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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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MERVIN PORTER and VIRGINIA PORTER,	)	
Petitioners-Appellees,	)	Filed May 31, 1988
vs.	)	
CINDY BEARDSLEY and CRAIG BEARDSLEY,	)	8-40 87-383
Respondents-Appellants.	)	

Appeal from the Iowa District Court for Polk County (No. CE 26015117), Jack D. Levin, Judge.

Respondents, the natural mother and adoptive father of two children, appeal from the district court order granting petitioners, the parents of the natural father, visitation with the children. **AFFIRMED AND REMANDED.**

Thomas N. Martin, Des Moines, for appellants.

James W. Carney and David M. Head of Carney, Hudson, Williams, Blackburn & Grask, Des Moines, for appellees.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

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During their marriage, Gary Porter and respondent Cindy Beardsley had two children, Sarah, born in 1976, and Stephanie, born in 1978. The marriage was dissolved in 1980, and Cindy was given custody of the children. Cindy subsequently married respondent Craig Beardsley. Craig filed a petition under Iowa Code chapter 600 (adoptions) to adopt Sarah and Stephanie. Gary consented, and the step-parent adoption was finalized in 1982. Cindy and Craig thereafter refused to allow Gary's parents, petitioners Mervin Porter and Virginia Porter, to visit the children.

In 1986, the Porters filed a petition for grandparent visitation rights pursuant to the then newly-enacted Iowa Code section 600A.10 (1987). That section provides:

> **600A.10 Grandparent visitation rights.**
> A grandparent of a child may petition the district court for grandchild visitation rights when any of the following circumstances occur:
> 1. The parent of the child, who is the child of the grandparent has died.
> 2. The child has been placed in a foster home.
> 3. The parental rights of the parent of the child, who is the child of the grandparent, are terminated pursuant to section 232.117 or 600A.9 or a petition to terminate parental rights has been filed pursuant to section 232.111 or 600A.5.
> A petition for grandchild visitation rights shall be granted only upon a finding that the visitation rights are in the best interest of the child and would not unduly disrupt the child's relationship with the person who has custody of the child including an adoptive parent. (Emphasis added.)

Cindy and Craig answered the Porter's petition. They also filed a motion to adjudicate law points, in which they asserted that the trial court lacked jurisdiction to grant visitation because Gary's parental rights had been terminated under section 600.13, not under section 232.117 or section 600A.9.

The trial court denied respondent's motion to adjudicate and entered an order granting the Porters visitation rights. In doing so, the trial court found

that by enacting section 600A.10, the legislature intended to include all situations where the parental rights of the grandparents' child (one parent of the grandchild) have been terminated, whether under section 232.117, section 600A.9, or section 600.13. On our de novo review we must determine if the trial court erred by interpreting section 600A.10 of the Iowa Code in this manner. We find no error.

I.

The respondent-parents challenge the district court's jurisdiction to grant visitation rights to the petitioner grandparents. They assert that since Gary Porter voluntarily allowed his parental rights to be terminated under section 600.13 of the Code and the children have been adopted by their stepfather, the grandparents do not have the right to petition for visitation under section 600A.10(3). In this respect, section 600A.10(3) does permit a grandparent to petition for grandchild visitation rights where parental rights have been terminated pursuant to section 232.117 or 600A.9 of the Code. That section, however, does not include a voluntary parental termination under section 600.13. Thus, respondents ask this court to construe section 600A.10(3) in such manner that grandparents do not have petitioning rights when parental rights have been terminated under Chapter 600 of the Code. We decline to do so.

Prior to this legislation (section 600A.10), Iowa law authorized court-ordered visitation by grandparents only within a divorce, death, or foster home placement context. Iowa Code § 598.35 (1985). The Iowa Supreme Court viewed grandparents' rights as being derivative of the rights of their child, the natural parent. Matter of Adoption of Gardiner, 287 N.W.2d 555, 557 (Iowa 1980). In Gardiner the court held that section 598.35 did not give the district court jurisdiction to grant grandparent visitation where the child is adopted. Id. at 558.

In 1985 the Iowa Supreme Court signaled a departure from the strict "derivative rights" analysis exemplified by Gardiner. In re Guardianship and Conser-

vatorship of Ankeny, 360 N.W.2d 733, 734 (Iowa 1985), and Patterson v. Keleher, 365 N.W.2d 22, 23-24 (Iowa 1985), both raised the issue whether a grandparent's court-decreed right to visit a grandchild survives that child's adoption by a stepparent. In each case the court held that a decree of adoption does not automatically nullify or invalidate the jurisdiction of a probate or other court sitting in equity whose authority is dictated by the best interests of the ward. Ankeny, 360 N.W.2d at 737; Patterson, 365 N.W.2d at 25.

