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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000361-ME

MICHAEL W. JACKSON APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 11-CI-00121

CHRISTINA JACKSON APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Michael W. Jackson (father) appeals from the circuit court's grant of supervised visitation to Christina Jackson (mother).

Father and mother were married on April 5, 2003. They had three children. During the course of the marriage mother became addicted to prescription medication and began to commit crimes related to this addiction. While on probation for theft in Tennessee, mother was arrested twice for DUI and, on each

occasion, one or more children were in the car. In 2009, mother pled guilty to DUI in exchange for having two counts of felony child endangerment dropped and served time in jail. In 2010, mother's arrest on DUI and other charges resulted in her pleading guilty to solicitation of prescription drugs. On March 5, 2010, mother's probation for theft was revoked, and she began serving her twenty month prison sentence.

On February 15, 2010, father and mother separated. In May 2010, father filed a petition for dissolution and changed his telephone number terminating telephone contact between mother and the children. Father was granted temporary custody of the children during the pendency of the dissolution action. On September 1, 2011, in the decree of dissolution, father was granted sole care, custody and control of the children. The issue of visitation was not addressed in the decree.

Mother was released from incarceration on October 31, 2011, and began living with her mother. She worked at various jobs in the fast food industry.

On March 22, 2012, mother, *pro se*, filed a motion requesting visitation. An evidentiary hearing was held on July 23, 2012. Father offered testimony as to why visitation would endanger the children. Mother did not attend the hearing.

On July 25, 2012, the circuit court denied mother's motion, ordering that no visitation take place:

> Based upon [mother's] history of alcohol/drug abuse and the lack of an established relationship with these three children, lack of any knowledge of where she resides and

> with whom, the Court finds that visitation would endanger seriously the children's physical, mental, moral, or emotional health since they are doing well in their current environment.

Mother did not ask for a new hearing or otherwise challenge this order. Instead, on August 8, 2012, mother filed a new motion for visitation, alleging she became lost in Kentucky on her way to the previous hearing. Mother subsequently obtained counsel.

On January 29, 2013, an evidentiary hearing was held on mother's second motion for visitation. Mother sought visitation on any terms that the court would find appropriate, admitting she had seriously endangered her children in the past because of her addiction to prescription medication. She testified regarding her criminal history and how it involved other people's prescriptions. Mother admitted to previously having "passed out" in the presence of the children from prescription drug abuse. Mother stated that her only steps to combat her addiction after her release were to work and mostly stay home. She admitted that the day before the hearing she had taken a Lortab that she had been previously prescribed and a Percocet from a friend, but claimed she needed them for a toothache.

The court took the matter under advisement, stating that the governing standard was whether visitation would seriously endanger the children. On February 4, 2013, the court ordered that mother be granted supervised visitation, finding as follows:

> Because of [mother's] history of drug abuse and current drug use, unrestricted visitation would seriously endanger

> the mental and emotional health of the children. Her continued drug use could seriously endanger the children's physical health if she drove with them while impaired, with or without a license.
>
> Despite the finding of endangerment with unrestricted visitation, the Court believes that restricted visitation would at least give [mother] the opportunity to see if she can maintain a relationship with her children.

The court set out a gradual reintroduction process for the children to become reacquainted with mother. The court ordered that mother be allowed telephone calls with the children once a week for three weeks before receiving bi-monthly visitation supervised by father or his wife at McDonald's or another public place. The court additionally stated, "If the reintroduction process does not appear to be going well for the three children, the Court will review this matter on motion."

Father appealed, arguing that no visitation should have been granted. Father argues that the circuit court's decision was clearly erroneous because it applied the wrong legal standard to mother's motion for visitation, which should have been treated as a motion seeking the modification of the previous denial of visitation. Father argues that because the court previously determined visitation would endanger the children's physical, mental, moral or emotional health, the court should have employed a best interest analysis in determining whether to modify the denial of visitation.

At the outset of our analysis, we note that mother did not file a brief. Whether her failure to do so is the result of inadvertence or intended as a

confession of error, our civil rules provide this Court with three options when considering this appeal. Kentucky Rules of Civil Procedure 76.12(8)(c) provides:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Consequently, this Court could summarily reverse as a confession of error without further discussion. However, we elect to review the issues raised by the father to determine whether reversal is reasonable. Upon review, we agree that it is.

"[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." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). We review *de novo* whether the proper law was applied to the facts. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005).

