousal support obligation through that date.[1] Darrel M. continued to pay Mary Lou $1000 per month in spousal support until he died in June 2005, despite cost of living increases in his retirement pay. At no time before his death did Mary Lou seek to increase her spousal support payments.

Mary Lou and Darrel M.'s son, Darrel W. Morrow (Darrel W.), became attorney-in-fact for his mother pursuant to a general power of attorney executed

[1] She also executed releases and satisfactions in September 1986, August 1986, and May 1989 acknowledging full payment of Darrel M.'s spousal support payments.

in October 2003.[2] Darrel W. handled his mother's financial affairs, including her receipt of Darrel M.'s spousal support payments. He was not aware of the provision in his parents' dissolution decree providing for an adjustment in Darrel M.'s spousal support payments to reflect increases in his military retirement pay until after his father's death.

Darrel M.'s will, which devised all of his property to his second wife, Patricia Morrow, was admitted to probate on November 9, 2005. Patricia was appointed as executor of the estate. Darrel W., acting as attorney-in-fact, filed a claim in probate on behalf of Mary Lou on May 16, 2006, asserting she was entitled to $65,849.15 plus interest due to Darrel's "underpayment of spousal support."[3] The estate disallowed the claim and filed a motion for summary judgment on October 16, 2006, contending Mary Lou's claim was barred by the doctrine of estoppel by acquiescence.[4]

Mary Lou filed an application for extension of time to file a resistance to the summary judgment motion on October 26, 2006, pursuant to Iowa Rule of Civil Procedure 1.981(6). She asserted she needed additional time to respond to the summary judgment motion because she had not received the estate's responses to her discovery requests, which were served on the estate on

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[2] There is some discrepancy in the record as to when Darrel W. began acting as attorney-in-fact for his mother. He testified in a deposition that he became her attorney-in-fact in 2001 due to her depression, dementia, and memory loss. However, in an affidavit he filed in support of his resistance to the estate's first summary judgment motion, he stated he became Mary Lou's attorney-in-fact in October 2003.

[3] Mary Lou's amended claim, filed on June 28, 2006, sought $73,104.19 plus accruing interest in unpaid spousal support judgments.

[4] The estate's first summary judgment motion, filed in August 2006, was denied by the district court on October 16, 2006, and is not at issue in this appeal.

October 10, 2006.[5] Mary Lou did not file a resistance to the motion for summary judgment until November 17, 2006. The estate moved to strike Mary Lou's resistance as untimely. Mary Lou then filed a supplemental statement of disputed facts on December 11, 2006, which the estate also moved to strike due to its untimeliness.

A hearing was held on December 19, 2006. Before hearing arguments on the merits of the summary judgment motion, the district court granted the estate's motions to strike the resistance and supplemental statement of disputed facts filed by Mary Lou. However, the court allowed counsel for Mary Lou to present arguments in resistance to the summary judgment motion at the hearing.

Following the hearing, the district court entered a ruling on February 16, 2007, concluding Mary Lou's claim was barred by the doctrine of estoppel by acquiescence.[6] The court accordingly granted summary judgment to the estate and denied Mary Lou's claim for underpaid spousal support. Mary Lou filed a motion to enlarge or amend the district court's ruling under Iowa Rule of Civil Procedure 1.904(2), seeking additional written findings from the court "supporting the Court's granting of the Executor's two Motions to Strike." The court denied the motion.

Mary Lou appeals and raises the following issues:

I. The court erred when it held that Mary Lou Morrow's claim was barred by estoppel by acquiescence.

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[5] The estate responded to Mary Lou's interrogatories on October 28, 2006.

[6] The court's written ruling also confirmed its earlier ruling from the bench at the December 19 hearing granting the estate's motions to strike.

II. The trial court erred when it refused to grant the claimant additional time for which to file a resistance to the executor's motion for summary judgment.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

"When a party opposing a motion for summary judgment files a motion requesting continuance to permit discovery, our review is for abuse of discretion." *Bitner v. Ottumwa Comm. Sch. Dist.*, 549 N.W.2d 295, 302 (Iowa 1996).

III. Discussion.

We must first address Mary Lou's claim that the district court "abused its discretion when it failed to grant additional time so the claimant could make discovery to prepare a proper resistance to the estate's motion for summary judgment." The estate argues Mary Lou did not preserve error on this claim because the court did not enter a ruling on her application for extension of time to file a resistance. We agree.

