

**IN THE COURT OF APPEALS OF IOWA**

No. 6-721 / 06-0427  
Filed November 30, 2006

**IN RE THE MARRIAGE OF KATHY ELAINE  
BLACKFORD AND KIRK STEVEN BLACKFORD**

**Upon the Petition of  
KATHY ELAINE BLACKFORD,**  
Petitioner-Appellee,

**And Concerning  
KIRK STEVEN BLACKFORD,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Mahaska County, E. Richard Meadows, Judge.

Father appeals from the denial of his application to modify physical care of the parties' children. **AFFIRMED.**

Cathleen J. Siebrecht of Siebrecht & Siebrecht Law Firm, Des Moines, for appellant.

Richard J. Hanson of Heslinga, Heslinga, Dixon, Moore & Hanson, Oskaloosa, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**ZIMMER, J.**

Kirk Blackford appeals following the district court's denial of his application to modify the physical care of the parties' children. We affirm the district court.

The marriage of Kirk and Kathy Blackford was dissolved in 1994. The stipulated decree granted the parties joint legal custody of their two children: Chance, born in 1991, and Shane, born in 1994. The decree placed the children's physical care with Kathy.

Following the dissolution, Kirk served two prison sentences. He was incarcerated from 1995 to 1997 for theft by deception, and from 1998 to 2000 for forgery.<sup>1</sup> Kirk also had two additional children with two different women. He does not see or pay support for either child. He married his current wife, Colleen, in 2001.<sup>2</sup> As he did during his marriage to Kathy, Kirk relies on Colleen for financial support.

Kathy met Allynn Mundell in 1996 and began a live-in relationship with him. Allynn used marijuana in front of Chance and Shane, did not get along well with the children, and was abusive. Allynn and Kathy's daughter Katelynn was born in 2003. The couple separated in September 2004, but Kathy continued to pursue a relationship with Allynn until September 2005.

In December 2004 Chance, Shane, and Katelynn were adjudicated as children in need of assistance (CINA) pursuant to Iowa Code section 232.2(6)(c)(2) (2003) (children likely to suffer harm as a result of parent's failure

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<sup>1</sup> Kirk also served two years in prison, from 1987 to 1989, before he married Kathy.

<sup>2</sup> Colleen has two adult children from a prior marriage. She and Kirk do not have any children together.

to exercise care in supervising children). The adjudication was primarily the result of Allynn's presence in Kathy's home. Allynn used marijuana around the children. He also shoved the children and shut a door on one of the boys, which resulted in injury.

In a dispositional order filed in February 2005, the juvenile court ordered that Kathy would retain legal custody of the children subject to the supervision of the Iowa Department of Human Services (DHS). The order was based in large part on a DHS report which opined that it was "okay" for the children to remain in Kathy's care since Allynn was no longer living in her home.

In March 2005 Kirk filed an application to modify in district court, requesting that the children's physical placement be changed. The juvenile court granted the district court concurrent jurisdiction to consider the application.

In May 2005, while the application to modify was still pending, the juvenile court granted a motion for change of disposition in the CINA matter. The motion was made by the children's guardian ad litem, who recommended a change in placement because the children disliked Allynn and wished to live with Kirk, and because Kathy had difficulty controlling the children. Kathy agreed to the change in placement with some reluctance, believing it was in the children's best interests. The parties agreed the children would not begin living with Kirk until June 2005 so they could finish out the school year.

The children remained in Kirk's care until November 2005, when the juvenile court granted the guardian ad litem's request to terminate the court's jurisdiction. The juvenile court apparently believed physical care had already

been modified by the district court. The order terminating jurisdiction released the children from the supervision of the juvenile court and made the issue of physical care subject to the parties' as yet unmodified decree. As a result, physical care was effectively returned to Kathy.

In January 2006, upon learning the modification proceedings had not been resolved, the juvenile court rescinded the order terminating its jurisdiction. The children were accordingly returned to Kirk's care. In light of a DHS report that found both parents could provide a safe home for the children, the CINA proceedings were to be dismissed once the modification proceeding was concluded.

Kirk's modification application came on for hearing in January and February 2006. In a detailed and thoughtful opinion, the district court considered the parties' respective backgrounds; the CINA proceedings; the guardian ad litem's recent recommendation; the parties' credibility, parenting abilities, and strengths and weaknesses; and the children's adjustment and preferences. The court concluded that, based on the facts presented, Kirk had not shown he is the superior parent. It accordingly denied his petition to modify the children's physical care, but ordered that visitation be modified "to increase Kirk's meaningful parenting contacts."

Kirk appeals. He contends he demonstrated a change in physical placement was warranted. Our review of this matter is de novo. Iowa R. App. P. 6.4. Although not bound by the district court's fact findings, we give them weight, especially when assessing witness credibility. Iowa R. App. P. 6.14(6)(g).

As the party seeking modification, Kirk bears a heavy burden. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). He must establish a substantial change in circumstances has occurred that was not within the contemplation of the district court when the decree was entered. See *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). He must also show he is the parent who can more effectively minister to the children's well-being. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). The overriding consideration is always the children's best interests. Iowa R. App. P. 14(6)(o).

Even if we assume, as Kirk asserts, that the CINA proceeding constituted a substantial change in circumstances, he has failed to establish he would more effectively minister to the children's needs. Kirk's primary complaint about Kathy's parenting abilities relates to the CINA proceeding and her relationship with Allynn. However, Kathy testified that she ended her relationship with Allynn in September 2005. She realizes the relationship was a mistake and has no plans to pursue it. The district court found Kathy credible, and we give weight to this assessment.

As the district court noted, both DHS and the guardian ad litem concluded that either Kathy or Kirk would prove a suitable caretaker for the children. Significant to the district court's decision to deny a change in placement was evidence that it was Colleen who was the stabilizing and disciplinary influence in Kirk's household, that Kirk was not an involved parent when the boys were in his care, and that he failed to support both Kathy's and Colleen's parenting decisions. The court also took note of Kirk's relatively recent history of drug

use,<sup>3</sup> his temperamental outbursts that led Colleen to obtain a protective order or orders, his two prior suicide threats, and his failure to support his children.

We also agree with the court's findings that Kathy is an involved, reliable, and stable parent who has supported the children's relationship with Kirk and, with the exception of her relationship with Allynn, she has consistently provided the children with material and emotional support. While we recognize Kathy has had and continues to have difficulty in disciplining the children, so has Kirk. Moreover, we agree with the district court that Kathy is the parent more likely to follow through with family counseling and to address the need to improve her disciplinary skills.

Kirk emphasizes the children's stated preferences to live with him. However, these preferences are entitled to less weight in a modification proceeding than in an original action, *Thielges*, 623 N.W.2d at 239, and are dependent upon several factors, including the children's ages and education levels, and the strength of and reason for the preference, *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985). The district court carefully considered the boys' preferences and found them an insufficient basis upon which to change physical placement. In light of the relevant circumstances, including the fact the preferences seem to be driven largely by the children's dislike of Allynn and their partiality to Kirk's non-assertive parenting style, we must agree with the district court.

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<sup>3</sup> Kathy also has a history of drug use, but the record credibly indicates she has not used drugs since 1997.

After reviewing the totality of circumstances shown by the record in this case, and giving due weight to the district court's fact findings and credibility assessments, we conclude Kirk has failed to establish that he can more effectively minister to the children's needs. We accordingly affirm the court's decision to deny his petition to modify physical care.

**AFFIRMED.**