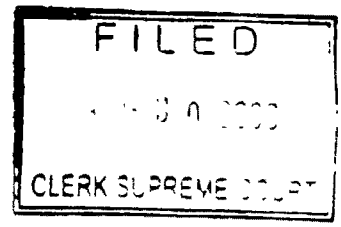
IN THE COURT OF APPEALS OF IOWA

No. 0-499 / 99-1797
Filed August 30, 2000

IN RE THE MARRIAGE OF JACQUELYN C. GOSNELL AND JOHN W. GOSNELL

Upon the Petition of
JACQUELYN C. GOSNELL,
Petitioner-Appellant,



And Concerning
JOHN W. GOSNELL,
Respondent-Appellee.

Appeal from the Iowa District Court for Marion County, Paul R. Huscher, Judge.

Jacquelyn appeals from the visitation provisions of the dissolution decree.

AFFIRMED.

William L. Shelton of Shelton Law Firm, Chariton, for appellant.

Marla Suddreth of Borseth, Genest & Suddreth, Altoona, for appellee.

Considered by Vogel, P J., and Miller and Hecht, JJ.

HECHT, J.

Jacquelyn ("Jackie") Gosnell contends the district court erred by granting her husband, John Gosnell, too much visitation with their daughter. We affirm.

I. Factual Background and Proceedings. John and Jackie Gosnell married on August 24, 1984. They are parents of one child, Jennifer, born on June 24, 1988. The parties have been estranged since 1994, largely due to John's drinking habits. They went through several periods of reconciliation but have not lived together for any extended periods of time since 1994. John is trained as a chiropractor and until 1994, he maintained his own practice. The practice suffered because of his drinking and episodes of depression, and John eventually closed his chiropractic office. In 1995, John pled guilty to operating while intoxicated, first offense. Largely in an effort to reconcile with Jackie, John attended alcohol abuse treatment three times in 1994 and 1995. For the most part, these treatment programs were unsuccessful. Hospital records from this time period suggest he was suffering the effects of alcoholism: blackouts, shakes, and sweats.

On April 28, 1998, Jackie filed a domestic abuse complaint against John alleging he hit her several times while he was drunk. On May 8, 1998, the parties entered into a stipulated order restraining John from any contact with Jackie and setting visitation between John and Jennifer on Sundays from 1:00 p.m. until 7:00 p.m. in Pella, Iowa. This visitation schedule was modified on January 15, 1999, setting visitation every other Saturday from 11:00 a.m. to 3:00 p.m. within a fifteen-mile radius of Pella.

Jackie currently lives in Pella with Jennifer. She works at her father's chiropractic office and at a realtor's office part-time, and sells Mary Kay products.

John sought counseling for depression after the 1998 domestic abuse allegation. At the time of the incident of abuse and when the petition for dissolution was filed, he was unemployed and living in a homeless shelter. However, at the time of trial, he was working two jobs as a waiter, one part-time and the other full-time. He resides in a studio apartment in Des Moines, Iowa. Although his chiropractic license is currently suspended for failure to maintain continuing education requirements, John testified at trial of his intention to complete the requirements for reinstatement and return to his profession. The record reveals he is still drinking "socially," but John testified he no longer drinks to the point of intoxication. He claims his problems with alcohol are behind him.

Trial in this matter occurred on August 25 and 26, 1999. The district court entered its decree of dissolution of marriage on September 10, 1999, granting Jackie legal custody of Jennifer, liberal visitation with John, and setting a visitation schedule of alternate weekends, alternate holidays, Father's Day, alternate birthdays, and four weeks summer vacation. However, the schedule contained the following limitations:

> Until such time as the Respondent secures housing with a separate bedroom for Jennifer, weekend visitation shall be on alternate Saturdays from 8:00 a.m. until 8:00 p.m., and holiday visitation shall be on the holiday from 8:00 a.m. until 8:00 p.m. The place where visitation is exercised is not limited, except that neither party shall remove the child from the state without prior notification to the other parent.
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> The Respondent shall not, within 24 hours prior to, or at any time during, the exercise of visitation, consume any alcoholic beverage. A violation of this prohibition will be punished as contempt.

Jackie contends the district court should not have expanded John's visitation time beyond four hours every other week, should not allow him to remove her

from the Pella area, and should not allow Jennifer to stay overnight when visiting him. Her arguments in support of these contentions are: (1) John is an alcoholic who has not acknowledged the nature and extent of his drinking problem; (2) John lives in an unsafe neighborhood; and (3) Jennifer does not wish to see her father as frequently as the decree requires, and does not wish to leave Pella with him.

II. Standard of Review. The court's standard of review in dissolution of marriage proceedings is de novo. *In re Marriage of Wagner,* 604 N.W.2d 605, 608 (Iowa 2000).

III. Merits. In establishing visitation rights, our governing consideration is the best interests of the child. *In re Marriage of Stepp,* 485 N.W.2d 846, 849 (Iowa App. 1992). Generally, liberal visitation rights are in the child's best interests. *In re Marriage of Kerber,* 433 N.W.2d 53, 54 (Iowa App. 1988); *In re Marriage of Muell,* 408 N.W.2d 774, 777 (Iowa App. 1987). The Iowa Code provides:

> The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.

