**IN THE COURT OF APPEALS OF IOWA**

No. 7-182 / 96-1645

**IN RE THE MARRIAGE OF SHELLY ANN OLSON AND NEIL RICHARD OLSON**

000349

Upon the Petition of
**SHELLY ANN OLSON,**

Petitioner-Appellant,

And Concerning
**NEIL RICHARD OLSON,**

Respondent-Appellee.

FILED
JUN 26 1997
CLERK SUPREME COURT

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Appeal from the Iowa District Court for Boone County, Newt J. Draheim, Senior Judge.

Petitioner appeals the district court's order granting respondent's petition to modify custody of the parties' minor child.. **AFFIRMED.**

Loren A. Nalean of Nalean & Nalean, Boone, for appellant.

Dorothy L. Dakin of Dakin Law Office, Boone, for appellee.

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

**SACKETT, P.J.**

This is an appeal from a trial court decision modifying a 1993 dissolution decree to award physical care of Allison, born in 1983, and DaNeil, born in 1987, to appellee Neil Olson. The children's physical care originally was placed with appellant Shelly Ann Olson. We affirm.

Shelly has raised thirteen issues on appeal, all challenging the trial court's finding and its decision on modification and placement. Shelly specifically contends the trial court was not correct when it found she had not and does not adequately care for the children; that the stability of Neil's household increased after his remarriage; that there is increased turbulence in her home; that she and her current husband frequently consumed intoxicating beverages; and that the children's relationship with their stepfather is strained. She also contends the trial court incorrectly found she did not want Allison in her home. She advances Neil has failed to show a substantial change in circumstances and that his home is where the children are most likely to thrive.

The parent seeking to modify the physical care has the burden to establish that conditions since the last decree or modification was entered have materially and substantially changed and the person seeking physical care has the burden of showing he or she will render superior care. *In re Marriage of Spears*, 529 N.W.2d 299, 310 (Iowa App. 1994). This burden stems from the principle that once custody of a child

has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. *Id.; see also In re Marriage of Gravatt*, 371 N.W.2d 836, 838-40 (Iowa App. 1985).

The central issue of all of Shelly's allegations is whether Neil has met his burden of showing both (1) there has been a substantial change of circumstances, and (2) he is the superior custodian.

Our review is de novo. *Hobson v. Hobson*, 248 N.W.2d 137, 139 (Iowa 1976). We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

After the dissolution, Shelly moved to an apartment complex and Neil stayed in the home the family had lived in during the marriage. The children spent time with both parents and had a good relationship with each. Neil's work schedule allowed more flexibility than Shelly's, and at times he would sleep in her apartment when she was gone to care for the children or he would drive to her apartment to pick up the

children and take them to school. There is some question, with Neil's substantial involvement in the children's care, whether he may not have been the parent who actually had physical care.

Neil did not pay ordered child support or maintain medical insurance as required in the decree. There is evidence he gave Shelly money for the children and paid for a number of the things they needed. Ultimately, Shelly obtained an order garnishing his wages. Shelly contends Neil's decision to confide in Allison about this fact was the participating factor in the deterioration of her relationship with Allison. We do not agree. Shelly's problems with Allison had been serious and surfaced when Shelly's new husband entered the picture.

In the fall of 1995, Allison consulted with the counselor at her elementary school about the problems she had with her mother. She reported she and her mother argued and her mother made derogatory remarks about her father, including the vocalization of her wish when Neil had surgery that the knife would slip and kill him. Allison also told the counselor she wanted to live with her father and spent the majority of her time with him. Allison talked of problems with her stepfather, who her mother began cohabitating with in the late summer of 1995 and married in January 1996. The counselor testified at trial and was of the opinion Allison should live with her father.

Allison manifested the same wishes to be with her father to a neighbor; and in 1995, as a part of a school project, she wrote a letter to a district court judge[1] asking what she should do to live with her father.

In June 1996, while the modification action was pending, Shelly told Allison to pack her bags, go live with her father, and never come back. She called Neil to pick her up, which he did. Allison has lived with her father since the incident and has spent little time with her mother.

The trial court visited with the children with the parents absent from the courtroom. Allison told of her mother slapping her and pushing her against a dresser. Allison is a good student and according to school personnel has good friends. DaNeil lacks self-confidence but has a close relationship with Allison.

We have reviewed the findings made by the trial court. We agree with these findings. There are problems in Shelly's home. She and her current husband have used alcohol to excess on many occasions. Shelly is totally unable to communicate with Allison. Neither of the girls have a satisfactory relationship with their stepfather. The school counselor recommends Allison's custody be changed to her father. Neil has assumed substantial care of the children since the dissolution. There is no valid reason to separate these siblings.

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[1] The district court judge receiving her correspondence was not the judge deciding the case.

Neil has met the high burden necessary to modify a physical care award. We affirm the trial court.

**AFFIRMED.**