IN THE COURT OF APPEALS OF IOWA

No. 9-672 / 89-947

FILED
FEB 22 1990
CLERK SUPREME COURT

**PATRICIA KILBY,**

Appellee,

vs.

**LANA LEA FRANKEN,**

Appellant.

129

---

Appeal from the Iowa District Court for Butler County, Carl D. Baker, Judge.

Appellant appeals the decision of the district court granting appellee visitation with appellant's daughter pursuant to Iowa Code section 598.35. **AFFIRMED.**

Frances L. Gohlke of Carney & Gohlke, Waverly, for appellant.

Roger L. Sutton of Sutton Law Office, Charles City, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

**HABHAB, J.**

Appellant, Lana Lea Franken, appeals the decision of the district court granting appellee, Patricia Kilby, visitation with appellant's daughter, Stacey, pursuant to Iowa Code section 598.35. The appellee is the paternal grandmother of Stacey. We affirm.

Stacey was born on January 21, 1983, to Lana Lea Otto and Lonny Lee Otto, appellee's son. The Ottos' marriage was dissolved on December 18, 1984. Lana was given custody of Stacey. The decree is silent as to grandparent visitation rights.

On March 23, 1985, Lana married Paul C. Franken, Jr. Up until this time, Patricia had been permitted to have visitation with her granddaughter, Stacey, in her home. After the marriage of Lana and Paul, Patricia has been permitted limited visitation with Stacey and only in the Franken home. The length of these visitations is usually between one and two hours.

On February 19, 1988, Lonny's parental rights were terminated. Soon thereafter, Paul adopted Stacey. Patricia subsequently filed a petition for grandparent visitation rights. The trial court, after a hearing on the matter, granted Patricia visitation rights with Stacey.

In this equity action, our review is de novo. Iowa R. App. P. 4. 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).

Iowa Code section 598.35 provides in pertinent part:

> The grandparents of a child may petition the district court for grandchild visitation rights when any of the following circumstances occur:
>
> * * *
>
> 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.
>
> * * *
>
> 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.

The first issue we need address is whether Patricia is entitled to petition the district court for grandparent visitation rights under section 598.35, Iowa Code. In this respect, it is undisputed that Patricia is the grandmother of Stacey and that Stacey's parents are divorced. Under the decree of dissolution, Lana Lee, who is not the child of the grandparent, Patricia, was granted legal custody of Stacey and Lana Lee's husband, Paul C. Franken, Jr., was issued a final adoption decree pursuant to section 600.13. We hold that the circumstances called for under subparagraph 5 of section 598.35 have been met and that Patricia is entitled to petition for grandparent visitation rights.

The next issue we need address is whether Patricia and Stacey had a "substantial relationship" prior to Patricia's

filing of her petition. The trial court found that such relationship had been established until early 1985, when Lana and Paul were married. Since that marriage, Patricia's visitation and the resulting relationship have been limited to the Franken home. This limitation to the Franken home obviously acts as a barrier to the enhancement of Patricia and Stacey's grandmother-granddaughter relationship. Lana should not now complain of the lack of a current substantial relationship when her actions contributed significantly to the present state of Patricia's and Stacey's relationship. We agree with the trial court's finding that Patricia and Stacey had a "substantial relationship" prior to the filing of the petition in this matter.

Lana alternatively argues that increased visitation with Patricia would not be in Stacey's best interest. She argues that due to Paul's adoption of Stacey, Stacey would be confused by her relationship with Patricia. Patricia obviously loves her granddaughter a great deal. While some confusion will undoubtedly be the result of increased visitation, the benefits of Stacey's continued relationship with her grandmother vastly outweighs any drawbacks. We, therefore, conclude that increased scheduled visitation between Patricia and Stacey will be in Stacey's best interest. In doing so, we emphasize that we are not necessarily critical of Lana's position, but our concern is what is in the best interest of Stacey.

133

Both parties seek attorney fees on appeal. See Iowa Code § 598.36. Each party shall pay her own respective attorney fees. Costs are assessed to appellant.

**AFFIRMED.**