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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000548-ME

J.C. APPELLANT

v.

APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 04-J-00445

S.D. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT, AND J. LAMBERT, JUDGES.

D. LAMBERT, JUDGE: J.C. brings this appeal of an order by the McCracken Family Court denying him visitation with his children J.D. and N.D. The matter was opposed by the children's mother, S.D. Finding no error, we affirm.

I. FACTS

On November 10, 2004, J.C. filed a motion for unsupervised visitation with his son J.D. The McCracken Circuit Court heard the motion and granted him unsupervised visitation for six hours per month.[1] A little more than a year later, the circuit court ordered J.C. to show cause regarding his failure to pay child support. The circuit court offered J.C. the option of paying the balance of his arrears in lieu of serving a 60-day jail sentence. Apparently, J.C. met his obligations, at least initially. J.C. later filed a motion for unsupervised visitation. This motion was denied because he failed to appear.

On January 19, 2006, S.D. filed a motion to receive sole custody of J.D. She also requested that J.C. receive supervised visitation. On February 24, 2006, the family court granted S.D. sole custody. The family court further ordered J.C. to complete a visitation schedule before granting standard visitation. The family court imposed this condition after finding that J.C. had only sporadically exercised visitation in the past and had given conflicting stories regarding his employment history. On July 14, 2010, the family court found J.C. in contempt for his nonpayment of child support.

On February 13, 2015, J.C. once again filed a motion for visitation. At the time, J.C. was incarcerated. He had been convicted of raping and sodomizing his former girlfriend's 12-year-old child. On March 3, 2015, the family court heard J.C.'s motion. After S.D. testified that J.C. had only visited

[1] The order also required S.D. to be present for the first two hours of visitation and prohibited J.C. from leaving the state.

with the children sporadically prior to the time he became incarcerated, the court stated:

> I'm not big on … establishing … relationships for the first time with people in prison. If they haven't actually tried to be a father to the child before they go to prison, I'm not gonna do it while you're there… So what the deal is, is when you get out in ten months, you come back to this court and I will start you a regimen where you can have a relationship with these children. But I think it's unfair for these children to have to drive across the state, literally, uh, virtually, and see somebody that they don't have a relationship behind bars with simply because you want to start it with them. Now, when you get out and you're still wanting to do that, I will be more than happy to try to accommodate you.

Later, the family court stated, "I will make a finding that because you are serving time for sodomizing a 12-year-old child of your girlfriend, that it would seriously endanger the child." The trial court subsequently denied the motion for visitation. The court's order denying visitation states that "[the c]ourt finds serious endangerment because of his conviction of sodomy & rape involving a child u/18 years. (12 yr. old)[.]" This appeal followed.

II. ANALYSIS

KRS 403.320(3) states that "[t]he 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." "[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).

In *Smith v. Smith*, 869 S.W.2d 55 (Ky. App. 1994), this Court considered a situation in which an inmate had requested visitation. *Id.* at 55. We held that the appellant was entitled to a hearing even though he was incarcerated: "The fact of his incarceration alone does not, in our opinion, justify denial of [the inmate]'s right to visitation as a matter of law." *Id.* at 57. The *Smith* Court continued as follows:

> Regardless of the heinous nature of Robert's crimes, his status as an inmate in a penal institution alone does not make visitation with his child inappropriate. Had it been shown that visitation would not be appropriate, that is, had Edna proven that Amanda would suffer serious consequences, the statute would have allowed the trial court to deny visitation. However, in no event may a non-custodial parent, even one who is incarcerated, be deprived of visitation because of the mere whim or lack of cooperation of the custodian.

Id.

In the present case, the family court held a hearing and found visitation with J.C. would endanger the children. The family court considered that J.C. was currently incarcerated for a sex crime committed against a minor once entrusted to his care, and that J.C. had been sporadic in his visitation. These were appropriate grounds to deny J.C. visitation both in light of *Smith*, *supra*, and *Alexander v.*

Alexander, 900 S.W.2d 615, 616 (Ky. App. 1995). The McCracken Circuit Court's order denying J.C. visitation is thus affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J.C.
Clinton, Kentucky

BRIEF FOR APPELLEE:

S.D.
Paducah, Kentucky