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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LARRY CHARLES HUBBARD and LINDA GAIL HUBBARD

Upon the Petition of)
LARRY CHARLES HUBBARD,)
Petitioner-Appellant,)
And Concerning)
LINDA GAIL HUBBARD,)
Respondent-Appellee.)

Filed November 26, 1980

0-309
2-64652

Appeal from Pottawattamie District Court - Paul H. Sulhoff, Judge.

Petitioner-father appeals dismissal of his application to modify the child custody provision of the parties' dissolution decree. REVERSED.

Maynard S. Telpner of Telpner & Smith, Council Bluffs, Iowa, for petitioner-appellant.

John P. Heithoff and Robert C. Heitoff of Heithoff, Pratt & Heithoff, Council Bluffs, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner-father appeals dismissal of his application to modify the child custody provision of the parties' 1974 dissolution decree. He claims that there is sufficient evidence showing a material and substantial change in circumstances since the decree and that the best interests of the children require transfer of their custody to him. Our review is **de novo.** Iowa R. App. P. 4. We reverse.

Larry and Linda Hubbard were married in 1966. They had two children—Kimberly and Eric (twelve and nine years of age, respectively, at the time of the November, 1979 modification hearing). The marriage was dissolved by decree on December 12, 1974 which provided that Linda was to have custody of the children. Larry filed this petition to modify the custody provision on October 22, 1979. He alleged that the children were suffering from maternal neglect, they were generally unsupervised, and were forced to live in an environment detrimental to their physical and mental health. The matter was heard on November 28 and 29, 1979, and the trial court dismissed Larry's petition on January 4, 1980. His appeal followed.

The principles governing modification of a child custody provision of a dissolution decree are familiar. Such a modification will be allowed only upon a showing of "a material and substantial change in circumstances since the date of the original decree." In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976). Larry must show by a preponderance of the evidence the required material and substantial change in circumstances, and he must show that he would be a better custodial parent than Linda. Id.

Contrary to the conclusion of the trial court, we think the record supports a finding of a material and substantial change in circumstances such that the best interests of the children require that custody be given to Larry. After the parties were divorced in 1974, Nelson Phillips moved in with Linda and became involved in many heated arguments which often became physically violent. Kimberly was forced to call the police on a number of occasions—she and Eric were afraid that Nelson would kill their mother. Larry and two of Linda's neighbors saw her with black eyes which resulted from various fights with Nelson. Naturally, all this had a significant impact on the children—they were often heard crying hysterically during these fights. At one point, one of the neighbors heard Kim say "don't hit Mommy."

There was also a good deal of evidence showing that Linda would leave the children alone for long periods of time such that they were forced to go to their

neighbors' houses or to Larry's home, two blocks away from where Linda and Nelson lived. Linda works at a bingo hall several nights per week; Larry testified that she would ask him to watch the children while she went out. During late 1978 and 1979, Larry would have the children nearly every Wednesday, Thursday and Friday night, and occasionally on Monday and Tuesday nights as well. They would also stay with him almost all day on Sunday while Linda was at bingo. She admitted that she does not hesitate to leave the children at home alone from 5:30 p.m. to 10:30 p.m. on some evenings. Nelson and Linda have plans to marry, but they are uncertain as to when that will occur. The prospects for the children having a relatively stable home life with their mother therefore does not appear very promising.

Larry, on the other hand, was planning to remarry during the summer of 1980. His fiancee testified that she and her three children from a previous marriage get along very well with Larry and his two children. They have already made plans to move into her house after their marriage. The prospects for a strong home and family environment for Kim and Eric are much more promising here than with Linda and Nelson.

To be sure, neither party is wholly blameworthy nor completely without fault. Our only task on this appeal, however, is to determine whether there has been a material and substantial change in circumstances as to which the best interests of the children dictate a change in custody. Such a change is warranted here given Linda and Nelson's proclivities toward violent arguments with their inevitable deleterious effects on Kim and Eric, and given Linda's tendency to leave the children unattended for substantial periods of time.

We reverse the order of the trial court dismissing Larry's application for modification and remand for an order modifying the custody provisions of the 1974 decree so as to grant custody to Larry, cancelling his obligation to pay child support, and providing reasonable and liberal visitation rights for Linda.

REVERSED AND REMANDED.