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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002158-ME

JERAMIE MASSENGILL — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 03-CI-01235

STEPHANIE MASSENGILL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

STUMBO, JUDGE: Jeramie D. Massengill appeals from an order of the McCracken Family Court denying his *pro se* motion for visitation with his minor child. Jeramie, who is incarcerated at the Eastern Kentucky Correctional Complex ("EKCC"), argues that the court improperly concluded that visitation would be detrimental to the child based on his incarceration, the lack of familial bonds between Jeramie and the child, and evidence that

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the child responded negatively to Jeramie. For the reasons stated below, we affirm the order on appeal.

Jeramie is currently serving a life sentence at EKCC without the possibility of parole. On November 14, 2003, and while he was incarcerated in the McCracken County jail, Jeramie's wife, Stephanie, filed a petition for dissolution of marriage in McCracken Circuit Court. The marriage had produced one child, namely David J. Massengill. After a property settlement agreement was entered into the record and additional proof was taken, the court rendered its findings of fact, conclusions of law and decree of dissolution on February 10, 2004. The property settlement agreement, which was incorporated into the decree, provided that the parties would share joint custody of David, with Stephanie serving as residential custodian and Jeramie receiving reasonable visitation.

After the decree of dissolution was rendered, Jeramie was convicted on one count of murder and sentenced to life in prison without the possibility of parole. It appears from the record that Jeramie did not exercise any visitation rights after February, 2004. On June 9, 2006, he filed a *pro se* motion seeking visitation. Stephanie responded with a pleading asking the court to deny visitation. As a basis for the pleading, she argued that visitation was not in the child's best interest.

After a hearing on the motion was conducted, the court rendered an order on October 2, 2006, denying the motion for visitation. In support of the ruling, the court found that 1) the testimony of Stephanie and her mother indicated that the child had an

adverse reaction to Jeramie; 2) the child did not remember Jeramie, failing to even identify him in a photograph; 3) because of the age of the child and the length of Jeramie's incarceration, no relationship existed between the child and Jeramie; and 4) Jeramie committed a violent felony resulting in a sentence of life without parole. The court went on to find that even though a biological relationship existed between Jeramie and the child, no emotional bond had been established and "it would be detrimental to the child to be forced to attempt to create a relationship with a person that he has no bond with in a prison environment which is not conducive to providing a nurturing, safe and stable environment within which a child could bond with a parent." Jeramie's motion for visitation was denied, and this appeal followed.

Jeramie now argues *pro se* that the trial court committed reversible error in denying his motion for visitation. He maintains that the child visitation statute creates a presumption that parental visitation is in the child's best interest, and that he cannot be denied visitation without a finding that visitation would seriously endanger the child. He directs our attention to a published opinion addressing a convict's motion for visitation which he argues is similar to the facts at bar, and claims that - contrary to Stephanie's assertion - he has continued to maintain contact with the child during all relevant times. Finally, Jeramie argues that the family court improperly concluded that the prison environment would not provide a nurturing, safe and stable environment for visitation. He notes that the EKCC visitation area is fully supervised, and that, if granted, the visitation would be observed by no less than three correctional officers at all times. In

sum, Jeramie seeks an order establishing visitation with David at least five times per year.[2]

We have closely examined Jeramie's written argument, the record and the law, and find no basis to disagree with the trial court. The McCracken Family Court's findings of fact, conclusions of law and decree of dissolution of marriage, rendered on February 10, 2004, adopted the parties' prior property settlement agreement. The agreement provided at paragraph 10 that, "[T]he Parties shall share joint custody of the Parties [sic] minor child with the Wife being named residential custodian and the Husband to receive reasonable visitation, not less than set-forth in the current McCracken County Family Court Standard Visitation Schedule." Accordingly, we recognize that Jeramie was entitled to reasonable visitation prior to the filing of the June 9, 2006, *pro se* motion for visitation which gave rise to the instant proceeding. Stephanie's June 15, 2006, responsive filing to that motion, wherein she opposed visitation, may reasonably be regarded as a motion to amend the visitation award incorporated in the February 10, 2004, decree.

KRS 403.340(3) addresses the modification of visitation. It states that,

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

Though it did not characterize Stephanie's responsive pleading as a motion to modify visitation, the circuit court did apply the KRS 403.340(3) standard in addressing the

[2] Stephanie did not file a responsive brief.

matter. That is to say, it denied Jeramie's motion because "it is not in the best interest of the child", and went on to find that "it would be detrimental to the child" to be forced to create a relationship with someone to whom he was not bonded and to do so in a prison environment. Though the court's language does not parrot KRS 403.340(3) verbatim, it captures its essence and achieves what the legislature intended in enacting KRS 403.340(3) - protecting the child's best interest and denying visitation only to safeguard the child's "moral, or emotional health."

The court's findings of fact and conclusions of law on this issue are supported by the record. The court relied in part on the testimony of Stephanie and her mother in finding that David had an adverse reaction to Jeramie and that no bonds of love and affection had been established between the two. While Jeramie directs our attention to evidence which he claims supports a different conclusion, the trial court determines the weight and credibility of the evidence which will not be disturbed absent an abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996). The standard for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999). Jeramie has directed us to no such abuse of discretion on this issue, nor has our review of the record revealed any, and, as such, we find no error in the court's finding that Jeramie and David had developed no bonds of love and affection.

The court also determined that David did not remember his father, was unable to identify him in a photograph, and that the nature and severity of Jeramie's

crime (the violent stabbing death of another), coupled with his sentence of life without parole, collectively worked against a finding that visitation was in David's best interest. Again, these findings of fact and conclusions of law have support in the record, and Jeramie has directed us to nothing to the contrary.

Finally, Jeramie's assertion that the EKCC is a "safe and stable environment . . . for visitation" is not persuasive. *Arguendo*, even if this were true, which the circuit court did not so find, this claim does not form a basis for relief. The family court found that visitation was not in David's best interest and that it would be detrimental to his well-being. These conclusions are supported by the record and the law, and comport with KRS 403.340(3). As such, we find no error.

For the foregoing reasons, we affirm the September 29, 2006, order of the McCracken Family Court denying visitation.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeramie D. Massengill, Reg. No. 182643
West Liberty, Kentucky

NO BRIEF FOR APPELLEE