KRS 403.320 provides the standards for granting or denying visitation. Section one provides the standard for granting or denying an initial request for visitation: "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." *Id.*

> [T]he non-custodial parent cannot be denied reasonable visitation with his or her children unless there has been a finding that visitation will seriously endanger the child. The non-custodial parent is not required to show visitation is in the child's best interest . . . . Clearly the statute has created the 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. The burden of proving that visitation would harm the child is on the one who would deny visitation.

Smith v. Smith, 869 S.W.2d 55, 56 (Ky.App. 1994) (internal citations and quotations omitted).

The circuit court properly applied the KRS 403.320(1) standard in its July 25, 2012 order by considering whether visitation with mother would seriously endanger the children. Once the court made the finding that it would, it was appropriate for the court to deny visitation. While the court may have made a different determination had mother appeared and testified at the evidentiary hearing, mother failed to file a motion to vacate pursuant to CR 59.05, move for relief under CR 60.02 or file an appeal. "[S]ince this previous order was unappealed, the court was bound to follow it as the law between the parties[.]" *Hornback v. Hornback*, 636 S.W.2d 24, 26 (Ky.App. 1982).

Mother's second motion for visitation stands on a different procedural posture than her first motion. Once a determination has been made that visitation will seriously endanger the child and visitation has been denied, KRS 403.320(3) governs. It provides: "The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the

child[.]" *Id.* "In modifying a previous denial of visitation to allow visitation, there is no presumption, as in subsection (1), of entitlement to visitation. Instead, the child's best interests must prevail." *Hornback*, 636 S.W.2d at 26. Additionally, the person seeking the modification of the previous order bears the burden of proof to establish that modification is in the children's best interests. *McNeeley v. McNeeley*, 45 S.W.3d 876, 878 (Ky.App. 2001).

Hornback governs how we are to review this matter, as follows:

> First we consider the initial visitation judgment. Under K.R.S. 403.320(1), the noncustodial parent has absolute entitlement to visitation unless there is a finding of serious endangerment to the child. No "best interests" standard is to be applied; denial of visitation is permitted only if the child is seriously endangered. A finding that the Hornback children would be seriously endangered if the appellee were permitted visitation was embodied in the original order denying her visitation.
>
> Under subsection [(3)] of the statute, a "best interests" of the child standard is required when a judgment is sought to be modified. In modifying a previous denial of visitation to allow visitation, there is no presumption, as in subsection (1), of entitlement to visitation. Instead, the child's best interests must prevail. In this case, having found in the original judgment that the Hornback children's welfare would be endangered if the mother were allowed visitation, the court may not now modify that judgment without a finding that the modification would be in the children's best interests. No such finding appears in the judgment; instead, the court is apparently attempting to "reward" the mother for seeking psychiatric help.

636 S.W.2d at 26.

As *Hornback* makes clear, the court erred in its February 4, 2013 order in applying the KRS 403.320(1) standard, rather than the KRS 403.320(3) standard. Additionally, caselaw is clear that the trial court must make an actual finding regarding the best interests of the children; it is absolutely not to be presumed. *Id.*; *Hicks v. Halsey*, 402 S.W.3d 79, 84-85 (Ky. App. 2013) (citing *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011); *Keifer v. Keifer*, 354 S.W.3d 123, 125–26 (Ky. 2011)). "[A] rigid standard of reciting statutory standards--coupled with supporting facts--has now become a requirement." *Hicks*, 402 S.W.3d at 84.

Moreover, we pause to note that it is not the mother's best interests or wishes that is the compelling factor for visitation; as in *Hornback*, she should not be "reward[ed]" for her attempts at self improvement, which were apparently still questionable at the time of the hearing in this matter, to the potential detriment of her children. While it may generally be a truth of nature that children and their mother should have contact and a bond, courts cannot presume this is always in the children's best interests. Beyond the bond of mother to child, which is by nature's design a strong one, no evidence was presented on which the trial court could make a finding that even restricted visitation was in the children's best interests. While certainly the family court can be commended for the structure it put into place to protect the children during a period of transition regarding visitation, this may be construed as experimental and an avenue to gather information regarding whether visitation is in the children's best interests.

For reasons stated, we vacate the order under review and remand for additional findings on whether visitation is in the children's best interests pursuant to KRS 403.320(3).

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Barclay W. Banister Princeton, Kentucky	No brief filed.