FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARY LOIS KAVANAUGH, )

Plaintiff-Appellant, ) Filed August 30, 1983

vs. ) 3-160
3-69413

DANIEL J. KAVANAUGH, )

Defendant-Appellee. )

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Appeal from Polk District Court, Ray A. Fenton, Judge.

The trial court modified the parties' 1968 divorce decree to transfer custody of a daughter from the mother to the father. AFFIRMED IN PART; REVERSED IN PART.

James L. Spellman of Neiman, Neiman, Stone & Spellman, Des Moines, for plaintiff-appellant.

Alan A. Anderson, Des Moines, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

**OXBERGER, C.J.**

The trial court modified the parties' 1968 divorce decree. The mother has appealed from the modification order. She challenges the transfer of the daughter's custody, and she also contends the evidence did not support the finding that she was estopped from recovering a child support arrearage. In addition, she argues her right to child support should have ended on the date the daughter's legal custody was changed rather than on the earlier date when physical custody changed. We affirm in part and reverse in part.

**I. Scope of Review**

Our review is de novo. Our duty is to examine the entire record and adjudicate anew rights on the issues properly presented. In doing so we give weight to, but are not bound by, the trial court's findings. In re Marriage of Steenhock, 305 N.W.2d 448, 452 (Iowa 1981).

**II. The Custody Issue**

The general rule is that when a reviewing court changes custody, the award of child support payments to the other parent is canceled. Andreesen v. Andreesen, 110 N.W.2d 275, 279 (Iowa 1961). And it is well established that the age of majority law that is in effect at the time of the dissolution decree governs the divorced father's child support obligation. In re Marriage of Harless, 251 N.W.2d 212, 213 (Iowa 1977). It would thus appear that the determination of which parent is entitled to custody would also determine the child support issue. However, Kim has reached her majority and can live where she chooses. Fortunately, the record shows that both parents love her and would welcome her into their respective homes. Because of Kim's age, we find the custody issue in and of itself moot, but, because the original divorce decree mandates child support payments until Kim reaches 21, or becomes self-supporting, the custody issue retains relevance in as much as it relates to the support provision.

**III. Child Support Issue**

Through our de novo review of the trial record we must determine if Mary Lois is entitled to child support payments until Kim reaches the age of 21. The testimony below establishes that Kim was living with her father and that, at the time, it was her intent to stay there until she was 18. The record also indicated that Kim had told her mother that she would think about returning to her mother's home after Christmas, but at this point did not want to.

We do not have the insight nor the inclination to predict who Kim will live with in the future. As a court of review we must ordinarily limit our consideration to the record made at trial. In re Marriage of Callenius, 309 N.W.2d 510, 513 (Iowa 1981). Therefore, in our de novo review we will not consider any extra-record facts advanced by either party. The record shows that Kim moved in with her father on her own volition and that Daniel is providing 100 percent of Kim's support at this time. The record indicates also that, notwithstanding the problems that Mary Lois and Daniel have had, Kim is a well-adjusted child with a concern for her future. It appears that Kim will be starting college and there is no indication in the record that she will be returning to live with her mother. Therefore we find no reason why Daniel should continue to pay Mary Lois child support until Kim is 21. Both parents are liable for support of their children, not necessarily in equal shares, but proportionately according to their ability to pay. In re Marriage of Novak, 220 N.W.2d 592, 598 (Iowa 1974). Daniel is presently supporting Kim 100 percent. We will not force him to pay more. We therefore affirm the termination of child support payments to Mary Lois.

**IV. When did the Termination Occur**

The trial court terminated the child support payments as of July 15, 1981, the day that Kim moved in with Daniel. The order modifying decree was dated April 22, 1982. We agree that modification of support payments operates

prospectively and vested payments will not be taken away. In the Matter of Evans, 267 N.W.2d 48, 51, 52 (Iowa 1978). However, we find that the trial court properly terminated the support payments as of July 15, 1981. Mary Lois testified that she would release Daniel from paying child support during the period of time since July when he was furnishing 100 percent of Kim's support and Mary Lois was furnishing none. Mary Lois testified further that she would release Daniel from any support payments when Kim was not living with her. We have no record evidence that Kim is now residing in her mother's home. The record establishes that Mary Lois voluntarily and expressly released Daniel from those payments accruing from the day Kim moved in with Daniel, i.e., approximately July 15, 1981. Mary Lois cannot now attempt to recover from Daniel support that she said he was under no duty to pay. Pappas v. Pappas, 75 N.W.2d 264, 267 (Iowa 1956). We therefore affirm the trial court's finding that the termination began July 15, 1981.

**V. Back Child Support**

In June of 1980 the trial court held that the oral agreement entered into between the parties in September of 1977 was a valid and binding modification of the decree. That agreement stipulated that the support payments for Kim would increase to $450 a month. Now, the trial court finds that Mary Lois is estopped from asserting a claim for back child support between the dates of February 1979 and July 1981 when Daniel only paid $225 for child support, the amount of the original court ordered modification. We disagree.

The trial court said it based its finding that, "the plaintiff is estopped" because she never mentioned the reduction in the child support to the defendant during the two and one-half years he failed to make the increased payments.

In Davidson v. Van Lenger, 266 N.W.2d 436, 438 (Iowa 1978), the court said:

> "The doctrine is applicable where a person knows or ought to know that she is entitled to enforce her right or to impeach a transaction and neglects to do so for such a time as would imply she intended to waive or abandon her right."

We hold that failure to pursue collection of past due child support for two and one-half years is not a sufficient period of time, standing alone to imply intent to waive or abandon a claim. There is no evidence that Mary Lois did or said anything to indicate a desire to abandon her claim.

Therefore, we reverse that portion of the trial court's ruling and remand for entry of an order by the trial court for the past due child support.

AFFIRMED IN PART; REVERSED IN PART.