

**IN THE COURT OF APPEALS OF IOWA**

No. 7-905 / 07-0375  
Filed January 30, 2008

**IN RE THE MARRIAGE OF JASON LEON MACE  
AND TRACY LYNN MACE**

**Upon the Petition of  
JASON LEON MACE,**  
Petitioner-Appellant,

**And Concerning  
TRACY LYNN MACE,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Harrison County, Timothy O'Grady,  
Judge.

Jason Mace appeals the district court's denial of his application to modify  
a stipulated joint physical care arrangement. **REVERSED AND REMANDED.**

Ann Long, Missouri Valley, for appellant.

Lloyd Bergantzel, Council Bluffs, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran JJ.

**VAITHESWARAN, J.**

Jason Mace appeals the district court's denial of his application to modify a stipulated joint physical care arrangement.

***I. Background Facts and Proceedings***

Jason and Tracy Mace are the parents of two minor children. In 2005, Jason petitioned for a dissolution of the parties' marriage, based on Tracy's use of methamphetamine. He obtained an order immediately placing the children with him, pending a hearing. One month later, the juvenile court adjudicated the children in need of assistance and ordered continuing placement with Jason.

Tracy began participating in services designed to address her drug addiction. She and Jason subsequently implemented a joint physical care arrangement. Based on Tracy's successes and the recommendations of service providers, the juvenile court essentially ratified the de facto joint physical care arrangement; while the court left care, custody, and control of the children with Jason, Tracy was afforded visitation of up to a half a week at a time. The court also granted the district court concurrent jurisdiction over custody, visitation, and support issues. The district court, in turn, approved the parties' stipulation to joint legal custody and joint physical care of the children.

Days later, methamphetamine was again found in Tracy's system. As a result, the juvenile court, which had not closed the child-in-need-of-assistance action, placed the children with Jason and restricted Tracy to supervised visitation.

Jason petitioned to modify the district court's custody order based on Tracy's recent methamphetamine use and association with "known drug users."

Following a modification hearing, the district court concluded Jason had not demonstrated a substantial change in circumstances warranting modification of the decree. Jason appealed.

## **II. Analysis**

The custodial provisions of a dissolution decree should be modified “if it has been established that conditions since the decree have so materially and substantially changed that the children’s best interests make it expedient to make the requested change.” *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005). The change must be more or less permanent, must relate to the welfare of the children, and must not have been contemplated by the court when the decree was entered. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other parent must also show the ability to render superior care. *Melchiori v. Kooi*, 644 N.W.2d 365, 368-69 (Iowa Ct. App. 2002).

Jason cites several factors in support of his contention that these standards were satisfied. We need address only one: Tracy’s drug use.

### **A. Substantial and More or Less Permanent Change of Circumstances**

When the stipulated custody order was entered, tests showed Tracy had been drug-free for approximately one year. Shortly thereafter, methamphetamine was detected in her system. This was not an isolated relapse. Tracy again tested positive a few months later and, in addition, several drug screens appeared to have been tampered with. We conclude Tracy’s renewed drug use after the stipulated custody order was entered amounted to an essentially permanent and substantial change of circumstances.

**B. Not Contemplated**

Turning to the question of whether Tracy's drug use was contemplated when the custody order was entered, the district court correctly found that Jason knew of her past drug use. We also have no reason to disagree with Tracy's assertion that, with any addiction, a relapse is a possibility. However, these facts do not mandate a conclusion that Tracy's return to drug use was contemplated by Jason. As noted, Tracy had been drug-free for a year before the custody order was entered. When Jason agreed to a joint physical care arrangement he believed Tracy "was going to be off drugs." We are not convinced Jason should have contemplated her relapse days later and her continued drug usage for months thereafter.

**C. Children's Welfare**

The next question is whether Tracy's drug use related to the welfare of the children. *Frederici*, 338 N.W.2d at 158. Tracy used methamphetamine after the children were removed from her care for a second time and a month before she became pregnant with a third child. At the modification hearing, she minimized the effect of her drug use, stating she did not believe it had a negative impact on her parenting. While there is no question Tracy loves her children, we conclude her continued use of methamphetamine evinces a disregard for the children's welfare.

**D. Superior Caretaker**

As noted, Jason also had to show he was the superior caretaker. *Melchiori*, 644 N.W.2d at 368. We believe he made this showing. Although he used marijuana and methamphetamine years earlier, he made concerted efforts

to change his lifestyle. He underwent random drug-testing by his employer and testified that it was not worth sacrificing his job for drugs. Additionally, he passed a drug test administered by the Department of Human Services. He testified “I have a very strong belief, if you set strong enough goals and want something more in life for yourself, it’s very easy.”

Jason was also actively involved in the children’s education. He attended an open house and parent/teacher conferences at the Head Start program in which both children had been enrolled and he received a certificate for volunteering in the classroom. Tracy, in contrast, was not actively involved in the children’s education.

Despite Tracy’s drug use, Jason additionally expressed a desire to foster a relationship between Tracy and the children. He testified “they need their mother in their life.” While noting concerns that her drug use and the drug use of her companion jeopardized the children’s safety, he hoped random drug-testing of both would help protect the children during visits with Tracy.

Finally, several professionals testified it was in the children’s best interests to place physical care with Jason. A court-appointed special advocate pointed to the negative impact of Tracy’s association with a drug-user. A Department social worker cited Tracy’s past drug use and the people she associated with. A child welfare worker noted Tracy’s questionable sobriety, her relationship with a drug user and her unstable employment. While these recommendations are not binding, they may be given weight. *In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa 1993).

We conclude Jason established he was the superior caretaker.

**III. Disposition**

Jason should have been granted physical care of the children.<sup>1</sup> We reverse the modification ruling and remand for further proceedings consistent with this opinion.

We deny Tracy's request for appellate attorney fees, as she did not prevail on appeal.

**REVERSED AND REMANDED.**

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<sup>1</sup> Jason did not seek a modification of the joint custody provision. Because he did not request it, we do not modify the order to afford him sole custody of the children.