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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000861-MR

T.S.B.[1] APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CI-00226

S.B. APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: T.S.B. has appealed, pro se, from an order of the Lewis Circuit Court entered on February 22, 2003, which denied his pro se motion seeking visitation with his minor child. Having concluded that the issue of whether T.S.B. had a right to personally appear at the hearing regarding his motion for visitation is not properly before this Court, but that the trial court erred by failing to make the necessary factual

[1] The parties will be referred to by initials to protect the interests of the minor child.

findings in denying T.S.B.'s motion for visitation, we vacate and remand for further proceedings.

T.S.B. and S.B. were married in Lewis County, Kentucky, in January 1999, when both were approximately 20 years of age. On August 25, 1999, S.B. gave birth to the couple's only child, A.D.B. Approximately one year later, in October 2000, the couple separated. At some point prior to the separation, T.S.B. allegedly raped S.B.'s sister, who was 13 years old at the time. As a result of this incident, T.S.B. was convicted of rape in the second degree,[2] and is currently incarcerated.[3]

On December 5, 2000, S.B. filed a petition for dissolution of marriage in the Lewis Circuit Court. Among other things, S.B. asked that she be awarded "sole care, custody, and control" of A.D.B. T.S.B. was eventually appointed a guardian ad litem and filed a response to S.B.'s petition for dissolution of marriage on May 31, 2001. In his response, T.S.B. asked that his parents and S.B. be awarded joint custody of A.D.B., and that he be granted visitation rights.

On January 10, 2002, a hearing was held before the Domestic Relations Commissioner regarding S.B.'s petition for dissolution of marriage. Although S.B. was present with her

[2] Kentucky Revised Statutes (KRS) 510.050.

[3] The term of T.S.B.'s sentence is not clear from the record.

attorney at this hearing, T.S.B. was not in attendance due to the fact that he had already begun serving his prison sentence in LaGrange, Kentucky. However, T.S.B. was represented at the hearing by his guardian ad litem. In addition, on February 6, 2002, T.S.B. testified via deposition from prison regarding the pending matters in the couple's dissolution proceedings.

Following the hearing and the taking of T.S.B.'s deposition, the Commissioner filed recommended findings of fact and conclusions of law on November 8, 2002. The Commissioner recommended, inter alia, that S.B. be awarded sole custody of A.D.B., and that T.S.B. have no visitation with A.D.B. during his period of incarceration. T.S.B. filed objections to the Commissioner's recommendations on November 12, 2002. T.S.B. argued that he was "a fit and proper person to have joint custody" of A.D.B., and that his visitation rights should not be denied. On November 21, 2002, T.S.B. filed a pro se motion for visitation.

On December 9, 2002, the trial court entered an order overruling T.S.B.'s objections to the Commissioner's recommendations. One week later, on December 16, 2002, the trial court entered findings of fact, conclusions of law, and a decree of dissolution of marriage. In addition to dissolving the marriage between T.S.B. and S.B., the trial court awarded S.B. sole custody of A.D.B. The trial court also denied

T.S.B.'s request for visitation on grounds that "[f]orcing a minor child to visit with [T.S.B.] at his place of incarceration would prove harmful to [A.D.B.'s] physical, emotional, mental and spiritual well-being."

On January 30, 2003, T.S.B. filed another pro se motion for visitation, which was in large part identical to his previous motion. On February 22, 2003, the trial court entered an order denying T.S.B.'s motion:

> [The trial court] has reviewed the case law and factual arguments proposed by [T.S.B.] in his [m]otion and remains convinced that forcing a child of such tender years, age [three], to visit with a parent she has barely known in a restrictive environment of a medium level security prison would impose harm upon the child's emotional and mental well-being and would pose an undue hardship on the custodial parent. Thus, the [c]ourt declines to force visitation between [T.S.B.] and the minor child at the current time.

On March 10, 2003, T.S.B. filed a pro se motion for reconsideration, wherein he again asked for visitation with A.D.B., and asserted for the first time that the trial court had erred by denying his previous motions without first conducting a hearing. On March 28, 2003, the trial court entered an order denying T.S.B.'s motion for reconsideration. The trial court once again found that "requiring visitation in a prison environment with a parent with whom the young child has had little to no contact would prove detrimental to the child's

emotional, physical, mental and spiritual well-being." In addition, the trial court determined that since T.S.B. had testified via deposition regarding the pending matters in the dissolution proceedings, the hearing requirement had been satisfied. This appeal followed.

T.S.B. raises two claims of error on appeal. First, he argues that the trial court erred by denying his motions for visitation without first conducting a hearing. T.S.B. claims that this alleged error denied him due process of law. We disagree.

We first note that T.S.B. is simply incorrect in his assertion that the trial court failed to conduct a hearing with respect to the issue of visitation. The record shows that a hearing before the Domestic Relations Commissioner was conducted on January 10, 2002. At this hearing, evidence was presented concerning all of the relevant issues related to the dissolution proceedings, including the issue of T.S.B.'s request for visitation. Accordingly, T.S.B.'s claim that the trial court erred by failing to conduct a hearing regarding his motion for visitation is clearly without merit.

In a related argument, T.S.B. appears to argue that he had a right to personally attend the hearing held before the Domestic Relations Commissioner. However, this issue is not properly before this Court on appeal. In Alexander v.

