

**IN THE COURT OF APPEALS OF IOWA**

No. 7-479 / 96-2026

000261

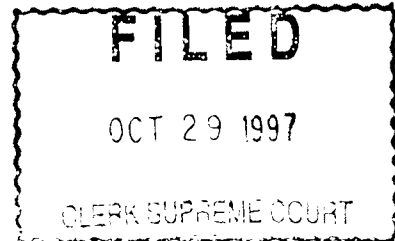
**IN RE THE MARRIAGE OF TODD ANTHONY McGEE  
AND ROSETTA McGEE**

Upon the Petition of  
**TODD ANTHONY McGEE,**

Petitioner-Appellee/Cross-Appellant,

And Concerning  
**ROSETTA (McGEE) KLINE,**

Respondent-Appellant/Cross-Appellee.



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Appeal from the Iowa District Court for Warren County, James W. Brown,  
Judge.

On appeal from the denial of her application to modify custody, the appellant argues the district court erred in finding there were no material and significant changes and in failing to consider the long-term best interests of the children.

**AFFIRMED.**

Donna M. Schauer, West Des Moines, until her withdrawal, and then Rosetta Kline, Pro se for appellant.

Luis Herrera of Herrera Law Office, P.C., Des Moines, for appellee.

Michael Burdette, Des Moines, for minor children.

Considered by Cady, C.J., and Huitink, and Vogel, JJ.

**PER CURIAM.**

Rosetta (McGee) Kline appeals the district court denial of her application to modify child custody. We affirm.

In 1987, Todd and Rosetta McGee were divorced in Colorado. Pursuant to the dissolution decree, Todd received sole custody of the parties' three minor children, Tracy, Michael, and Shannon. The decree granted Rosetta visitation and did not require her to pay child support. In 1988, the parties agreed to a modification of the decree allowing Todd and the children to move to Iowa. In October 1994, Todd was shot. During his recovery, Rosetta cared for the children. Rosetta claims to have been the de facto care taker from the time of Todd's injury until July 1996. In August 1996, Rosetta moved from Iowa to Arizona to join her husband who had found employment in Arizona.

The trial court found the children had moved freely between both parents' homes and the facts did not support her claim as a de facto primary care taker. The trial court also found Rosetta had not demonstrated she could provide superior care for the children. Additionally, the court directed Rosetta to pay \$300 per month in child support.

On appeal Rosetta claims the trial court erred in failing to find material and significant changes in circumstances and in not considering the best interests of the children. She asserts Todd lacks a stable home environment and Todd has drug abuse

problems. She also contends Todd minimized the seriousness of Tracy's asthma condition.

### **I. Standard of Review**

We review the record de novo in a proceeding to modify child custody. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). This requires us to examine the complete trial record and determine the issues presented anew unimpeded by the findings of the trial court. *In re Marriage of Salmon*, 519 N.W.2d 94, 95 (Iowa App. 1994). At the same time, we recognize the inherent virtues in listening to and observing the parties and witnesses. *Dale*, 555 N.W.2d at 245. Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

### **II. Modification of Custody**

Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the children. *Id.*; *In re Marriage of Frederici*, 388 N.W.2d 156, 158 (Iowa 1983). Additionally, we have recognized a de facto form of caretaking as grounds to modify a custody decree. *In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa App. 1994) (modification of dissolution decree transferring primary physical care from mother to father when father functioned as de facto primary care giver was supported by evidence); *Stouwie v. Stouwie*, 222 N.W.2d 435, 438 (Iowa 1974) (material change of circumstance

occurred when father had de facto custody). Nonetheless, the parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Dale*, 555 N.W.2d at 245; *Frederici*, 388 N.W.2d at 158. This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons. *In re Petition of Anderson*, 530 N.W.2d 741, 741-42 (Iowa App. 1995). Moreover, as in all cases involving custody, our first consideration in custody modifications is the best interests of the children. *Dale*, 555 N.W.2d at 245.

Rosetta claims a material change not contemplated by the trial court occurred when she began caring for the children more often in 1994. She asserts she became the de facto caretaker of the children from 1994 until 1996. The record reveals, however, the children spent much time with both parents. In fact, Rosetta had liberal visitation with the children both before and after the shooting. While Rosetta's time with her children increased, they still spent significant time with their father. Thus, although the trial court did not contemplate Todd's injury and Rosetta's subsequent increase in care of the children, we find this falls short of the type of de facto care sufficient to support a change in custody or primary care.

Rosetta next claims her care is superior to Todd's care. It is not enough that her caretaking is merely equivalent to Todd's caretaking. See *In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa App. 1994). Although Rosetta cites Todd's past drug use as a factor, we note both parties have past drug use problems. We also

observe both parties have a history of domestic altercations with their spouses. Moreover, testimony from both parents indicates a genuine concern for the well being of Tracy's asthma condition. Rosetta has therefore failed to demonstrate how her care would be superior to Todd's care.

We also find the best interests of the children would not be served by a move to Arizona. We live in a highly mobile society, and a move by one of the parties is not so unusual or substantial as to support a change in custody. *Dale*, 555 N.W.2d 243, 245 (Iowa App. 1996). The children are well adjusted in the Iowa school system and Rosetta has failed to show how a move to Arizona would be superior to the care they are currently receiving.

**AFFIRMED.**