

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-002078-ME

D.A.I., II

APPELLANT

v. APPEAL FROM CAMPBELL FAMILY COURT  
HONORABLE D. MICHAEL FOELLGER, JUDGE  
ACTION NO. 05-CI-00084

J.M.P.

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE: D.A.I., II (Appellant) appeals from an order of the Campbell Family Court denying his request for visitation with his minor child, B.I., during the period of his incarceration. Appellant argues that the trial court failed to conduct a valid hearing before entering its order, improperly deprived him of due process by failing to allow him to attend the hearing, and failed to follow the statutory requirements for denying visitation rights. We agree with Appellant's contention that the trial court failed to make a finding on whether

visitation would endanger the child's health and, thus, this case is vacated and remanded to allow the trial court to make a determination on that issue.

Appellant and J.M.P. (Appellee) are the unmarried parents of a child born in April 1994. Paternity was established by the Hamilton County Juvenile Court in Ohio, where the parties then resided. Appellant was subsequently incarcerated at the Eastern Kentucky Correctional Complex, and is due to be released in March 2007. At some point in time, Appellee moved to Campbell County with the child. After his incarceration, Appellant asked Appellee to bring their child to visit him in prison. Appellee initially consulted with the child's therapist who expressed the opinion that visitation should not occur within the prison setting. Relying on the therapist's advice, Appellee suggested limiting contact between Appellant and their child to letters and telephone calls.

Appellant then attempted to file a motion for visitation with the Campbell Family Court asking that Appellee be ordered to allow their child to visit him in prison. In a short letter, the trial court declined to hear the motion, citing the lack of any proceedings between the parties in Campbell County. The letter also expressed the opinion that the court would be unlikely to grant visitation due to Appellant's incarceration. Appellant asked the court to reconsider its

decision. Appellee, through counsel, filed a response arguing that Appellant had not taken adequate steps to transfer jurisdiction of the case from Hamilton County, Ohio, to the Campbell Family Court. She requested that the trial court take jurisdiction over the entire case, including child support issues, or else refuse to make a decision regarding visitation. Appellee also stated her opposition to Appellant's request for visitation, citing the therapist's opinion that visitation within the prison setting would be detrimental to the child.

The trial court held a hearing on February 22, 2005, at which Appellant was not present. The court considered evidence from the therapist, as well as the child's statement that she did not wish to visit her father in prison. On March 31, 2005, the trial court entered an order finding that visitation was not in the child's best interest as long as her father was incarcerated and denying Appellant's motion. Appellant's motion for reconsideration was denied on August 17, 2005. This appeal followed.

Appellant presents several issues for our consideration. He argues that the trial court failed to conduct a proper hearing in that he received no notice of the date of the hearing and that he was deprived of due process since he was not permitted to be present at the hearing. The response to Appellant's motion for visitation filed by Appellee contains

both a notice of the date of the hearing and a certificate of service to Appellant by regular mail. Further, Appellant had no right to be present at the hearing since he failed to join the warden as a necessary party in order to obtain transportation to the hearing. Alexander v. Alexander, 900 S.W.2d 615 (Ky. App. 1995). In addition, Appellant contends that the trial court based its decision denying visitation solely on his incarcerated status. This claim is contradicted by the docket sheet on which the trial court noted the therapist's opinion that visitation should not occur in prison, as well as the child's expressed wishes not to visit her father in prison.

Finally, Appellant argues that the trial court applied the wrong standard in deciding whether to deny him visitation with his child. Kentucky Revised Statute (KRS) 403.320(1) reads, in relevant part, as follows:

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.) The trial court's order, dated March 31, 2005, contains a finding that "it is not in the child's best interest" to visit her father while he is incarcerated. The order fails to address the issue of whether allowing in-person visitation while Appellant is incarcerated would endanger the

child. KRS 403.320(1) explicitly requires such a finding before visitation can be denied. Thus, the order denying visitation must be vacated in order to allow the trial court to reevaluate its decision in accordance with the dictates of KRS 03.320(1).

For the foregoing reason, the judgment of the Campbell Family Court is vacated and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

D.A.I., II, *Pro Se*  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Timothy E. Schneider  
Ft. Thomas, Kentucky