

## IN THE COURT OF APPEALS OF IOWA

No. 2-310 / 91-1897

IN RE THE MARRIAGE OF WILLIAM L. AUERBACH AND  
CHARLOTTE M. AUERBACH

FILED

SEP 29 1992

CLERK SUPREME COURT

Upon the Petition of

WILLIAM L. AUERBACH,

Appellant,

And Concerning

CHARLOTTE M. AUERBACH,

Appellee.

---

Appeal from the Iowa District Court for Cass County,  
Glenn M. McGee, Judge.

The husband appeals the district court decision sustaining the wife's motion for a directed verdict and dismissing his petition for modification of a dissolution decree. **AFFIRMED AS MODIFIED.**

Donald L. Carr II of Scalise, Scism, Sandre, McConville, Miller, Holliday, Schwarz, Carr & Renzo, Des Moines, for appellant.

Joanne C. Lorence and James P. Barry of Otto, Lorence & Barry, Atlantic, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab,  
JJ.

**OXBERGER, C.J.**

The marriage of William, ("Bill"), and Charlotte Auerbach was dissolved on January 5, 1987. The decree provided that the parties would have joint custody of the parties' children, Cheri, born July 5, 1977, and Joe, born September 4, 1979. Charlotte received physical custody of the children.

At the time of entry of the dissolution decree, both Bill and Charlotte lived in or near Atlantic, Iowa. The decree specifically provided for visitation and child support in the event Charlotte moved from Iowa, including requiring the children to reside with Bill during the summers, including Memorial Day and Labor Day, and abatement of child support payments during the summer arrangements. The stipulation and decree were prepared by Bill's attorney. Charlotte did not have an attorney at the time of the decree.

In December 1990, Charlotte informed Bill of her desire to move to Missouri. Bill opposed the move and on July 19, 1991, he filed a petition for modification of the decree of dissolution, including a request for physical custody and child support. Bill alleged there had been a substantial change in circumstances in that Charlotte had sold her home, quit her job and moved to Missouri with no prospects of employment or place to live. Charlotte filed an answer admitting that there had been a substantial change in circumstances with regard to the move and her sale of the home.

A hearing was held on the petition to modify the dissolution decree. Bill presented evidence that the children did not want to move to Missouri, would rather live with their father and alleged it would be in their best interests to remain in Iowa with their father.

Following Bill's presentation of evidence Charlotte moved for a directed verdict. She argued that Bill failed to show there had been a substantial change in circumstances that was not contemplated by the parties at the time of the original dissolution decree. Bill responded that there was substantial evidence that a move outside of Iowa was not contemplated. In addition, Bill argued that he had been deprived of meaningful contact with his children, thereby resulting in a substantial change in circumstances.

On December 6, 1991, the district court sustained Charlotte's motion for a directed verdict. The court found the move had been contemplated at the time the original decree was issued. The district court reserved ruling on child support and taxation of costs. On December 9, 1991, Bill filed this appeal.

On December 23, 1991, the district court issued its order and judgment. Again, the district court found that Charlotte's move to Missouri was contemplated by the parties. The district court found Bill's net monthly income to be \$1,827 and Charlotte's was to be \$826. Based upon the guidelines, the district court determined that

Bill should pay \$573 monthly child support. In addition, the district court ordered Bill to pay \$2,000 towards Charlotte's attorney fees.

Charlotte has asked the court to award her attorney fees on appeal.

#### I. Scope of Review

Our review in this matter is de novo. Iowa R. App.

P. 4.

#### II. Child Custody

A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim.

#### Id.

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

Both parties agree Charlotte's move to Missouri constituted a substantial change. However, Bill Auerbach failed to prove this changed circumstance was not contemplated by the court at the time the decree was issued. It is clear from the dissolution decree the possibility of Charlotte moving from Iowa was contemplated. This is evidenced by the specific order stating,

In the event the Respondent (Charlotte) shall move from the State of Iowa the minor children of the parties shall ...spend their summer school visitation with the Petitioner. During such time the Petitioner's [Bill's] responsibility for child support, as above described, shall abate. In addition, and included in said summer visitation, shall be the holidays of Memorial Day and Labor Day.

