

RENDERED: OCTOBER 1, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000382-ME

JESSE RANDOLPH

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE JENNIFER UPCHURCH CLARK, JUDGE
ACTION NO. 09-CI-00325

KATRINA ROSE AND
MARY MELTON

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Jesse Randolph, proceeding *pro se*, appeals the Wayne Circuit Court's order denying his motion for visitation in jail with his minor child, as well as his request for a hearing on the motion. After a careful review of the record, we reverse because the circuit court failed to hold the required hearing and to enter its

findings regarding the best interests of the child in the matter, and we remand for further proceedings.

In the circuit court, Randolph petitioned the court for in-jail child visitation, and he moved for a hearing on the matter. The court denied the motion for in-jail visitation without a hearing and ordered telephone visitation weekly at Randolph's expense. Randolph now appeals, contending that the circuit court erred in failing to hold a hearing to determine whether in-jail visitation should be granted and in failing to enter findings concerning the best interests of the child.

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. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.
- (2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.
- (3) 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.

This Court has held that this statute creates a presumption “that visitation is in the child’s best interest for the obvious reason that a child needs and deserves the affection and companionship of *both* its parents.” *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. App. 1994). The *Smith* Court continued, noting that “[t]he burden of proving that visitation would harm the child is on the one who would deny visitation.” *Id.* “[U]nder our statutory scheme, one may not be deprived of the right to visit his child without a hearing.” *Id.* This Court stated that, in *Smith*, there had “never been an evidentiary hearing, much less a finding, that [the child] would be endangered in any manner by visiting her father in prison.” *Id.* The *Smith* Court then held that a parent’s incarceration, “alone does not . . . justify denial of [the parent’s] right to visitation as a matter of law.” *Id.* at 57. Subsequently, this Court reiterated that a “parent’s incarceration does not suspend, nor deprive him of, his right to a hearing before he is denied visitation with his child.” *Alexander v. Alexander*, 900 S.W.2d 615, 616 (Ky. App. 1995).

In the present case, the circuit court erred in failing to hold a hearing concerning Randolph’s petition for visitation and erred in failing to enter its findings regarding the best interests of the child.

Accordingly, the order of the Wayne Circuit Court is reversed and this case is remanded with instructions for the circuit court to hold the required hearing on Randolph’s petition for visitation and to enter findings concerning whether in-jail visitation is in the best interests of the child.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jesse Randolph, *Pro se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

N/A