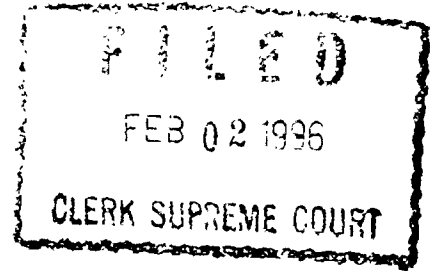


IN THE COURT OF APPEALS OF IOWA

No. 5-613 / 95-267

IN RE THE MARRIAGE OF KENNETH D. O'NEALL
AND MARY ANN O'NEALL



Upon the Petition of
KENNETH D. O'NEALL,

Appellant,

And Concerning
MARY ANN O'NEALL,

Appellee.

Appeal from the Iowa District Court for Clarke County, Darrell Goodhue,
Judge.

Father appeals the district court's denial of his petition to modify the parties' dissolution of marriage decree placing primary care of their minor child with the mother. **AFFIRMED.**

Ryan A. Genest of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Richard O. McConville of Coppola, Sandre & McConville, P.C., Des Moines,
for appellee.

Heard by Habhab, P.J., Cady, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, J.

Kenneth O'Neill appeals from a decision by the district court denying his petition to modify a decree for dissolution of marriage. We affirm the decision of the district court.

Kenneth and Mary Ann O'Neill dissolved their marriage in March 1992. The court decree awarded them joint custody of their daughter, Kaira, with primary physical care to Mary Ann. The decree granted Kenneth visitation rights including alternating weekends, one night every other week, alternating holidays, one week during the Christmas season, and four weeks during the summer months. Kaira was three years old at the time of the divorce.

Kenneth filed an action in November 1993 to modify the decree. He asked to be designated the primary caretaker of Kaira because of the numerous times Mary Ann had moved since the divorce, a deterioration in Mary Ann's lifestyle, the failure of Mary Ann to include him in the educational, medical, and child care decisions affecting Kaira, and Mary Ann's move from the Des Moines area to Cedar Rapids.

Following the modification hearing in October 1994, the district court found **circumstances had changed** since the decree, but concluded it was in Kaira's best interest for Mary Ann to remain the primary caretaker. The changed circumstances recognized by the court included: 1) Mary Ann was in her fourth relationship since the divorce and planned to marry next summer; 2) Mary Ann lived approximately 200 miles from Kenneth and had moved six times since the divorce; 3) Mary Ann had

used controlled substances; 4) Kaira spent nearly equal time with her parents, and Kenneth was capable of meeting Kaira's physical needs; 5) Kenneth assaulted Mary Ann; 6) Mary Ann had failed at times to be properly concerned with Kaira's cleanliness; 7) Kaira was becoming manipulative with her parents and 8) Mary Ann had inherited approximately \$750,000. In declining to change the primary care arrangement the court recognized Kenneth's lack of respect for Mary Ann, and questioned the type of relationship Mary Ann and Kaira could maintain if Kenneth had primary care.

The district court modified the decree to decrease Kenneth's monthly support obligation and removed his medical insurance requirement. Visitation was changed to give Kenneth visitation every third weekend, with two additional weeks during the summer.

On appeal, Kenneth claims the district court erred by failing to change primary care. He also argues the court erred in modifying the visitation terms. Finally, Kenneth contends the district court erred in failing to award him attorney fees and requests appellate attorney fees.

Our review is de novo. We give weight to the findings of the trial court, but are not bound by them. Iowa R. App. P. 14 (f)(7).

We begin our review by recognizing the venerable principle that once the custody of a child is established, it is changed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). The party seeking

custody must demonstrate conditions since the entry of the decree have so materially and substantially changed beyond the contemplation of the original trial court that the child's best interests make the requested change expedient. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Moreover, the changed circumstances must be more or less permanent, and relate to the welfare of the child. *Id.* Furthermore, the parent seeking custody must prove an ability to minister more effectively to the child's well being. *Id.*

Our review of the evidence reveals Mary Ann has not placed the best interests of Kaira in the forefront at times, as best illustrated by her numerous moves since the divorce. However, we are not convinced this pattern of behavior is of a permanent nature. Furthermore, the inheritance recently received by Mary Ann will help provide stability in her life. We also note Kaira has started school in the Cedar Rapids area and appears to be doing well.

We further observe Kenneth has physically assaulted Mary Ann since the divorce and possesses little respect for her. We have previously recognized violent and demeaning tendencies adversely impact on the fitness of a parent to be a primary caretaker and to participate as a joint custodian. *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa App. 1994).

We conclude Kenneth has failed to demonstrate the material changes since the decree are permanent in nature, and he can minister more effectively to Kaira's

overall welfare. We also conclude the district court properly modified the visitation arrangement in view of Mary Ann's move to Cedar Rapids. We deny Kenneth's request for appellate attorney fees and affirm the district court's denial of trial attorney fees.

AFFIRMED.