"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." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Although the court ruled on the estate's motions to strike, it did not issue a ruling on Mary Lou's rule 1.981(6) motion for additional time to file a resistance. "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.* Mary Lou's motion to enlarge or amend the district court's ruling did not request a ruling on her application for extension of time. We therefore conclude error was not preserved on this claim.[7]

We recognize that although our rules of civil procedure allow a nonmoving party to resist summary judgment, the moving party still has the burden to establish "there was no genuine issue of material fact and that it was entitled to judgment as a matter of law." *Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004) (citing Iowa R. Civ. P. 1.981(3)). A party faced with a summary judgment motion can therefore "rely upon the district court to correctly apply the law and deny summary judgment when the moving party fails to establish it is entitled to judgment as a matter of law." *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27-28 (Iowa 2005). Thus, we must determine whether the district court erred in finding Mary Lou's claim was barred

[7] Even assuming error was properly preserved on this claim, we cannot conclude the district court abused its discretion in not allowing Mary Lou additional time to resist the summary judgment motion by striking her untimely resistance. *See Kulish v. Ellsworth*, 566 N.W.2d 885, 889-90 (Iowa 1997) (finding the court did not abuse its discretion in denying a party's request for additional time to file a resistance to a summary judgment motion). We accordingly decline to consider Mary Lou's resistance, accompanying documents, and supplemental statement of disputed facts as these documents were not timely filed under rule 1.981(3) and were not considered by the district court.

by the doctrine of estoppel by acquiescence based on the undisputed facts before it.

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. *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005). The doctrine applies

> when (1) a party "has full knowledge of his rights and the material facts"; (2) "remains inactive for a considerable time"; and (3) acts in a manner that "leads the other party to believe the act [now complained of] has been approved."

Id. (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 63, at 489-90 (2000)). Estoppel by acquiescence focuses on an "examination of the individual's actions who holds the right in order to determine whether that right has been waived." *Davidson v. Van Lengen*, 266 N.W2d 436, 439 (Iowa 1978). "It advances a policy of stability and conclusiveness." *Id.*

We conclude the district court did not err in finding Mary Lou's claim based on underpaid spousal support was barred by estoppel by acquiescence in light of her "behavior over the years, the length of time unchallenged support was paid, and all other facts and circumstances surrounding [Darrel M.'s] payment record," all of which "join to imply an intention by Mary Lou to waive or abandon her right to alimony adjustments."

The record reveals Mary Lou accepted Darrel M.'s spousal support payments of $1000 per month for more than fifteen years, from January 1990 until his death in June 2005, without complaint. She executed a release and satisfaction in September 1991 indicating he had satisfied his spousal support

obligations to her through that date. She did not take any action after that date, legal or otherwise, to enforce the provision of the parties' decree that allowed her spousal support payments to be increased to reflect cost of living increases in Darrel M.'s military retirement pay. Mary Lou was aware of that provision and testified in a deposition she chose not to enforce it because "I was not needing the money. . . . and I had heard that [Darrel M.] was having some financial problems."[8] She "trusted him to increase it when it was time. And I think he did." She told her son she was not "owed any more money" when he discussed the issue of underpaid spousal support with her. Mary Lou now argues, however, that her "mere silence" and inaction is insufficient to bar her recovery under estoppel by acquiescence. We do not agree.

In *Markey*, our supreme court stated, "Mere silence on the part of the obligee parent, 'even for a prolonged period of time, is insufficient evidence . . . to bar recovery of child support based on' estoppel by acquiescence." *Markey*, 705 N.W.2d at 22 (quoting 24 Am. Jur. 2d *Divorce and Separation* § 1064, at 468 (1998)). We believe the court's pronouncement in that case is limited to cases involving the collection of unpaid child support given its reasoning that

> [i]n child support cases, we strive to serve the best interests of the children. Thus, we require some kind of affirmative act, inconsistent with the intention to collect child support, in order to imply the obligee parent intended to waive the right to child support.

Id.; *see also Davidson*, 266 N.W.2d at 440 (finding estoppel by acquiescence where there was evidence the mother agreed the father could stop paying child support if he ceased visiting the child). *But see Cullinan v. Cullinan*, 226 N.W.2d

[8] Mary Lou received an inheritance of approximately $252,000 in 1992. Darrel M. did not attempt to modify or terminate his spousal support payments following her inheritance.

33, 36 (Iowa 1975) (finding estoppel by acquiescence did not bar the mother's recovery where she attempted to enforce the father's child support obligation by filing a contempt action). The same interests present in child support cases are not at stake in cases involving spousal support. We therefore conclude the district court was correct in finding Mary Lou's acceptance of $1000 per month in spousal support from Darrel M. for more than fifteen years without objection bars her claim against his estate.

IV. Conclusion.

The district court was correct in finding Mary Lou's recovery of underpaid spousal support from the estate of her former husband was barred by the doctrine of estoppel by acquiescence. Mary Lou did not preserve error on her claim that the court abused its discretion in refusing to grant her additional time to engage in discovery before filing a resistance to the estate's motion for summary judgment. We accordingly affirm the judgment of the district court granting summary judgment in favor of the estate and denying Mary Lou's claim.

AFFIRMED.