RENDERED: JULY 19, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000196-MR

CALVIN LEE GODDARD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 92-CI-02588

DIANE LEE GODDARD (NOW SHIRLEY) — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: The appellant, Calvin Lee Goddard, appeals from an order of the Fayette Circuit Court denying visitation with his minor child. Appellant argues that the circuit court erred in denying his motion for visitation. We agree with the order of the circuit court and thus affirm.

On November 20, 1990, Appellant and Appellee were married in Las Vegas, Nevada. Several months later, Appellee gave birth to Appellant's son on June 17, 1991. At the time of his child's birth, Appellant was incarcerated in the Orange County Jail in Orlando, Florida. On July 22, 1992, Appellee filed for dissolution from her incarcerated husband. A Warning

Order Attorney was promptly appointed to notify Appellant of the nature and pendency of the dissolution proceeding and a Guardian Ad Litem was appointed to represent his interests. On behalf of Appellant, the Guardian Ad Litem requested that he be granted unsupervised visitation with his minor child on two unspecified weekends each month and for one half of the child's summer vacation. After a brief trial, a decree dissolving the marriage was entered by the circuit court on November 13, 1992. At the time of dissolution, however, the issue of Appellant's visitation with his minor child was reserved as Appellant was still incarcerated in Florida.

In 1997, Appellant was transferred from the Florida Penal System into the custody of the Kentucky Corrections Cabinet. Subsequent to his transfer, Appellant filed a motion with the Fayette Circuit Court requesting an opportunity to visit with his minor child. However, this motion was denied without a hearing. The matter was appealed to this court and we remanded to the circuit court with directions that Appellant be afforded an evidentiary hearing regarding visitation. On October 29, 1998, Appellant filed a motion requesting the circuit court to appoint a Guardian Ad Litem to represent him on his pending motion. However, this motion was denied by the circuit court on July 26, 1999.

On February 10, 1999, the circuit court conducted an evidentiary hearing concerning Appellant's request for visitation. Considering the evidence presented at said hearing, the circuit court found that allowing visitation would seriously

endanger the emotional and physical well-being of Appellant's child and thus denied Appellant's motion for visitation. Again, the decision of the circuit court was appealed. In an unpublished opinion issued July 21, 2000, this court vacated the circuit court's order and remanded the matter directing that Appellant be appointed a Guardian Ad Litem and that an additional hearing be held following said appointment.

On December 21, 2001, an additional hearing was conducted on the matter of visitation by the circuit court. Both Appellant and Appellee were present and testified at the hearing. Additionally, the circuit court interviewed the minor child *in camera* so as to determine his wishes to develop a father-son relationship with Appellant. On January 4, 2002, the circuit court once again denied Appellant's motion for visitation, finding that allowing him visitation would seriously endanger the mental and physical well-being of the minor child. The circuit court also denied Appellant's motion for a psychological evaluation of the minor child. This appeal followed.

On appeal, Appellant presents this court with three arguments. First, Appellant contends that KRS 403.320 is unconstitutional as it permits the circuit court to make a determination as to whether visitation will endanger the mental and emotional health of a child. Appellant also contends that circuit court erred by not ordering a psychological evaluation of the Appellant's minor child. Finally, Appellant contends that the circuit court erred by failing to include a record of the testimony of the minor child in the record on appeal.

Appellant first contends that KRS 403.320 is unconstitutional because it allows the circuit court to determine whether visitation will seriously endanger a child's "physical, mental, moral, or emotional health." KRS 403.320(1). More specifically, Appellant claims that KRS 403.320 is unconstitutional because it allows a circuit court to "pose as a mental health professional and deny a parent his constitutional right of association with his child." Although Appellant is correct in his assertion that the rights accompanying parenthood have been deemed fundamental, we find no merit to the argument that KRS 403.320 is unconstitutional. On the contrary, when drafting KRS 403.320 the General Assembly appears to have gone out of its way so as to ensure that any noncustodial parent seeking visitation would be protected by the penumbras of the United States Constitution.

