

No. 98-1571. [1999-94 (9-281)] IN RE PETITION OF HASSEL

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.
AFFIRMED AS MODIFIED. Heard by Sackett, C.J., and Vogel and Zimmer, JJ.
Opinion by Sackett, C.J. (6 pages \$2.40)

Kelly Hassel challenges a district court decree granting his mother, Marlys Hassel, visitation with his two children. Kelly and the mother of the children, Tamara, are divorced. Tamara was granted primary physical care. We affirm as modified. Marlys sought to establish grandparent visitation rights under Iowa Code section 598.35 (1997). The district court granted Marlys specific rights as a grandparent to visit with the children. Kelly contends (1) Iowa Code section 598.35 is unconstitutional; (2) the district court ordered Marlys custodial rights not authorized by the statute; and (3) the visitation ordered was excessive. Kelly was granted liberal rights of visitation. Marlys had spent time with the children during Kelly's visitation period. Kelly and Tamara decided to decrease Marlys's time with the children. Marlys filed this petition. The court provided her visitation one Sunday a month, one overnight visit a month from 4 p.m. on Friday until 7 p.m. on Saturday, five days during the summer, one day between Christmas and New Year's, one day for a family reunion, and one day for a birthday celebration. The court found Marlys could take the children to church, though finding Kelly and Tamara were the people to determine where the children should have their religious instruction. Kelly contends Iowa Code section 598.35 is unconstitutional. This issue was not presented to the district court. We decline to address Kelly's constitutional challenge. Kelly next contends the visitation provided Marlys is a custodial right not authorized by common law or statute. The legislature, in providing for grandparent visitation, did not create a custodial right in the grandparent. We need not address whether the order was custodial, as we modify it to strike the provisions Kelly contends were custodial. Marlys qualifies for visitation under the statute, yet she must still show visitation with her is in the children's interest. Marlys has a close relationship with the children. We agree with the district court it is in the children's interest this relationship continue. However, the extent of visitation provided by the district court infringes substantially on the parents' time with their children. We find the time fixed too extensive. Marlys shall have six hours a month to visit with the children. Marlys has requested appellate attorney fees. We deny her request.