This order prospectively addresses the issue of a future move by Charlotte. The fact that the order specifically addresses both summer visitation and child support is further evidence the court contemplated a future move by Charlotte.

The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Frederici, 338 N.W.2d at 158. Bill cites several factors he feels are determinative in his gaining custody. He claims the children want to stay with him in Iowa. He also cites Charlotte's attempts to block

his visitation. A third factor he makes reference to is Charlotte's financial situation.

While a child's preference in a custody action is relevant, it is accorded less weight in a modification than in an original dissolution. In re Marriage of Ellerbroek, 377 N.W.2d 257, 258-59 (Iowa App. 1985). While the evidence presented indicates the children demonstrate some preference for living with their father, we note this preference did not materialize until Charlotte initiated the move to Missouri. We do not find this preference of significant strength, coupled with the other factors considered when considering the preferences of children, to modify custody.

Next, we consider Bill's claim of Charlotte's attempts to block visitation. The original decree provides for visitation, should Charlotte move from Iowa, as follows: . . . "the minor children of the parties shall, in addition to such other visitation that can be arranged, spend their summer school vacationer with the Petitioner . . . and included in said summer vacation, shall be the holidays of Memorial Day and Labor Day." Charlotte has not denied Bill summer visitation. The record clearly reflects difficulty arranging visitation during the fall of 1991, following Charlotte's move to Missouri and during the pendency of this action. The evidence shows some reluctance on Charlotte's part to directly communicate with Bill, particularly without consulting with her lawyer during this

brief time. There is no evidence of difficulty arranging visitation prior to this action. In addition, Charlotte's family members were visiting several of the weekends Bill requested visitation. The one weekend she initially denied visitation, she quickly changed her mind and would have allowed had Bill not made other plans in the meantime. While we remind Charlotte of the importance of and legal requirement for "maximum continuing physical and emotional contact with both parents," we do not find significant merit in Bill's claim.

Bill also claims he is financially better able to care for the children than Charlotte. Financial conditions of the parties is generally not a significant consideration in awarding custody. See Iowa Code § 598.41. We find this argument without merit for custody purposes, although we do consider such factors when determining child support.

The evidence clearly shows the move was within the court's contemplation at the time of the original decree. We do not find Bill's claims sufficient to warrant a change in custody. In addition, Bill's ability to minister to the children in a superior fashion has not been established. We affirm the District Court's denial of the custody modification petition.

### III. Modification of Child Support

Bill appeals the court's modification of the child support award. He contends Charlotte did not counterclaim for an increase nor present evidence regarding a

substantial change in circumstances warranting the modification. He further contends the amount awarded is excessive.

First, we must address whether the trial court had jurisdiction to modify the child support award. Charlotte did not cross-petition for support modification nor did she allege a substantial change in circumstances justifying the modification. She did include a modification request in her prayer clause and both parties submitted financial affidavits. Evidence regarding the parties respective financial situations was presented at trial without general objection. However, there is no evidence to indicate that the parties were litigating any issues beyond Bill's request for child support pursuant to his petition for physical custody. The record does not indicate Bill was properly notified or aware of a request for increased support by Charlotte. We do not find sufficient information in the record to find Bill had ample notice and opportunity to litigate an increase in child support. Accordingly, we vacate the trial court's increase in child support and reinstate the amount awarded in the original decree.

Since we do not find the issue of modification of Charlotte's support award properly before the trial court, we do not address whether there had been a substantial change in circumstances.

#### IV. Attorney Fees

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). See also Iowa Code § 598.36 (1991). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

In addition, an award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Charlotte was required to defend this action at the trial court and on appeal. Bill testified to his superior financial stability. We affirm the trial court's award of attorney fees to Charlotte. We further award Charlotte \$500.00 for attorney fees on appeal.

**AFFIRMED AS MODIFIED.**