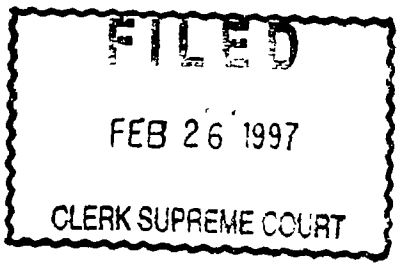
IN THE COURT OF APPEALS OF IOWA

No. 6-606 / 95-1731

000097



**IN THE MATTER OF
HEATHER LEIGH EWART, a Minor Child,**

**UPON THE PETITION OF
MICHAEL S. EWART,**

Petitioner-Appellant.

**IN THE MATTER OF THE GUARDIANSHIP
AND CONSERVATORSHIP
OF HEATHER LEIGH EWART, A Minor Child,**

Appeal from the Iowa District Court for Lee County, William L. Dowell, Judge.

Michael Ewart appeals the district court's denial of his application for court-ordered visitation with his minor child. **AFFIRMED.**

Michael S. Ewart, Fort Madison, pro se, appellant.

Gregory A. Johnson, Fort Madison, counsel for guardian of minor child.

Considered by Sackett, P.J., and Cady and Streit, JJ.

PER CURIAM

This is an appeal by a father claiming the district court should have granted him visitation with his minor child. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Michael Ewart is the father of Heather, born in July 1989. On February 25, 1991, Michael murdered his estranged wife Melissa while the parties were attempting to exchange custody of Heather. *See State v. Ewart,* 502 N.W.2d 624 (Iowa 1993). Michael was convicted of first degree murder. *Id.*

On September 27, 1991, Melissa's mother, Rose Mary Zelms, was appointed as guardian and conservator for Heather. Michael's father, Leon Ewart, was awarded grandparent visitation. The probate court denied Michael's request for visitation concluding "visits in a prison setting at this time would not be in her best interest. Until she is old enough to understand the situation and capable of making a decision about seeing her father, the court concludes that visits should not be ordered."

On June 15, 1992, Michael filed a motion asking the probate court to reconsider its previous ruling and allow him to have visits at the prison. The district court denied the motion.

On May 24, 1994, Zelms filed an application seeking to terminate Leon's visitation rights because he had been taking Heather to see Michael during his visitation time. In August 1994, Michael filed a separate application, pursuant to

Iowa Code section 598A.9, for visitation with Heather. That application was served on Zelms on August 23, 1994.

On September 27, 1994 Michael moved for entry of default judgment. On October 5, 1994, Zelms filed a resistance to the motion for default, a motion to join the two pending proceedings, and an answer to Michael's application for visitation. The district court denied Michael's motion for default judgment and consolidated the two cases.

A hearing was held on September 12, 1995. The court denied Michael's motions for entry of default judgment, for recusal, and for exclusion of testimony by Janet Smith Shepherd—a clinical psychologist who had been treating Heather and Zelms. Shepherd testified that Heather suffered from post traumatic stress disorder, that the visits with her father exacerbated Heather's condition, and that it was not in Heather's best interests to visit her father until she was older and more capable of dealing with the situation.

On September 21, 1995 the court entered its ruling denying Michael's request for visitation. The court concluded it was not in Heather's best interests to require visitation with her father.

On appeal Michael contends the court abused its discretion in overruling his motion for entry of default judgment and in allowing Shepherd to testify. He also argues Shepherd's testimony should have been given no weight. Finally, he

complains he was denied a fair trial and that his constitutional rights have been violated.

I. The question whether to allow default judgment is largely within the discretion of the trial court. *Avery v. Peterson*, 243 N.W.2d 630, 631-32 (Iowa 1976). We conclude the trial court did not abuse its discretion in denying Michael's motion for default, particularly when his application would have been more appropriately filed in the pending probate action.

II. We reject Michael's contention that he did not have adequate notice of Shepherd's expected testimony. On January 11, 1995, counsel for Zelms submitted answers to interrogatories propounded by Michael. Janet Smith Shepherd's name was included in the response to Interrogatory No. 2, which asked for the name of all expert witnesses intended to be used in "this action to deny Michael S. Ewart visitation rights with Heather . . ." Moreover, the response to Interrogatory No. 3 included an attached letter from Shepherd, which summarized her expected testimony concerning Heather. The trial court did not abuse its discretion in allowing Shepherd to testify.

III. Michael next challenges the weight to be given Shepherd's recommendations against visitation. He argues her testimony is that of a "hired-gun" and not to be believed. Upon our *de novo* review of this proceeding tried in equity,

see Iowa R. App. P. 4, we, too, give weight to Shepherd's testimony that visitation with Michael at the penitentiary is not in Heather's best interests.

IV. Michael contends the trial court should have recused itself because of "probable biasness and prejudice harbored against him . . ." The burden is on the party seeking recusal to establish the basis for it, and the determination is committed to the judge's discretion. *Forsmark v. State*, 349 N.W.2d 763, 767 (Iowa 1984). We find no abuse of discretion here.

V. Michael also raises several constitutional challenges to the proceedings below. These contentions were not raised in the trial court, however, and therefore we will not address them. *See In re Dugan*, 334 N.W.2d 300, 306 (Iowa 1983) (even issues of constitutional magnitude will not be addressed if not presented to the trial court).

For all the reasons stated above, we affirm the trial court's decision denying Michael's request for visitation.

AFFIRMED.