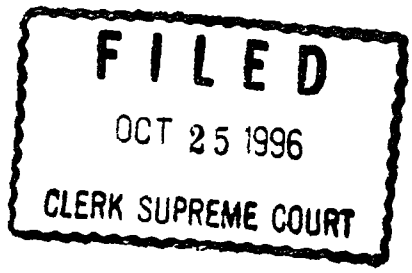
IN THE COURT OF APPEALS OF IOWA

No. 6-334 / 95-1478



ALLAN D. LEONARD and **KATHY L. LEONARD,**
Appellees,

vs.

JILL McTURK,
Appellant.

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

Jill McTurk appeals the district court's ruling which granted the Leonards' application for grandparent visitation. **AFFIRMED.**

James D. Robertson of Haupert, Robertson & Weiss, Marshalltown, for appellant.

Gene L. Beach of Grimes, Buck, Schoell & Beach, Marshalltown, for appellees.

Considered by Huitink, P.J., Vogel, J., and Hayden, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

HAYDEN, S.J.

This case involves a mother's appeal of the district court decision allowing the application of the paternal grandparents for grandparent visitation. We affirm.

Jill McTurk had a relationship with Jonathan Leonard, and became pregnant by him. In September 1994, before the child was born, Jonathan committed suicide. Nathanial McTurk was born on October 18, 1994.

Jonathan's parents, Allan and Kathy Leonard, came to visit Jill and Nathanial at the hospital on October 18 and 19. They also took Nathanial to a family gathering on November 6, 1994. Allan and Kathy testified they wanted to have a relationship with their grandchild. However, after December 4, 1994, Jill would not allow the Leonards to have contact with Nathanial.

On December 13, 1994, the Leonards filed a petition for grandparent visitation. Jill resisted the visitation. She claimed the Leonards had not done a very good job in parenting their own children, and stated she did not feel they would be a good influence for Nathanial. The Leonards were involved in family counseling with the Department of Human Services and Jasper County Youth Services due to problems with their two younger children, Daniel and Amanda. Daniel had been diagnosed with attention deficit disorder and a conduct disorder, and had been temporarily placed out of the home. Amanda was resistant to parental authority. Despite these problems, Kenneth Trotter, a social worker with DHS, testified there was nothing in the family's dynamics which would preclude grandparent visitation.

The district court issued a decree granting Allan and Kathy visitation with Nathanial on alternating weekends for three hours. Once Nathanial reaches the age of five, visitations were to be expanded to twenty-four hours.

Jill filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) and a motion for stay. The first scheduled visitation was to take place before the court ruled on the motion for stay. Jill denied the visitation. The Leonards then filed an application for rule to show cause.

In a combined ruling, the court denied the request for a stay. The court amended the decree to provide visitations in August, September, and October 1995 would be supervised by Jill. Thereafter, visitations will be unsupervised. The court also ruled when Nathanial reaches the age of five, only one visitation per month would be for twenty-four hours, and the other visitation would be for three hours. The court determined Jill was in contempt of court. She was given the opportunity to purge the contempt by complying with the amended decree. Jill has appealed.

I. We review the record de novo to determine whether grandparent visitation is in the best interests of the child. *In re Marriage of Woodley,* 474 N.W.2d 815, 817 (Iowa App. 1995). In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. In Iowa, a grandparent does not possess a common law right to visitation with a grandchild. *In re K.R.*, 537 N.W.2d 774, 776 (Iowa 1995). There is a

statutory exception found in Iowa Code section 598.35, which provides for court-ordered grandparent visitation. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa App. 1994). The pertinent portion of section 598.35 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.

Section 598.35 was enacted to ease the harshness of the common law in situations where grandparents could not seek derivative visitation rights from the parent who is their child. *Olds v. Olds*, 356 N.W.2d 571, 574 (Iowa 1984).

Jill claims the Leonards failed to show visitation would be in Nathanial's best interests. She states their testimony focused on their own feelings regarding Jonathan. She believes they failed to address the question of what would be best for Nathanial. Jill states it is not in Nathanial's best interests to be forced into the midst of a conflict between herself and the Leonards.

In the case of *In re Guardianship of Nemer*, 419 N.W.2d 582 (Iowa 1988), the child's father had engaged in a murder-suicide and the paternal grandparents sought visitation. *Id.* at 583. The supreme court determined it was in the child's best interests to have a trusting relationship with the paternal grandparents already established before the child started to question the father's death. *Id.* at 585. The court stated it was in the child's best interests to establish a grandparent relationship now, rather than permit him to grow to manhood with ignorance and doubts about his

paternal family. *Id.* We believe this case is instructive to the present situation. We believe it is in Nathanial's best interests to have a relationship with his paternal grandparents.

Jill also claims the Leonards failed to show they had a substantial relationship with Nathanial. She points out they only saw the child a few times before they filed the petition for grandparent visitation. We agree with the district court's conclusion the Leonards did their best to establish a substantial relationship with Nathanial. Their inability to have greater contact with the child was due to Jill's actions, not a lack of effort on their part.

We determine the Leonards fulfilled the statutory criteria for grandparent visitation and conclude the district court properly granted their request for such visitation.

III. Jill asks us to modify the visitation schedule. She asks to have visitation reduced to two hours of supervised visitation once a month until Nathanial reaches the age of five. She argues the Leonards could then petition for increased visitation. We find the amended visitation schedule is equitable and we affirm it.

IV. Jill contends the district court erred in finding her to be in contempt of court. She states she denied visitation because she believed the Leonards intended to exercise unsupervised visitation, and she believed visitation should be supervised. She also states she mistakenly believed the motion for stay would stay the case.

In a contempt action, we review to ensure the allegedly contumacious actions have been established by proof beyond a reasonable doubt. *Kirk v. Iowa Dist. Court*, 508 N.W.2d 105, 107 (Iowa App. 1993). The two defenses available in a contempt proceeding are: (1) absence of willfulness in disobeying the order; and (2) indefiniteness or uncertainty of the order. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995).

We believe Jill should have known the motion for stay alone would not stay visitation, and a court order was needed. We also find the original decree clearly did not provide for supervised visitation. Although this provision was later modified, at the time Jill denied visitation there was no reason for her to suppose visitation should be supervised. We determine there was sufficient evidence to conclude Jill was in contempt of court.

V. Jill seeks attorney fees for this appeal. We determine each party should pay their own appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Jill.

AFFIRMED.