FILED
MAY 20 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MERRILL LUTHER JOHNSON and JANICE FRANCES JOHNSON

UPON THE PETITION OF)
MERRILL LUTHER JOHNSON,) Filed May 20, 1977
Appellant,)
and Concerning)
JANICE FRANCES JOHNSON,) 138 / 3-59953
Appellee.)

Appeal from the Mills District Court - E. F. Hanson, Judge.

Petitioner father appeals denial of his application for a modification of custody provisions of a dissolution decree. Affirmed.

John D. Sens, Johnson, Stuart, Tinley, Peters & Thorp, of Council Bluffs, for Appellant.

Peter J. Peters, Peters, Campbell, & Pearson, P.C., of Council Bluffs, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

Petitioner Merrill Luther Johnson appeals the denial of his application for a modification to grant him full custody of his son Eric, age 14. The original dissolution decree of January 9, 1975 awarded respondent Janice Frances Johnson custody of Eric during the school term months and Merrill custody during the summer months.

Merrill grounds his application for modification upon an asserted change of circumstances: 1) Janice's sale of the family residence in Pacific Junction, 2) the resulting move to a duplex in Glenwood, 3) the change of schools for Eric necessitated by the move, and 4) the preference of Eric to live with Merrill.

The power of the court to modify exists only where there has been a material and substantial change in circumstances since the date of the original decree. Leo v. Leo, 213 N.W. 2d 495, 496 (Iowa 1973). In *Leo* the court was concerned with a twelve-year-old boy's continuing desire to live with his father and the trial court's original award of custody to the mother and subsequent refusal of modification of that award.

Eric expressed a desire to live with his father in the hearing prior to the original decree. A. 3. The tenacity of that desire cannot support a change of custody alone. *Leo*, 213 N.W.2d at 497. There was no showing of a deterioration of the relationship between Janice and Eric such as supported a modification in Woodward v. Woodward, 228 N.W.2d 74, 76 (Iowa 1975). No remarriage with an attendant disquieting and strained effect upon Eric has occurred, such as supported a change of custody in In Re Marriage of Junkins, 240 N.W.2d 667, 668 (Iowa 1976).

Eric is receiving proper care and supervision from Janice, his custodial home may be changed only upon a showing of the most cogent of reasons. Jones v. Jones, 175 N.W.2d 389,

391 (Iowa 1970). His desire to live with his father is entitled to less weight in this proceeding to change custody than in the original hearing. In re Marriage of Junkins, 240 N.W.2d 667, 668 (Iowa 1976).

Therefore, the only real basis for modification is the move from the small community to the larger town and the attendant change in schools and life style. *Woodward* specifically noted change in life style, standing alone, would not justify change of custody. 228 N.W.2d at 76. We view *Woodward* as dispositive.

We also recognize that Merrill's failure to pay his mortgage obligations under the original decree at least in part precipitated the move to the duplex. I would be troubling indeed to allow the default of the non-custodial parent to work a change in circumstances in the custodial home, which could thereafter serve to support a change in custody.

Merrill has been allowed by Janice full enjoyment of his custodial rights under the decree. He, because of his occupational mobility, could, and has often, visited Eric during the school term. Janice filed for a contempt order and the return of Eric to her home within two days of her realization of Merrill's intent to enroll Eric in the Kansas school. A. 6.

The trial court has twice observed the parties and has twice concluded the appropriate custodial decision gives Janice school term custody and Merrill summer vacation custody. According the proper weight to the trial court's superior position to observe the conduct of all witnesses including the parties, *Junkins*, 240 N.W.2d at 668, we affirm.

AFFIRMED.