The Iowa Supreme Court very recently stated that section 600A.10 amended termination of parental rights legislation. In Nemer v. Sweeney, the court stated this was done by

> affording grandparents a right of visitation independent of their child's parental rights upon a showing that such visitation was in the child's best interest and would not "unduly disrupt the child's relationship with the person who has custody, including an adoptive parent."

Matter of Guardianship of Nemer, 419 N.W.2d 582, 584 (Iowa 1988).

Noting the departure from the "derivative rights" analysis in Gardiner, the trial court correctly determined that to interpret section 600A.10 to exclude cases where the parental rights are terminated in connection with a stepparent adoption under section 600.3(2)(b) of the Iowa Code, which is the case here, "would produce a strange and arbitrary class of grandparents." The trial court went on to say

> Section 600A.10 recognizes that grandparents and grandchildren have an interest in continued contact independent of the natural parent-child relationship. To construe Section 600A.10 as only applying where the natural parent fights the termination or where the termination is initiated because the natural parent is incapable or unwilling to care for the child makes the grandparents' rights again dependent upon the actions of their child.

We agree with the court's analysis.

The legislature enacted section 600A.10 to overcome the court's finding in Gardiner. The intent of the legislature would be frustrated by interpreting

the statute to exclude stepparent adoptions under chapter 600 of the Iowa Code. That this is true is evidenced by the fact that 600A.10 has recently been repealed by an amendment to section 598.35 of the Iowa Code. It provides:

> The grandparent of a child may petition the district court for grandchild visitation rights when any of the following circumstances occur:
>
> 1. The parents of the child are divorced.
>
> 2. A petition for dissolution of marriage has been filed by one of the parents of the child.
>
> 3. The parent of the child, who is the child of the grandparent, has died.
>
> 4. The child has been placed in a foster home.
>
> 5. The parents of the child are divorced, and the parent who is not the child of the grandparent has legal custody of the child, and the spouse of the child's custodial parent has been issued a final adoption decree pursuant to section 600.13.
>
> 6. The paternity of a child born out of wedlock is judicially established and the grandparent of the child is the parent of the father of the child and the mother of the child has custody of the child, or the grandparent of a child born out of wedlock is the parent of the mother of the child and custody has been awarded to the father of the child.
>
> A petition for grandchild visitation rights shall be granted only upon a finding that the visitation is in the best interest of the child and that the grandparent had established a substantial relationship with the child prior to the filing of the petition. (Emphasis added.)

Iowa Code § 598.35 (Supp. 1987).

We hold that under Iowa Code section 600A.10(3), where the children are adopted by their stepfather (the spouse of the children's custodial parent), the district court had jurisdiction to allow grandchild visitation rights to the grandparents even though, as is the case here, the natural father voluntarily consented to the termination of his parental rights under section 600.13.

II.

Respondent parents contend that granting grandchild visitation rights is not in the best interest of the grandchildren and that it would unduly disrupt the child's relationship with its custodial parents. Of particular concern is the

time that has elapsed since the grandchildren were last allowed to visit their grandparents. At the time the briefs were filed it had been over two years.

The Iowa Supreme Court, in the Nemer case, dealt with the same issue where the children had not seen their grandparents for three years. Nemer, 419 N.W.2d at 585. The court there stated, "'the best interest of the child' is a dynamic concept that cannot be confined or discarded based on the passage of time." Id. at 585.

We find that visitation would be in the best interest of the children. Further, although visitation privileges may pose some inconvenience to the respondents, we are of the opinion that such visitation would not unduly disrupt the children's relationship with their natural mother and their adoptive father. From the record it is apparent that the children's bond with their adoptive father is secure. This is as it should be. We leave it for the trial court to determine the extent of visitation. Because of the time that has elapsed since grandparents and grandchildren have been together, care should be taken that at least one of the parents be present at the very beginning.

This court parenthetically notes that visitation privileges are extended only to the petitioner. The biological father is not included. He voluntarily surrendered his parental rights and was released from his parental obligations. The trial court, if it so decides, may impose as a condition to the grandparents visitation privileges that the biological father not be present. Accordingly, we affirm the trial court on all issues.

AFFIRMED AND REMANDED.