Alexander,[4] this Court held that where an incarcerated father had failed to request that the trial court make arrangements for his personal attendance at a hearing to consider his motion for visitation, the question of whether the father had a right to personally attend such a hearing was not properly presented to the Court on appeal:

> Although appellant is entitled to a hearing, the question of whether he has the right to attend the hearing is not properly presented to this court. Appellant mentions in his brief that he has transportation available to a hearing should he be so entitled; there is no assertion, nor authority cited, however, which would support his right to attend. And, he has not named as parties the warden or any other custodian who could be ordered to provide transportation. Moreover, the record reveals that the only request for transportation made before the trial court was to a November 1990, custody hearing. As a result of the failure to properly present the issue to this court, we decline to decide whether an inmate has a right to attend a visitation or custody hearing. It is sufficient to state that this appellant does not [citation omitted].

Similarly, in the case sub judice, the record shows that T.S.B. was served with notice through his guardian ad litem that a hearing before the Domestic Relations Commissioner would be held on January 10, 2002, during which time "all issues related to the parties' divorce" were to be considered. However, there is no evidence in the record indicating that

[4] Ky.App., 900 S.W.2d 615, 616 (1995).

T.S.B. took any affirmative steps with the trial court to secure his presence at this hearing. Therefore, the issue of whether T.S.B. had a right to personally attend the January 10, 2002, hearing is not properly before this Court.[5]

Regardless of this procedural defect, however, we note that T.S.B. was represented at the January 10, 2002, hearing by his court-appointed guardian ad litem, who, as the record shows, was given an opportunity to call and cross-examine witnesses on T.S.B.'s behalf. Further, T.S.B. was afforded an opportunity to testify via deposition regarding any issues related to the dissolution proceedings. Therefore, under the facts of the case at bar, we reject T.S.B.'s claim that he was denied due process of law.[6]

T.S.B. next argues that in denying his motion for visitation, the trial court erred by failing to make specific factual findings that T.S.B.'s visitation with A.D.B. would "seriously endanger" A.D.B.'s "physical, mental, moral, or emotional health." We agree.

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[5] See also Hall v. Arnett by Greene, Ky.App., 709 S.W.2d 850, 853 (1986)(stating that issues not raised before the trial court will not be considered on appeal).

[6] See Alexander, 990 S.W.2d at 617 (Howerton, J., concurring)(stating that "[i]t is simply not essential that a party be present at every civil hearing. There are times when, for economic, distance, time, logistical, or psychological reasons, etc., a party may be 'present' by deposition or counsel, or not at all. Larry Alexander has a right to notice of the [hearing regarding his motion for visitation], but he has no right to be taken from the prison and transported under guard at the expense and inconvenience of the State").

"[T]his Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case."[7] Pursuant to KRS 403.320(1), "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health [emphasis added]." In the instant case, we hold that in denying T.S.B.'s motions for visitation, the trial court abused its discretion by failing to make the required specific factual findings.

As we mentioned previously, the trial court on three occasions denied T.S.B.'s requests for visitation on grounds that "forcing" A.D.B. to visit T.S.B. in a prison setting would either "harm" or would be a "detriment" to A.D.B.'s "emotional, physical, mental and spiritual well-being."[8] Simply stated, these factual findings fall short of meeting the serious endangerment standard as contemplated by KRS 403.320(1). This is especially true in light of this Court's decision in Smith v. Smith,[9] where it was stated that a parent's "status as an inmate

[7] Drury v. Drury, Ky.App, 32 S.W.3d 521, 525 (2000).

[8] Although the trial court also found that granting T.S.B. visitation would place an "undue hardship" on S.B., our reading of the trial court's orders shows that its principal reason for denying T.S.B.'s motions for visitation was his status as an inmate.

[9] Ky.App., 869 S.W.2d 55, 57 (1994).

in a penal institution alone does not make visitation with his child inappropriate."

As our Supreme Court noted in Reichle v. Reichle,[10] when a trial court is called upon to apply statutory standards in child custody disputes, it is "particularly important" for the trial court to make specific findings of fact "so that a reviewing court may readily understand the trial court's view of the controversy." This reasoning applies with equal force when a trial court is asked to determine visitation issues under KRS 403.320. Therefore, we vacate the trial court's order denying T.S.B.'s motion for visitation, and remand this matter with instructions to make specific factual findings based upon the evidence of record. After making the necessary factual findings, the trial court should then rule on T.S.B.'s motion for visitation.

Based on the foregoing, the order of the Lewis Circuit Court is vacated and this matter is remanded for further proceedings consistent with this Opinion.

KNOPF, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING: I concur with the majority opinion but desire to state my views separately. As noted by the majority, KRS 403.320(1) requires that a parent not

[10] Ky., 719 S.W.2d 442, 444 (1986).

granted custody of his or her child is entitled to reasonable visitation rights unless the court finds "that visitation would endanger seriously the child's physical, mental, moral, or emotional health." The trial court determined that the child's emotional and mental well-being would be harmed by ordering visitation in light of the child's young age, the fact that she has barely known the appellant, and the fact that visitation would occur in a prison. The majority concluded that the factual determinations made by the trial court fell short of meeting the serious endangerment standard. I believe these facts are sufficient evidence to meet a finding of serious endangerment. However, I agree with the majority that the trial court did not make such a finding as required by the statute. Therefore, I agree that the order must be vacated and the case remanded to the trial court for more specific findings.

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