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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001525-ME

RONNIE DALE NEELEY APPELLANT

v.

APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 00-CI-00102

ED NEWTON AND JUDY NEWTON APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: Ronnie Dale Neeley appeals from an order of the Jackson Circuit Court suspending visitation with his minor child pursuant to Kentucky Revised Statute ("KRS") 403.325. On appeal, he contends that KRS 403.325 does not apply and that it was error for the court to seal the *in camera* interview with the child. We disagree.

History

On May 5, 2000, Michell[1] Neeley filed a petition for dissolution against Ronnie Neeley. In the petition, Michell requested custody of the parties' son. On June 17, 2000, Michell was murdered. Ronnie was thereafter arrested and indicted for her murder. Ed Newton and Judy Newton, the child's maternal grandparents, intervened in the action and filed a petition for custody of the child. The trial court awarded the Newtons custody and ordered visitation with Ronnie pursuant to KRS 403.320.[2] Ronnie had not yet been convicted of Michell's murder at this time.

Thereafter, Ronnie pled guilty to Michell's murder in the Jackson Circuit Court.[3] He received intermittent visitation with his son over a period of several years while incarcerated at various institutions. Visitation ceased when Ronnie was transferred to a new detention facility with different visitation procedures. An agreed order was then entered into between Ronnie and the

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[1] There is a discrepancy in the spelling of Michell Neeley's name. Although Ms. Neeley's name is spelled "Michelle" throughout the pleadings and briefs of both counsel, the record from the trial court (including Ms. Neeley's own signature on certain documents) shows the correct spelling of her first name to be "Michell". Throughout this opinion, therefore, we shall refer to her as "Michell".

[2] Although KRS 403.325 was in effect at the time the trial court entered its order, it was not yet applicable as Ronnie had not yet been convicted. Thus, the trial court properly applied the general visitation statute, KRS 403.320.

[3] Ronnie previously filed an appeal in this Court from a denied Kentucky Rules of Criminal Procedure ("RCr") 11.42 motion, wherein we acknowledged that Ronnie was charged with two counts of capital murder, one count of first-degree arson, two counts of first-degree robbery, one count of tampering with physical evidence, one count of violating a domestic violence order, and two counts of abuse of a corpse. We further acknowledged that Ronnie pled guilty to all charges. He was sentenced to life imprisonment pursuant to the Commonwealth's recommendation.

Newtons on June 27, 2008, establishing new visitation times and procedures. However, no further visitation occurred after the agreed order.

Ronnie filed several motions in an attempt to have visitation commence at the new facility. On February 18, 2009, the Newtons filed a response to Ronnie's motions as well as a motion to suspend visitation pursuant to KRS 403.325. On February 24, 2009, a hearing was held on Ronnie's motions as well as the Newtons' motion to suspend visitation.

At the hearing, counsel for the Newtons made an oral motion before the trial court for the court to take judicial notice of the fact that Ronnie was convicted for Michell's murder. The trial judge stated that she would review the court's records. The trial court then heard testimony from Mrs. Newton and Loretta Gibbons (Ronnie's sister) in addition to hearing the arguments of counsel and conducting an *in camera* interview of the child. The court sealed the record of the *in camera* interview with the child, but stated that access to the interview could be obtained upon motion of either party.

The testimony at the hearing indicated that while a social worker had always supervised visitation between Ronnie and his son at previous facilities, no social worker was available to supervise visitation at the new facility. Rather, Judy Newton would have to personally accompany her grandson into the prison to supervise each visit between Ronnie and the child. Further, the visits at this new facility were to be "full contact" visits held in a large room where other prisoners would be visiting in the same room. Finally, the child stated during the *in camera*

interview with the court that he did not want to see his father and that he could "never forgive him" for killing his mother.

On May 14, 2009, the trial court entered an order suspending visitation on the grounds that visitation would seriously endanger the child's mental and emotional health. The order further stated that the court would not "require Petitioners to supervise visitation between their grandson and the person who killed their daughter." Finally, the court also held that it would not allow Ronnie's sister to supervise visits, noting that the sister had no previous relationship with the child.

