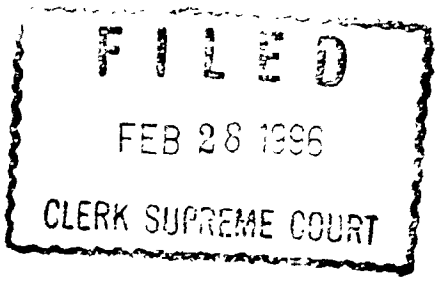
IN THE COURT OF APPEALS OF IOWA



No. 5-626 / 95-0475

IN RE THE MARRIAGE OF CINDY J. EVANS AND RON W. EVANS

Upon the Petition of
CINDY J. EVANS,

Appellee,

And Concerning
RON W. EVANS,

Appellant.

Appeal from the Iowa District Court for Mills County, Glen M. McGee, Judge.

Ron Evans appeals a district court order denying his petition for modification of the child custody provision of the parties' dissolution decree. **AFFIRMED.**

Matthew V. Stierman of Rodenburg Law Offices, P.C., Council Bluffs, for appellant.

Michael J. Winter, Council Bluffs, for appellee.

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

HUTTINK, J.

Cindy and Ron Evans were previously married to each other. They had one child, Callie, who was born in 1988. Cindy and Ron were divorced on April 18, 1994. The dissolution decree granted joint legal custody of Callie, with Cindy having primary physical care.

After the dissolution, Cindy and Ron both lived in the area of Glenwood. Cindy was employed by Pacific Place, where she earned about $23,000. Ron was employed as a vocational manager, and he had annual income of about $19,000. Ron exercised visitation every weekend.

On December 7, 1994, Cindy's attorney notified Ron's attorney Cindy planned to marry David Hunt, who lived in Oklahoma City, Oklahoma, and she would be moving there. Cindy and David were married on February 3, 1995. David is employed as an auto mechanic, and he has annual income of about $29,000.

On December 20, 1994, Ron filed an application to modify the custody provision of the dissolution decree. He claimed Cindy's remarriage and proposed move was a substantial change in circumstances. He also claimed David would be a negative influence on Callie.

At the modification hearing, Ron presented the testimony of David's first wife, Sharyn Fuoss. Sharyn testified David neglected the children and was physically abusive to her. She also stated he owed about $26,000 in child support for their two

children. Ron testified he felt it would be better for Callie to stay in Glenwood where she had friends and where she had the benefit of his extended family.

Cindy testified David earned sufficient money so that she did not plan to work once she moved to Oklahoma City. She stated she believed her remarriage would prove to be beneficial to Callie because she would be able to spend more time at home with her. Cindy testified David felt his failure to pay child support had been a mistake. David did not testify at the hearing because there was an outstanding warrant for his arrest in Iowa due to his failure to pay child support.

The district court denied Ron's application for modification. The court found Callie had lived with Cindy all of her life and it would be in her best interests to continue to do so. The court found Cindy was not moving in an effort to deprive Ron of contact with Callie, but in an effort to improve her life. The court did find visitation should be modified. Ron was given visitation during two months each summer, spring vacation, and one-half of Christmas vacation. The parties were ordered to divide equally the costs of transportation.

Ron has appealed the denial of his application for modification. He concedes Cindy's move to Oklahoma City, itself, it not a substantial change in circumstances sufficient to warrant modification of the dissolution decree. He states the move, together with David's history of being a poor parent, should be a substantial change in

circumstances He also states he can better minister to Callie's needs because he has been a more stable parent and has extended family in the Glenwood area.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

In child custody cases, the governing consideration is the best interest of the child. *In re Marriage of Moore*, 526 N.W.2d 335, 337 (Iowa App. 1994). To change custody set by a dissolution decree, the party seeking modification must establish by a preponderance of the evidence conditions have so materially and substantially changed since the decree the child's best interests make the requested change expedient. *In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa App. 1993). The parent seeking to change custody must prove an ability to minister more effectively to the child's well-being. *Moore*, 526 N.W.2d at 337. This heavy burden comes from the principle once custody has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213-14 (Iowa App. 1994).

We agree with the district court that Ron has failed to show a substantial change in circumstances which warrants a modification of the custody provision of the dissolution decree. Ron agrees Cindy has been able to meet Callie's needs up until this point in time. We agree with the district court that there is no evidence Cindy's ability

to care for Callie has changed. We note that while it may disruptive to Callie, for a period of time, to move to Oklahoma City, it would also be disruptive to change her physical care to Ron

While we are concerned about Sharyn's testimony concerning David, it is apparent the events she related took place at least eleven years before the current proceedings. Cindy testified she believed David had changed and had become a more stable person. David has lived in Oklahoma City for several years and has maintained steady employment as an auto mechanic.

We conclude Ron has failed to show he can minister more effectively to Callie's well-being. We affirm the decision of the district court denying Ron's request for modification.

In the alternative, Ron raises a request that his child support obligation be suspended or reduced during the two months of extended summer visitation. He states that since he will be taking care of all of Callie's needs during this period, it would be reasonable to use the resources directly for her benefit. This issue was not raised before the district court, nor addressed by the court. Since we have no evidence of Cindy's continuing costs during the time Ron has summer visitation, we are unable to address the issue. If Ron seeks to pursue the issue, he may file an application in district court.

Cindy seeks attorney fees for this appeal. We have the discretion to award appellate attorney fees under Iowa Code section 598.36. In addressing a party's request

for appellate attorney fees, we consider the party's needs, the ability of the other party to pay, and whether the party was obligated to defend the trial court's decision on appeal. *In re Marriage of Krone*, 530 N W 2d 468, 472 (Iowa App. 1995). We conclude Ron should pay $1000 for Cindy's attorney fees for this appeal.

We affirm the decision of the district court denying Ron's request for modification of the custody provision of the parties' dissolution decree. Costs of this appeal are assessed to Ron.

AFFIRMED.

Cady, J., concurs; Sackett, P.J., dissents.

SACKETT, J. (dissenting)

I dissent.

I would modify the custodial care arrangement. In Ronald's care, Callie will remain in the place, with extended family, where she grew up. I recognize Cindy has been an important person in Callie's life. Circumstances here changed. I do not see Cindy's decision to remarry a man who was a poor father to his own children and who could not appear in the Iowa court because there was an outstanding warrant for his arrest for failure to pay child support a decision for Callie's best interest. Cindy contends, in this new marriage, she will not have to work outside the home but will stay home and give more time to Callie. I understand that, too, means her new husband will be supporting Cindy and Callie and not make things right with her new family. If there is a warrant for this man's arrest in Iowa, he could well be arrested in Oklahoma. Cindy is carelessly embarking on a new adventure in a new state. A man who cannot even appear in the Iowa courts will have a substantial influence on Callie's upbringing. The modification Ronald sought should have been ordered.