

IN THE COURT OF APPEALS OF IOWA

No. 6-992 / 06-1253
Filed December 28, 2006

CHANTELL LENORE NUTTER,
Petitioner-Appellee,

vs.

KENTON WILLIS KIRK,
Respondent-Appellant.

Appeal from the Iowa District Court for Marshall County, William J. Pattinson, Judge.

Kenton Kirk appeals following the district court's refusal to modify a custody order to give him shared physical care or additional visitation.

AFFIRMED.

Barry S. Kaplan of Kaplan & Freese, L.L.P., Marshalltown, for appellant.

Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C.,
Marshalltown, for appellee.

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

SACKETT, C.J.

Kenton Kirk appeals following the district court's refusal to modify a custody order to give him shared physical care or additional visitation. We affirm.

Kenton and Chantell Nutter are the parents of a son born in November of 1998. The parties cohabited for a period and separated. In July of 2004 the district court, following a contested hearing, awarded the parties joint legal custody of the child, named Chantell as the child's primary physical caretaker, and provided that Kenton could have visitation "as agreed by the parties." In the absence of an agreement Kenton was given specific visitation. The parties again cohabited and then separated. Kenton filed this application for modification in December of 2004. The matter came on for trial in June of 2006. Kenton asked for joint physical care or additional visitation that would allow him to spend forty percent of the time with the child. The district court found circumstances had not changed since the original decree, and Kenton had failed to show he could render superior care. The court denied Kenton joint physical care and additional visitation and refused to modify the decree.

To change the custodial provision Kenton must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially changed that his son's welfare supports the requested change. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). 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. *Id.* Kenton must prove an ability to minister more effectively to his son's well-being. *See id.* The heavy burden upon a party seeking to modify

custody 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 Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The burden to modify visitation requires a less extensive change of circumstances. *Donovan v. Donovan*, 212 N.W.2d 451, 453 (Iowa 1973); *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985).

Kenton contends this is an original custody determination because he, Chantell, and their son resided together following the initial custody order. He argues the earlier order is moot and the court should treat this as an original custody dispute. He cites no authority in support of this proposition. We find no basis to treat this as an initial custody determination and do not do so.

Kenton did not introduce evidence to meet the substantial burden. We affirm the trial court's refusal to modify the decree to award joint physical care or additional visitation to Kenton.

AFFIRMED.