Thereafter, Ronnie filed a motion to amend on the grounds that the court had purportedly not taken judicial notice of his conviction and that the court purportedly applied the wrong standard for suspending visitation. The court granted the motion to amend and thereafter entered an amended order on August 7, 2009. The amended order stated that the court had taken judicial notice of Ronnie's conviction. The amended order also altered the wording used concerning the suspension of visitation to state that "continued visitation would be harmful to the child's mental and emotional health *and* contrary to the best interest of the child." (Emphasis added). Ronnie now appeals from this amended order.

Analysis

Ronnie argues on appeal that the trial court never took judicial notice of the conviction and that the conviction was not a part of the record. Ronnie also argues that KRS 403.325 does not apply as it was not yet in effect at the time of

Michell's murder. Further, Ronnie argues that even if KRS 403.325 were applicable to him, it would not apply now after visitation was allowed to commence and continue for nearly eight years. Finally, Ronnie claims that the trial court should not have conducted an *in camera* interview of the child.

Application of KRS 403.325

We begin by first addressing whether KRS 403.325 applies. As a general rule, a parent who is not granted custody of a minor child is entitled to "reasonable visitation" with that child unless the court finds that visitation would seriously endanger the child's "physical, mental, moral, or emotional health." KRS 403.320. However, KRS 403.325 provides an exception to this general rule where one parent is convicted of the homicide of the other parent. Specifically, KRS 403.325 provides:

> (1) Notwithstanding the provisions of KRS 403.320, if a parent of a child is convicted of murder or manslaughter in the first degree of the other parent, a court shall not grant the convicted parent visitation rights with respect to that child unless the court, through a hearing, determines that visitation is in the child's best interest.
>
> (2) If the court later modifies a denial of visitation to grant visitation, the court shall do so only after a hearing which establishes that visitation is in the child's best interest.
>
> (3) In any hearing conducted under subsection (1) or (2) of this section:
>
> > (a) Jurisdiction shall lie with the Circuit Court of the county where the child resides; and

> (b) The convicted parent, to obtain visitation, shall have to meet the burden of proving that visitation is in the child's best interest.

Ronnie argues that this statute does not apply to him because it was not enacted until July 14, 2000, nearly a month after Michell's murder. He further argues that even it were applicable, it would not apply because visitation was allowed to continue for almost eight years before the motion to suspend visitation was filed. We disagree.

To begin, the relevant date under this statute is the date of conviction, not the date of the homicide. KRS 403.325. Although Ronnie killed Michell before the effective date of the statute, he was not convicted until *after* the statute became effective. Thus the statute did not apply retroactively because the statute only became applicable once a conviction was returned. In addition, we note that the trial court's initial custody determination did *not* utilize KRS 403.325, but instead relied upon the general visitation statute, KRS 403.320. Although the trial court initially applied KRS 403.320, this did not prevent KRS 403.325 from being applied later, once Ronnie was convicted for killing his wife. Regardless, the trial court found that visitation would "be harmful to the child's mental and emotional health" *and* that visitation "would be contrary to the best interest of the child." Consequently, the trial court's findings would have supported a suspension of visitation under *either* KRS 403.320 or KRS 403.325.

Ronnie also contends that the Newtons are precluded from seeking application of KRS 403.325 now because visitation was allowed to continue for

several years under KRS 403.320. However, this is not the case. KRS 403.325 is applicable because Ronnie was convicted for the murder of his son's mother. Although a hearing should have been held after his conviction to determine whether visitation was in the child's best interest, the fact that there was no such motion or hearing does not obviate the statute's applicability in general. Rather, it is mere luck on Ronnie's part that the Newtons did not file such a motion earlier, as KRS 403.325 effectively applied to him from the date that he was convicted for Michell's murder.[4]

Further, although the statute does not specifically address what happens if visitation has already been allowed and there is a motion to suspend further visitation, it is clear that the intent of the statute is to protect the child and require a hearing before visitation is granted or modified. Indeed, "[g]eneral principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy." *County of Harlan v. Appalachian Reg'l Healthcare, Inc*., 85 S.W.3d 607, 611 (Ky. 2002). Additionally, our Courts "must be guided by the intent of the legislature in enacting the law." *Id*. Here, it is apparent that the legislature intended parents who have been convicted of the homicide of the other parent to bear the burden of proving at a hearing that visitation is in the best interest of the child. KRS 403.325(2). Finally, we cannot ignore the strong sentiments expressed by the child when he said he could never forgive the man

[4] Ronnie did not argue laches or estoppel before the trial court, nor has he argued either doctrine on appeal; thus, we address neither.

who murdered his mother. Thus, by the letter and spirit of the statute, we hold that although visitation had already commenced, it was proper for the trial court to hold a hearing upon the Newtons' motion to determine whether visitation was in the child's best interest.

