FILED
OCT 05 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-242 / 88-1586

BETTY JANE THOMPSON,

Plaintiff-Appellant,

vs.

GARY THOMPSON and **VICKIE JO (THOMPSON) FELTON,**

Defendants-Appellees.

Appeal from the Iowa District Court for Poweshiek County, James D. Jenkins, Judge.

The district court declined to grant appellant court-ordered visitation rights with her grandson. She has appealed. She contends the district court erred and she seeks an order prescribing monthly visitation with the child. **AFFIRMED AS MODIFIED.**

William D. Olson of Charnetski, Olson & Lacina, Grinnell, for plaintiff-appellant.

Michael W. Mahaffey, Montezuma, for defendants-appellees.

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

DONIELSON, P.J. 527

Gary Thompson and Vickie Jo (Thompson) Felton were formerly married to each other. They had a son, Nicholas, born in 1978.

The marriage of Gary and Vickie was dissolved in 1980. The dissolution decree placed the child in Vickie's custody and provided Gary with reasonable but unspecified visitation rights. Gary exercised visitation often until 1982, when his employer transferred him to Missouri. Because Gary's new home in Missouri is 425 miles from the child's home, Gary now exercises visitation only four or five times per year. However, Gary's mother Betty Thompson, who continues to live near the child's home, has exercised regular grandparent visitation with the child since 1982.

A conflict developed between the child's paternal grandmother Betty Thompson and his mother Vickie over the frequency of Betty's visitation. Betty wished to exercise visitation one weekend per month; Vickie was agreeable to allowing Betty visitation but preferred that it be less often than once a month.

To resolve this conflict, Betty filed the present petition seeking grandparent visitation rights. After a hearing, the district court denied Betty's petition. The district court found the child had a close relationship with his grandmother and should continue to have contact

with her and other paternal relatives. However, the court expressed the view that "the best way to accomplish an ongoing, close, intimate family relationship is by the gentle art of persuasion, not by the rigid mandate of a court order." The court concluded court-ordered grandparent visitation would not be in the child's best interest.

Betty has appealed from the district court's ruling. She contends that, in light of the child's acknowledged close relationship with her, the district court erred by refusing to grant her court-ordered grandparent visitation rights. Our scope of review in equitable proceedings is de novo. Iowa R. App. P. 4.

In the absence of a statute, grandparents have no common-law right to visit their grandchildren. Olds v. Olds, 356 N.W.2d 571, 573 (Iowa 1984). By enacting section 598.35, the Iowa General Assembly delineated exceptions to the general rule that grandparents have no common-law right to visitation. Id. The pertinent provisions of this statute applicable in this case are:

> 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 . . . .
>
> 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 ameliorate the harshness of the common law in situations where grandparents could not seek derivative visitation from the parent who is their child. Id. at 574. In this case, Betty's son was not the custodial parent of Nicholas, so she could seek visitation rights pursuant to this statute.

The trial court found a "substantial relationship" existed between Betty and her grandson, and the record supports this finding. Prior to the dispute in this case, Nicholas had visited his grandmother fairly often and he informed the court he loved his grandmother and wished to visit her. The trial court declined, however, to award Betty visitation rights, because it felt voluntary visitation was preferable to court-ordered visitation.

The court is correct in that cooperative, voluntarily arranged visitation is always in a child's best interests. However, parties cannot always reach such an agreement, and in such situations the court must set forth a visitation schedule for the parties. The trial court has misconstrued the "best interests" language in this statute. The court is to determine if visitation with a grandparent is in the child's best interests, not whether a voluntary visitation schedule is more in the best interests of the child than a court-ordered visitation arrangement. From this court's review of the record, it appears visitation with Betty would be in Nicholas' best interests. Since the time of

his parents' divorce he has had visitation with his grandmother. These visits allowed Nicholas to maintain close connections with his extended paternal family. This is especially important since his father lives in Missouri and cannot visit him often, and it is only through visitation with his grandparent that he can regularly visit with his father's family.

The trial court erred and should have awarded Betty visitation in this case. She has requested visitation of one weekend per month from 9:00 a.m. on Saturday until 6:00 p.m. on Sunday, and we feel this request is reasonable and should be awarded. If the parties cannot mutually agree on which weekend is to be set aside for visitation, then the first weekend of each month is so designated by the court.

Betty testified as to her awareness of the number of extra-curricular activities in which a growing boy is engaged, and the need for her visitation to accommodate these activities. We encourage both Betty and Vickie to recognize that a rigidly-applied visitation schedule may become disruptive as Nicholas gets older and becomes even more involved with nonfamily activities. Expectations and the visitation schedule may have to be adjusted to accommodate these changes. Efforts now between Betty and Vickie to encourage visitation will make facilitation of those future changes much easier.

AFFIRMED AS MODIFIED.