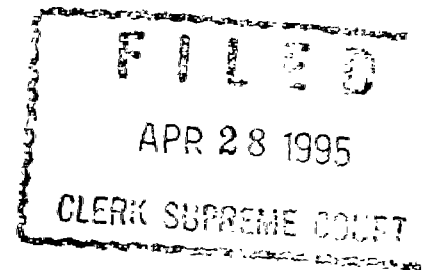


IN THE COURT OF APPEALS OF IOWA

No. 5-111 / 94-1171



**IN RE THE MARRIAGE OF ROBERT GEORGE McCORMICK AND
KATHRYN ANN McCORMICK**

Upon the Petition of
ROBERT GEORGE McCORMICK,

Appellee,

And Concerning
KATHRYN ANN McCORMICK n/k/a KATHRYN ANN KUHLMAN

Appellant.

Appeal from the Iowa District Court for Washington County, Dan Morrison,
Judge.

Kathryn appeals the district court order modifying the parties' dissolution decree
by placing their son in Robert's primary care. **AFFIRMED.**

Craig A. Davis of Morrison, Lloyd, McConnell, Mullins & Davis, Washington,
for appellant.

Allan C. Orsborn of Orsborn, Bauerle, Milani & Neary, Ottumwa, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

HUITINK, J.

The McCormicks' 1980 dissolution decree awarded Kathryn custody of their son, Seth. Robert was awarded visitation and ordered to pay support. Seth has resided with Kathryn at her home in Keota since the decree was entered.

Seth is a fifteen-year-old high-school student. He is by all accounts an intelligent and thoughtful child who has enjoyed significant academic and social success. Seth has an excellent relationship with his parents and stepparents.

Kathryn recently earned an advanced degree and has accepted an academic appointment at Northeast Missouri State University in Kirksville, Missouri. Her contract runs from August through June each academic year. During the school year Kathryn divides her time between her home in Keota and a temporary residence in Kirksville. She is gone four to five days each week and returns on the weekends.

Kathryn's husband, Paul, cares for Seth while she is away. Seth has expressed his preference to live with Robert rather than remain in Keota with Paul in Karen's absence. Although Seth is dissatisfied with this arrangement, there is no evidence it has affected him in any negative way. He continues to do well in school, and aside from this dispute, there is no significant distress or conflict in his relationships with family and friends.

Robert has also remarried. He lives on a ranch near Moravia with his wife and two-year-old son. Seth visits Robert regularly and enjoys working with Robert on the

ranch. He has a good relationship with Robert's wife, Carolyn, and his half-brother. Seth has made friends in the Moravia area and would like to attend high school in Moravia.

Robert has a history of failing to pay child support. He was cited for contempt after his accumulated arrearages exceeded \$20,000. His jail sentence was withheld as long as he is in compliance with a court-ordered repayment plan. Robert has made his support payments since this order was issued.

In June 1993 Robert filed an application requesting modification of the 1980 decree's custodial provisions. The district court found Karen's extended absences in combination with Seth's express preference to live with Robert constituted a substantial change of circumstances warranting modification. Robert and Kathryn were awarded joint custody of Seth. Robert was awarded physical care, and Kathryn was ordered to pay child support. Her support obligation was offset by Robert's arrearages.

On appeal Kathryn contends Robert has failed to establish a substantial change of circumstances or that he can minister more effectively to Seth's needs. Our review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings, but we do give them deference because of the district court's opportunity to view the witnesses first-hand while testifying at trial. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

To change the provisions of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to administer more effectively to the children's well-being. *Id.*, see also *In re Marriage of Gravatt*, 371 N.W.2d 836 (Iowa App. 1985). This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). In considering what custody arrangement is in the child's best interests, the court shall consider the child's wishes, taking into account the child's age and maturity. Iowa Code § 598.41(3)(f) (1993). *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 259 (Iowa 1985). The wishes of a child are entitled to some weight, although they are not controlling. *Id.* The preference of a child is accorded less weight in a modification proceeding. *In re Marriage of Levsen*, 510 N.W.2d 892, 894 (Iowa App. 1993) (citations omitted). This preference, however, has been found to be a substantial circumstance justifying modification. *In re Marriage of Bugg*, 492 N.W.2d 452, 453 (Iowa App. 1992).

There is no serious dispute concerning the high quality care Seth has received while living in Kathryn's home. His good character, educational, and social

development are a testament to Kathryn's custodial abilities. Although her professional obligations are demanding, they do not subtract anything from the quality of the environment her home offers Seth. There is every reason to believe Seth will continue to thrive if he remains in her custody.

Robert has had considerably less primary care experience than Kathryn. There is however, no evidence suggesting any significant deficiency in the custodial environment he offers Seth. He has an adequate home and has the financial ability to provide for Seth without assistance from Kathryn. Carolyn supports Robert's custodial aspirations and her positive relationship with Seth will facilitate his adjustment to their home.

We are concerned about the implications of Robert's failure to pay support. His failure to appreciate the consequences of nonpayment reflect badly on his parental judgment and priorities. The record indicates this circumstance has been addressed in earlier contempt proceedings, and any injustice done to Kathryn has been remedied by the district court's repayment order. Modification resulting in a custodial award to a parent who is delinquent in paying child support is not without precedent. *See Bugg*, 492 N.W.2d at 453. We do not believe Robert's past failure to pay support should disqualify him as Seth's custodian. It is a factor to be considered along with all of the other circumstances found in the record.

As stated earlier, Seth's preferences are entitled to consideration if the evidence indicates he is of sufficient age and maturity. We agree with the district court's assessment of Seth as an intelligent and mature fifteen-year-old. Seth's testimony indicates that he has made a thoughtful decision regarding his desire to live with Robert. Moreover, there is no evidence suggesting Robert unduly influenced his decision or that Seth is motivated by any resentments or ill feelings towards Kathryn or Paul. We believe Seth is of sufficient age and maturity to give his preference significant weight in our decision.

After carefully considering all of the evidence, we conclude Robert has met his substantial burden of proof. Seth's preference to live with Robert combined with Karen's extended absence from the home constitute a substantial change of circumstances justifying modification. In reaching our decision, we note as a practical matter Seth will be spending as much time with Kathryn under the modified decree as he was prior to modification.

Finally, we acknowledge Kathryn's concern that the result in this case will establish a chilling precedent for divorced parents facing similar circumstances. Her concerns, however, are based on a misconception of the issue presented for our consideration. The dispositive issue in this case, like all custody cases, is the best interest of the child and not the parents' career choices. We have repeatedly stated prior cases have little precedential value, and we base our decisions primarily on the

particular circumstances of the parties presently before us. *See In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). Our decision in this case is limited to this family's unique circumstances, and divorced parents need not be discouraged from pursuing opportunities to improve their professional or economic circumstances.

Each party shall be responsible for his or her own attorney fees. Costs of this appeal are assessed to Kathryn.

AFFIRMED.