Judicial Notice of the Conviction

We now address Ronnie's argument that the trial court failed to properly take judicial notice of the conviction. Ronnie alleges that the actual conviction is not in the record and that the trial court did not take judicial notice of the conviction.

However, although the trial judge did not take notice of the conviction during the actual hearing, she stated that she would review the court files. The trial court's amended order of August 7, 2009, clearly states that the court took judicial notice of the conviction. Kentucky Rule of Evidence ("KRE") 201 permits our courts to judicially notice adjudicative facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See also, Hutson v. Commonwealth*, 215 S.W.3d 708, 718 (Ky. App. 2006). As this Court has previously stated, a court's own records fall squarely within this definition. *Id*.

In Camera Interview of the Child

Finally, we address Ronnie's last argument on appeal that it was improper for the court to conduct an *in camera* interview of the child and seal the

record. Ronnie states (1) that the child's testimony was irrelevant; and (2) that sealing the interview violated his right to rebut the child's testimony.

KRS 403.290 governs interviews of children in custody matters. KRS 403.290(1) provides that "[t]he court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation." Thus, it is clearly within the court's discretion to interview a child in such matters. *Id.* *See also*, *Brown v. Brown*, 510 S.W.2d 14 (Ky. App. 1974). Further, KRS 403.290(1) provides that "[t]he court *may* permit counsel to be present at the interview." *Id*. (*Emphasis added*). Thus, it is also clear that the court may choose *not* to allow counsel to be present for the interview. *Id.* *See also, Couch v. Couch*, 146 S.W.3d 923 (Ky. 2004).

Ronnie next argues that the child's wishes were irrelevant to the determination of visitation. We disagree. To the contrary, the wishes of a fifteen-year-old child are certainly relevant to a court's determination of whether suspension of visitation would be in the child's best interest under KRS 403.325.

However, we agree with Ronnie that a court may not seal the record of such an interview and deprive the parties a chance to rebut the testimony of the child witness. *Couch v. Couch*, *supra*. As the Supreme Court stated in *Couch,*

> [W]hile it is certainly within the discretion of the trial court to conduct an *in camera* interview in the absence of the parties and counsel, a record of such interview must be made so that the parties are afforded the subsequent opportunity to determine and contradict the accuracy of statements and facts given during the interview.

Id. at 925-26. In *Couch*, the trial judge refused to grant the parties access to the record of the interview. Indeed, the trial court even refused to grant access to the parties for the record on appeal. *Id*. at 924. That is not the case here.

In this case, the *in camera* interview was conducted at the hearing on February 24, 2009. At that hearing, the trial court informed parties and counsel that the record of the interview would be sealed and would only be available upon motion to the court. However, neither party moved for access to the sealed testimony before the court entered its order suspending visitation on May 14, 2009, nearly three months later. Thereafter, Ronnie made a motion to amend the order on May 19, 2009. On June 5, 2009, before the court had ruled on the motion to amend, Ronnie filed a motion for access to the sealed testimony stating that "Counsel needs access to the testimony for the purposes of appeal." The trial court granted the motion for access to the sealed testimony on June 22, 2009. However, the trial court did not grant the motion to amend until August 4, 2009, and did not enter its amended order until August 7, 2009. Thus, nearly two weeks passed between the time counsel was granted access to the sealed interview and the time the court entered the amended order from which Ronnie now appeals.

As such, this case is clearly distinguishable from *Couch, supra*, in that the trial judge *did not* deny access to the tape. Further, Ronnie's motion for access stated that the sole reason for the motion was "for the purposes of appeal." Thus Ronnie has waived his right to complain on appeal when he never made a motion for access to the interview for the purpose of rebutting the child's testimony.

Accordingly, we affirm the order of the Jackson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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