

IN THE COURT OF APPEALS OF IOWA

No. 9-282 / 08-1409

Filed May 29, 2009

**IN RE THE MARRIAGE OF TERRY LEE FOGLE
AND NINA MAE FOGLE**

**Upon the Petition of
TERRY LEE FOGLE,**
Petitioner-Appellant,

**And Concerning
NINA MAE FOGLE,**
Respondent-Appellee.

Appeal from the Iowa District Court for Keokuk County, Dan F. Morrison,
Judge.

The petitioner appeals from the district court's order denying his petition to
modify the child custody provision of the parties' dissolution decree. **AFFIRMED.**

Barry Kaplan and Melissa A. Nine of Kaplan, Frese & Nine, L.L.P.,
Marshalltown, for appellant.

Jeffrey Smith, Oskaloosa, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Terry Fogle appeals from the district court's order denying his application to modify physical care of his and Nina Fogle's two young children. In January 2007, after the parties reached a stipulation, a dissolution of marriage decree was entered, granting Nina physical care of the parties' children, born in 2001 and 2003. Terry was granted liberal visitation, which equated to a near fifty-fifty split of the care of the children. In April 2007, Terry filed an application to modify requesting physical care of the parties' children. Subsequently, in December 2007, Nina moved approximately twenty miles away, without consulting Terry and aware of the difficulty this would present for Terry to maintain the same level of contact with the children. In August 2008, following a hearing, the district court denied Terry's request to modify physical care, finding there was not a material and permanent change in circumstances since the entry of the dissolution decree.

We review modification proceedings de novo, but give weight to the district court's fact findings and deference to its credibility findings. Iowa R. App. P. 6.4; *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

Terry's primary concerns for the children are their exposure to Nina's live-in boyfriend, Jason, and the ongoing domestic disputes in the home. Although Nina denies any physical violence she suffered at the hand of Jason, the district court clearly did not believe her. However, there was no indication the children witnessed any domestic abuse or suffered physical abuse.

Terry has very legitimate concerns for the questionable environment to which Nina has exposed the children. Nonetheless, for the most part, the same

concerns existed prior to the dissolution of marriage. Nina was in a “dysfunctional relationship” with Jason prior to the original decree. Terry’s own testimony could provide no concrete proof the situation had deteriorated or presented a greater risk to the children when the modification came on for trial, one and one-half years after the stipulated dissolution decree. As Terry testified, “Well, it doesn’t get any better.” Having heard the complaints of a few specific incidences, the district court found:

Jason Tomas is not a positive influence on the parties’ children He currently has a pending OWI and it’s this court’s belief that he is physically violent with Nina, although she denies any domestic abuse. There is no credible evidence in the record that the children have witnessed domestic violence. ***Witnessing of domestic violence in this court’s opinion, could be grounds for a custody change.***

(Emphasis added.)

While there is ample room for concern regarding the home environment Nina is subjecting the children to, we agree with the district court that Terry was not able to carry his burden of proof, which would support a change of physical care. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (discussing that the parent requesting the modification must establish by a preponderance of the evidence that conditions since the original decree was entered have so materially and substantially changed that it is in the children’s best interests to change custody). Furthermore, as the district court noted, “there is virtually no record regarding Terry’s current situation.” *Id.* (discussing that in addition to a material and substantial change in circumstances, a parent seeking a change in custody must prove an ability to render superior care). As such, we affirm the district court’s denial of a change of physical care of the children.

AFFIRMED.

Sackett, C.J. dissents.

SACKETT, C.J. (dissenting)

I dissent and would modify the decree to place primary physical care of the parties' children with Terry.

The majority finds that there is no substantial change in circumstances because concerns about Nina's dysfunctional relationship with her current boyfriend existed at the time of the original dissolution. From my review of the record, the relationship is not merely dysfunctional, but has escalated to one of ongoing physical abuse.

When a parent establishes a home with another adult, that adult's background and his or her relationship with the children becomes a significant factor in a custody dispute. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004); *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). It is relevant, (1) because the companion will play a role in the children's lives, and (2) the type of relationship the parent establishes and the manner he or she established it is an indication of that parent's priority for his or her children. *Malloy*, 687 N.W.2d at 113; *Decker*, 666 N.W.2d at 179. In my view, Nina's companion's abusive nature has a negative impact on the children that will be damaging to them long-term and exposes them to the risk of being subject to his abuse.