The express language of the Fourteenth Amendment provides that no State shall, "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Indeed, the purpose of the Fourteenth Amendment is to provide "heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772, 787 (1997). Of the many rights deemed "fundamental" by the United States Supreme Court, the oldest and most fundamental of these is the right a parent has in caring for and nurturing their children. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49, (2000). Thus, it is clear

that the liberty interest at issue here, the interest Appellant has in establishing a relationship with his only child, is well within the protection of the Due Process Clause.

Unlike other legal rules, the rubric of due process is not an esoteric concept unrelated to time, place, or circumstance. Matthews v. Eldridge, 424 U.S. 319, 334, 47 L. Ed. 2d 18, 34, 96 S. Ct. 893, 903 (1976) citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1749, 6 L. Ed. 2d 1230, 1236 (1961). On the contrary, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." Matthews at 334 citing Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972). Resolution of a due process challenge, then, requires a careful analysis of the state and private interest affected. Goldberg v. Kelley, 397 U.S. 254, 263, 90 S. Ct. 1011, 1018, 25 L. Ed. 2d 287, 296 (1970). Indeed, "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews at 333 citing Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

The plain language of KRS 403.320 provides that a noncustodial parent "is entitled to visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(1). Moreover, it is well established through judicial interpretation of KRS 403.320 that even a noncustodial parent who is incarcerated cannot be denied

reasonable visitation with his or her children unless there has first been a hearing regarding visitation. Smith v. Smith, Ky. App., 869 S.W.2d 55 (1994). Appellant has been afforded two separate hearings regarding visitation with his only child. Subsequent to each of these hearings, the circuit court determined that visitation would endanger the mental health of appellant's child. Appellant, then, is concerned not so much with the constitutionality of the KRS 403.320 as he is with the methodology articulated by the statute for determining visitation. As the express language of KRS 403.320 provides adequate due process protection and due process was complied with in the present case, we find appellant's claim to be without merit.

Appellant next contends that the circuit court erred in finding that visitation with the appellant while incarcerated would seriously endanger the emotional health of Appellant's minor child. More specifically, Appellant claims that it was error not to base such a finding on a proper psychological examination of Appellant's child. We disagree. KRS 403.290 provides that the court "*may* seek the advice of professional personnel" in order to determine whether allowing visitation would endanger the child. KRS 403.290(2) (emphasis added). The language of KRS 403.290 is clearly permissive. Thus, the circuit court need not have based its findings on the opinion of a mental health professional.

Finally, Appellant contends that the circuit court erred by not including a copy of the child's *in camera* testimony

in the record. KRS 403.290(1) allows the court to interview a child *in camera* in order to ascertain the child's wishes as to visitation. However, if the court chooses to conduct such an interview it "shall cause a record of the interview to be made and to be part of the record in the case." KRS 403.290(1). On appeal, the record is silent as to the content of any conversation between the circuit court and the appellant's child. Thus, the circuit court has clearly erred by not complying with the mandate of KRS 403.290(1). However, we cannot say that the circuit court's error here warrants a reversal of the circuit court's decision.

It is well established that errors are harmless or nonprejudicial where they are not responsible for the appealing party having lost what he contends on appeal he should have attained. Vittitow v. Carpenter, 291 S.W.2d 34, 36 (1956). Such is the case *sub judice*. The circuit court has noted the "expressed bitterness" currently existing between Appellant and Appellee. Moreover, the on-going litigation over the matter of visitation has served only to foster this mutual dislike. Although the circuit court was in error, we cannot see how including a copy of the child's testimony in the record would have changed the outcome of this visitation proceeding. Thus, the error is harmless.

In conclusion, we find that KRS 403.320 is constitutional because it expressly provides noncustodial parents seeking visitation both notice and opportunity to be heard. We also find that the circuit court properly denied Appellant's

motion to have his child psychologically evaluated because the language of KRS 403.290(2) is clearly permissive. Finally, although the circuit court erred by not including a record of its conversation with Appellant's son, we cannot say that such error was harmful to Appellant's motion for visitation. Accordingly, we affirm the decision of the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Calvin Goddard, *Pro Se* West Liberty, Kentucky	Michael R. Moloney Lexington, Kentucky