

FILED

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IN THE COURT OF APPEALS OF IOWA CLERK SUPREME COURT

IN RE THE MARRIAGE OF CATHRYN FLEENER AND JERRY DEAN FLEENER

Upon the Petition of	)	
CATHRYN FLEENER,	)	
Appellant,	)	Filed November 22, 1978
And Concerning	)	
JERRY DEAN FLEENER,	)	<u>662</u>
Appellee.	)	3-61453

Appeal from Mahaska District Court - L. R. Carson, Judge.

Petitioner-mother appeals from modification of dissolution decree awarding custody of children to father. Reversed.

Garold F. Heslinga, of Heslinga & Heslinga, of Oskaloosa, counsel for appellant.

Charles K. Pettit, of Bloomfield, counsel for appellee.

Heard by Oxberger, C. J., Donielson, Snell and Carter, JJ.

DONIELSON, J.

Petitioner Cathryn Fleener appeals the trial court order modifying the dissolution of marriage decree which changed custody of the parties' two children, Johnathan and Julie, from Cathryn to respondent Jerry Dean Fleener. We reverse.

Our review is *de novo*. Rule 4, Rules of Appellate Procedure. We give weight to the findings of the trial court but are not bound by them. Rule 14(f)(7), R. App. P.; In re Marriage of Morton, 244 N.W.2d 819, 821 (Iowa 1976).

In cases involving applications for modification of custody arrangements, the party seeking a change in custody has the burden of showing by a preponderance of the evidence that the circumstances at the time the original decree was entered have changed so materially and substantially as to warrant a transfer of the children to his or her custody. The parent seeking to take custody from the other must show some superior claim based on his or her ability to minister, not equally, but more effectively to the children's well-being. The best interests of the children involved remain our first and governing consideration. Rule 14(f)(15), R. App. P. In deciding the question we seek neither to punish one parent nor to reward the other. *Hobson v. Hobson*, 248 N.W.2d 137, 139 (Iowa 1976); In re Marriage of Brown, 247 N.W.2d 2, 3-4 (Iowa 1976); In re Marriage of Morton, *supra* at 821; *Davis v. Davis*, 237 N.W.2d 455, 457 (Iowa 1976).

We think the evidence falls short of showing a superior claim on Jerry's part demonstrating his ability to minister more effectively to the children's well-being. The only change in circumstances not contemplated when the decree of dissolution was entered is the adjustment of the children to Jerry's second wife. Cathryn's relationships with men and possible indiscretions on her part do not provide a sufficient basis in and of themselves for a transfer of custody. They are but one factor, albeit a serious one, to be given consideration. In re Marriage of Morton, *supra* at 822. Further, the trial court in the original dissolution decree noted that Cathryn was dating men and had no plans to remarry.

The only other ground relied on by the trial court is Johnathan's strong desire to live with his father. He was not returned to Cathryn's home after a summer visitation with Jerry, and at the time of the modification hearing had been living with Jerry for five months. Julie was living with Cathryn and her preference was to remain there.

While Johnathan's wishes should be given consideration, we accord them little weight in this situation where the proceeding is to change custody, *Davis v. Davis*, *supra* at 457, and the record discloses pressures exerted on Johnathan by Jerry in the belief that when his son turned 14 he could choose for himself with which parent he wanted to live.

In reversing the trial court, we are aware that Johnathan has been in his father's home since August 1977, and Julie since December 1977. The practical difficulties of our decision do not preclude reversal, however, where both children have lived with Cathryn since 1973 and the circumstances did not justify the modification. *See In re Marriage of Brown*, *supra* at 458.

Cathryn's appeal also asks us to determine the validity of that portion of the modification order dated December 21, 1977 which retrospectively relieved Jerry of his child support obligation as to Johnathan effective August 1, 1977. Modification of a decree for support payments operates prospectively and not retrospectively. Those payments which have accrued are vested and may not be taken away. In the Matter of Evans, 267 N.W.2d 48, 52 (Iowa 1978); *Gilliam v. Gilliam*, 258 N.W.2d 155, 156 (Iowa 1977). Consequently, Jerry is liable for all child support accrued and vested between January 15, 1974 when the dissolution decree was entered and December 21, 1977 when the modification order was entered. Child support will, of course, again become due and payable from the date of issuance of *procedendo* in this appeal.

Finally, Cathryn seeks attorney fees for this appeal. No attorney fees are allowable where modification of a final dissolution decree is the issue. *In re Marriage of Jensen*, 251 N.W.2d 252, 254 (Iowa 1977).

REVERSED.