

FILED

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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

IN RE MARRIAGE OF ROBERT WAYNE McCARL & KATHRYN ANN McCARL
SCHWITTERS

Upon the Petition of	)	
ROBERT WAYNE McCARL,	)	Filed March 22, 1979
Appellant,	)	
And Concerning,	)	<u>41</u>
KATHRYN ANN McCARL SCHWITTERS,	)	3-62360
Appellee.	)	

Appeal from Polk District Court - Dale S. Missildine, Judge.

Father appeals trial court's order which granted mother's application to modify custody of the parties' two children. - REVERSED.

David Wm. Patton & Ted E. Marks, of Marks, Marks & Marks, Urbandale, for Appellant.

Harry Perkins III, of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, for Appellee.

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

OXBERGER, C. J.

Petitioner Robert McCarl appeals trial court's order granting modification of custody of two minor children to respondent Kathryn McCarl Schwitters. We reverse.

Our review is de novo, and while we give weight to trial court's findings of fact, we are not bound by them. Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976). Under the terms of their 1976 divorce decree, the parties' two daughters, ages six and four, were awarded to Robert. At that time, the family was receiving an A.D.C. grant; neither Robert nor Kathryn was employed. Since the decree, both have remarried. Robert no longer receives A.D.C. He supplements his income from the Yellow Cab Co. by repairing automobiles, buying and selling used merchandise, and performing other odd jobs. He has purchased a comfortable, four bedroom house. Kathryn works full-time at a manufacturing plant and has established a stable home with her husband. The parties' children appear to be normal, well-adjusted and well cared-for. They have been in Robert's custody continuously since the divorce decree. There was some testimony concerning an assault and battery charge against Robert involving the daughter of his present wife, Debbie. Although the exact disposition of the charge is unclear, the record shows that Robert and Debbie successfully underwent psychological counselling. A probation officer responsible for monitoring the household testified that a good adjustment had been made within the family and that the McCarls were providing a very lovable home.

Both parents love their children and sincerely desire their custody. If we were determining the issue for the first time, the evidence would justify an award to Kathryn. We are bound, however, by well-established rules governing our review of applications for modification. The party seeking the change in custody must show that circumstances which existed at the time of the original decree have so materially and substantially changed as to warrant a transfer of the children. Hagen v. Hagen, 226 N.W.2d 13, 15 (Iowa 1975). Custody of children who are receiving proper care will not be disrupted in the absence of cogent or compelling reasons. In re Marriage of Pokrzywinski, 221 N.W.2d 283, 286 (Iowa 1974). We

recognize the fact that Kathryn has made commendable improvements in her life since her divorce from Robert. At the same time, however, Robert's circumstances have likewise improved. He has established his own home and has consistently provided for his children's economic, social, and emotional needs. Custodial decisions are not made to reward one parent or punish the other. In re Marriage of Powers, 226 N.W.2d 810, 812 (Iowa 1975). Having reviewed the entire record, we conclude that Kathryn failed to establish by a preponderance of the evidence that conditions in Robert's home had so materially and substantially changed that the best interests of the children dictated an award of permanent custody to her.

We therefore reverse trial court's order. Kathryn is entitled to the same visitation rights as were given to Robert. We remand this case for the entry of an order consistent herewith.

REVERSED AND REMANDED.

All judges concur, except Donielson, J., and Snell, J., who dissent.

DONIELSON, J. (dissenting)

I dissent. On our *de novo* review, I would affirm the trial court's modification of the dissolution decree by awarding custody of the parties' two children to Kathryn. The original decree awarded custody to Robert apparently because he was living in his mother's home, and she provided the primary care for the girls. The trial court indicated, however, "[i]n the event the Respondent [Kathryn] should establish a suitable home for herself and the children, this court would be disposed to give her the custody of said children provided she can demonstrate her competency to properly care for them as a proper and loving mother."

At the hearing on modification, Kathryn was able to demonstrate that her situation, through her own efforts, had greatly improved. The children are no longer living with their grandmother, but with Robert and his second wife. While Robert has provided for the children adequately, he continues to be employed sporadically and at a minimum income level. There was some evidence of child abuse by Robert in his treatment of his step-daughter. I believe Kathryn has shown a change in circumstances from the time of the original decree sufficient to warrant a change in custody. Our continuing and governing consideration is the best interests of the children. See In re Marriage of Brown, 247 N.W.2d 2 (Iowa 1976). I would affirm the trial court.

SNELL, J. joins this dissent.