Iowa Code § 598.41(1) (1999). Unless visitation with the noncustodial parent will injure the child in some way, it should be allowed. *In re Marriage of Riddle,* 500 N.W.2d 718, 720 (Iowa App. 1993) (citing *Fitch v. Fitch,* 207 Iowa 1193, 1197, 224 N.W. 503, 504 (1929)).

Jackie contends John still abuses alcohol and therefore it is not in Jennifer's best interests to have liberal visitation with her father, as she would be at an increased risk of harm. It is clear from the evidence presented John had a severe drinking problem that started in 1994 and continued in some respects until Jackie filed the domestic abuse complaint. However, since that time, John has started to get his life in order. He moved out of the homeless shelter and into his own apartment, found full-time employment, and plans on resuming his professional practice. He has been regularly attending mental health counseling. While he had not decided at the time of trial to completely refrain from consuming beverages containing alcohol (he admitted to drinking two beers the night before trial and to drinking before the hearing on temporary matters on May 27, 1999), there is no evidence he is abusing alcohol to the extent he was in 1994 and 1995.

We base our decision to affirm the district court's decree regarding John's visitation on several factors. First, the record indicates an extensive history of John exercising his restricted visitation with Jennifer during the pendency of the trial court proceedings without incident. Jennifer testified at trial her father had never been drunk during such visits. Her extensive diary entries recounting visits with her dad do not support a finding Jennifer has been put at risk because of John's consumption of alcohol. Second, Jackie's evidence regarding John's alcohol abuse was mostly based on occurrences in 1994 or 1995. The only exception was the 1998 domestic abuse incident for which John immediately sought counseling. Third, John testified at trial he had a problem with alcohol in the past, which he attributes to a period of depression, but he states the depression has improved. Although we view his claim he has moved beyond his

alcoholism with some skepticism because he does not participate in AA, his mental health counselor's treatment notes reinforce his testimony. They confirm the therapy has been focused more on dealing with depression than alcoholism.

Although John's decision not to forego all intake of alcohol causes us concern, there is no evidence John's drinking presently poses a threat of danger to Jennifer's welfare. *See In re Marriage of Salmon,* 519 N.W.2d 94, 96 (Iowa App. 1994); *In re Marriage of LeGrand,* 495 N.W.2d 118, 120 (Iowa App. 1992). John has not been arrested since his 1995 OWI conviction and there is evidence in the record he is returning to a stable life. *See In re Marriage of Harris,* 499 N.W.2d 329, 332 (Iowa App. 1993). We note with approval the restrictions contained in the decree regarding John's consumption of alcohol before and during visits with Jennifer. We believe this restriction is appropriate to protect Jennifer during visitation with her father. The visitation schedule adopted by the district court is in Jennifer's best interests.

Jackie contends John's living situation is not appropriate for overnight visitation. She contends he lives in a dangerous part of Des Moines that has a high crime rate. The part of town John lives in has little to do with whether he should have overnight visitation with Jennifer, as long as he is able to take appropriate measures to ensure her safety. He testified at trial his apartment is equipped with safety measures and he is acquainted with others who live in the neighborhood with their children. We are not persuaded John is unable to care for Jennifer properly and safely in this neighborhood. However, we approve of the district court's restriction of overnight visitation until such time as John has living accommodations that will provide a suitable place for Jennifer to sleep.

Finally, Jackie argues the district court disregarded Jennifer's wishes when it granted liberal visitation to John. The district court made the following finding regarding Jennifer's testimony:

> The Court heard the testimony of Jennifer Gosnell regarding custody and visitation, and has reviewed the exhibits which were purportedly prepared by her. Even a cursory examination of [Jennifer's diary] leads to the conclusion that the child has been involved to an excessive degree in the parties' disputes regarding custody and visitation. While such involvement may be unintended and inadvertent, it nonetheless diminishes the weight the Court is willing to give to the 11-year-old's expressed wishes. The child is somewhat alienated from her father, and it will require a period of time for Jennifer and her father to reestablish their relationship.

When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, although not controlling, may be considered by the court, with other relevant factors, in determining child custody rights. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility, but we are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Jennifer made clear statements both in her diary and during her testimony that she did not want to see her father often and did not want to spend the night in his apartment with him. However, we will defer to the determination by the district court that her statements lack some credibility because of her posture in the middle of her parents' divorce. Jennifer has not been able to spend significant periods of time with her father recently. Although John has primary responsibility for this circumstance because of his past abuse of alcohol, Jackie has been less than completely resolute in her adherence to the temporary visitation schedule. Visitation between John and

Jennifer should be encouraged so as to rebuild their relationship and because it is in Jennifer's best interests to have a relationship with both of her parents. We expect the relationship between father and daughter will also improve under the district court's visitation schedule because visits will no longer be confined by time and geographical constraints to the Pella area.

We affirm the district court's determination John should have liberal visitation with his daughter, subject only to those restrictions contained in the decree.

AFFIRMED.