

IN THE COURT OF APPEALS OF IOWA

No.3-319 / 92-1640

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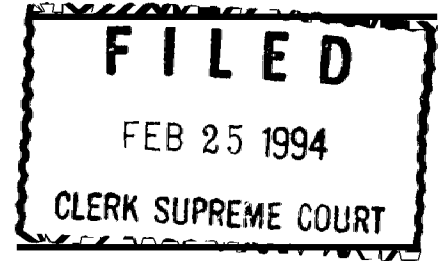
POLLY ENGLANT,

Appellant,

vs.

CHRISTINE SMALLFOOT,

Appellee.



Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scole, Judge.

Polly Englant appeals from the district court's order dismissing her petition for grandparent visitation rights. She contends that (1) visitation is in the best interests of the children, and (2) a substantial relationship existed between her and the children prior to filing the petition.

AFFIRMED.

Charles H. Levad, Mason City, for appellant.

Kristy B. Arzberger of Arzberger & Short, Mason City, for appellee.

Considered by Oxberger, C.J., and Hayden and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

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OXBERGER, C.J.

Christine Smallfoot previously was married to Polly Englant's son, Monte. There are three children of the marriage: Grace, Nathan, and Emma, now six, four, and two years of age respectively. The family lived in California, where Polly resided, until 1987 when they moved to Mason City, Iowa. The marriage was dissolved in August 1991.

In October 1991 Polly filed her petition for grandparent visitation rights. At the time of the hearing Polly was in the process of moving to Jackson, Wyoming, and so requested an order allowing her visitation with the children in Jackson, at her expense.

At trial, Christine testified she had no objection to Polly visiting with the children in Iowa, but did not agree to visitation in Jackson. One reason presented for this objection was that in a prior marriage Polly's son had kidnapped his child and Polly, having seen them, had failed to alert the authorities. Other reasons given were the age of the children, the distance they would have to travel, their alleged lack of substantial contacts with Polly, and Christine's difficulty in communicating with Polly because of the existing hostility between them.

Polly presented evidence that contact between children and their grandparents is vital to their well-being. She noted Christine had admitted it "would be nice" if there was visitation between her and the children. Also, Polly argued she would not present any threat to the children,

emotionally or physically, and she did not have anything to tell the authorities when her son kidnapped his child eight years ago because she did not know where they were. Polly testified the children know her as "grandma" and she visited them as much as she could as well as phoning and sending birthday, Christmas, and Easter gifts.

The district court dismissed Polly's petition because it determined visitation was not in the best interests of the children, and there was only "minimal" contact between them and Polly. The district court particularly noted Polly's failure to notify authorities of the prior kidnapping, and the fact she had visited the children only once in 1991.

Polly appeals. She argues there was never any allegation she was involved in the kidnapping, and the evidence was too vague, speculative and remote to be relevant. She also argues she had attempted to arrange visitation in 1991 but had been frustrated by Christine. Furthermore, she believes her relationship with the children is universally recognized as being valuable, thus it is substantial.

Christine argues, among other things, the notice of appeal was not timely filed. She filed a motion to dismiss on February 26, 1993, based on the assertion the appeal was untimely. The motion was denied by the supreme court on March 19, 1993.

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In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Appellee raises a jurisdictional question concerning the timeliness of the appeal. We conclude, after a review of the file, the supreme court resolved this issue in March, 1993, by denying appellee's motion to dismiss. We address this issue only to the extent of stating we have jurisdiction in this case and, therefore, reach the merits.

Appellant asserts the district court erred in not granting her visitation rights because the record demonstrates (1) such rights would be in the best interests of the children and (2) she had established a substantial relationship with the children.

Iowa Code section 598.35 (1991) provides:

A petition for grandchild visitation rights shall be granted only upon a finding that the visitation is in the best interests of the child and that the grandparent had established a substantial relationship with the child prior to the filing of the petition.

Id. at final unnumbered paragraph. This paragraph promulgates a two-part test. The burden is on the petitioner to establish both parts in order to receive

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court-ordered visitation rights. In our de novo review of the record before us, we find appellant has failed to carry her burden on both parts of the statutory test.

Although the district court did not discuss the "best interests" prong of the test in any detail, we note the court expressed concern about removing the children from Iowa for visitation and about appellant's past failure to contact authorities when her son kidnapped his daughter from a previous marriage. We share the same concerns and give weight to the assessment of credibility made by the district court. Accordingly, we find it would not be in the best interests of the children to order visitation rights for appellant.

We also find the record establishes the relationship between appellant and the children has been intermittent and insubstantial. We recognize families today frequently are scattered across the country as in this case, making frequent visits difficult. Yet we do not find the contact in this situation rises to the level of substantiality. Therefore, we conclude appellant has not established a substantial relationship with the children and affirm the decision of the district court.

Finally, we note our decision does not preclude appellant from visiting her grandchildren. While we decline to mandate rights of visitation, appellee is free to allow visitation between the children and their grandmother.

Appellant shall pay the costs of this appeal.

AFFIRMED.