

IN THE COURT OF APPEALS OF IOWA

No. 7-523 / 07-0966

Filed August 8, 2007

IN THE INTEREST OF D.W., Minor Child,

A.W.P., Father,
Appellant.

Appeal from the Iowa District Court for Fayette County, Alan D. Allbee,
Associate Juvenile Judge.

A father appeals from the juvenile court's order in a child in need of
assistance case. **AFFIRMED.**

John W. Hofmeyer III, Oelwein, for appellant-father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, W. Wayne Saur, County Attorney, and Nathan Lein, Assistant County
Attorney, for appellee.

Richard Buffington, Oelwein, for mother.

John Sullivan, Oelwein, guardian ad litem for minor child.

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

EISENHAUER, J.

A father appeals from the juvenile court's order in a child in need of assistance (CINA) case. He contends the court erred in refusing his request to modify a dispositional order by placing the child in his custody. We review his claim de novo. *In re C.H.*, 652 N.W.2d 144, 147 (Iowa 2002).

The child, born in January 2006, was adjudicated in need of assistance in September 2006. The child had been voluntarily placed by his mother in the custody of the Department of Human Services (DHS) in June 2006. After the adjudication, the child was placed with the mother on the condition she participate in a residential parenting program. The mother was discharged from the program in March 2007 and the child was returned to the DHS for foster care.

Paternity of the child was initially in doubt, but A.P. was later determined to be the child's father. After the CINA adjudication, he sought and received visitation. The child suffers from life-threatening respiratory problems that prohibit him from being around cigarette smoke or even second-hand smoke on clothing or other material. In April 2007, the DHS investigated allegations that the child had been exposed to smoke during visitations with the father.

On May 18, 2007, a hearing was held to consider the father's motion to modify the last dispositional order and place the child with him. In its May 23, 2007 order, the court found, "Placement of the child in family foster care continues to be necessary because the child cannot be protected from a smoking environment which causes him respiratory problems that could be life-threatening." Custody of the child was ordered continued with the DHS.

The father appeals, arguing the court's order is not supported by the evidence. The modification of a dispositional order is provided for in Iowa Code section 232.103 (1995). A party seeking a modification of a prior dispositional order must show the circumstances have so materially and substantially changed that a modification is in the best interest of the child. *In re D.S.*, 563 N.W.2d 12, 14 (Iowa Ct. App. 1997). Our primary concern in a proceeding of this nature is the best interests of the children. *Id.* We consider the children's long-range as well as immediate interests. *Id.* The parents' past performance provides insight into this determination. *Id.* Part of our focus may be on parental change, but the overwhelming bulk of the focus is on the children and their needs. *Id.* at 15.

We conclude the father failed to show a substantial change in circumstances to justify modifying the dispositional order to grant him custody of the child. He did not show significant interest in his son until March 2007. He has failed to be vigilant in protecting the child from exposure to cigarette smoke, which could be dire for the child. The trial court found the father to be capable of safely raising his son if smoking was not an issue and we agree. In the trial court's words: "[H]e must choose his son over his smoking habit."

The father argues Iowa Code section 232.102(5) should apply to this situation as the child was not removed from his care as a result of his conduct and therefore has done nothing to forfeit his custodial rights. However, as the noncustodial parent, this section does not apply to him. See *In re D.L.*, 460 N.W.2d 343, 345-46 (Iowa 1991) (holding a noncustodial parent stands as just another relative under section 232.102. We affirm the juvenile court order.

AFFIRMED.