

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002295-MR

JAMES ROCKY WRIGHT

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE JUDA M. HELLMANN, JUDGE  
ACTION NO. 96-FC-001820

LORETTA A. WOODEN

APPELLEE

OPINION  
AFFIRMING IN PART  
AND  
VACATING IN PART

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BEFORE: JOHNSON, SCHRODER AND TACKETT, JUDGES.

JOHNSON, JUDGE: James Rocky Wright, pro se, has appealed from an order of the Jefferson Family Court entered on August 29, 2001, which denied his request for visitation with his daughter, Amber Marie Wooden. Having concluded that the family court's order as to the child support is substantially correct, we affirm on this issue. Having further concluded that the family court failed to comply with the statutory requirements contained

in KRS 403.320(1), we vacate the court's order in respect to all issues concerning James's request for visitation.

James married Loretta Wooden in Jefferson County, Kentucky on March 31, 1994. Shortly thereafter, on April 12, 1994, the couple separated. It was almost two years later, on March 26, 1996, that Loretta filed a petition for dissolution of the marriage in the Jefferson Family Court. James and Loretta entered into a settlement agreement and their marriage was dissolved by the Jefferson Family Court on May 1, 1996. As of May 1, 1996, there were no children born of the marriage and Loretta claimed she was not pregnant.<sup>1</sup>

On September 29, 1996, Loretta remarried and on November 16, 1996, she gave birth to Amber Marie Wooden. Loretta's new husband, Alan Wooden, was listed as the father on Amber's birth certificate. In fact, James is Amber's biological father. According to James, Loretta informed him that he was Amber's father shortly before Amber was born. James claims he lost contact with Loretta and Amber until September 1998, at which time he began visiting with Amber at the Wooden family home. Although Loretta and Alan permitted James to visit with Amber, they requested that he refrain from informing Amber that

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<sup>1</sup> A dissolution hearing was held on April 30, 1996, at which time Loretta informed the court that she was not pregnant. In addition, in her petition for dissolution, which was filed on March 26, 1996, Loretta stated that she was not pregnant.

he is her father. Consequently, Amber was told that James was a "friend of the family." James maintains that he visited with Amber on a regular basis until he was incarcerated on October 6, 1999.<sup>2</sup> James has remained incarcerated since October 6, 1999, and he is currently serving a 25-year sentence at the Lee Adjustment Center in Beattyville, Kentucky.<sup>3</sup> Apparently, Amber is still unaware that James is her father.<sup>4</sup>

On March 19, 2001, James attempted to exercise his parental rights by filing a pro se motion for declaratory judgment, in which he requested, inter alia, an order granting reasonable visitation with his daughter.<sup>5</sup> This was James's first attempt at legally asserting his parental rights. James's motion for declaratory judgment was returned due to the fact it was not "properly submitted." Nevertheless, on May 31, 2001, the Jefferson Family Court entered an order acknowledging, inter alia, that James sought to establish his parental rights. The family court found that the allegations raised in James's motion

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<sup>2</sup> Loretta contends the visits were more sporadic than regular.

<sup>3</sup> The record is silent as to the nature of the offense or offenses James was convicted of committing.

<sup>4</sup> James has not seen Amber since his incarceration.

<sup>5</sup> James further requested that Amber's birth certificate be changed to reflect that he is her father, and that her legal name be changed to Amber Marie Wright. James also asked the court to assess his child support obligation, but requested that his payments "be held in abeyance" until his release from prison.

for declaratory judgment were sufficient to justify a hearing, which was held on August 27, 2001.

James and Loretta were both present at the hearing. Loretta was represented by counsel and James proceeded pro se. The family court began by noting that its primary "responsibility [was] to determine whether visitation at a prison is in [Amber's] best interests." The family court then proceeded to hear testimony from both parties. Loretta conceded that James is Amber's father, however, she objected to his request for visitation. Loretta claimed Amber was claustrophobic and unable to ride in a car for longer than 30 minutes at a time.<sup>6</sup> Amber's claustrophobia posed a problem due to the fact Loretta and Amber resided in Louisville at the time of the hearing.<sup>7</sup> James agreed that it would be unreasonable to require Amber to travel such a long distance given her condition. James explained that he hoped to be transferred to a closer facility in the near future, and, that he would like to visit Amber on a regular basis following his relocation. At this point, the family court judge stated that she was not concerned with the distance issue. The judge declared that she was not willing to make a determination concerning visitation until a recommendation from a professional was provided. The

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<sup>6</sup> Loretta did not offer any medical evidence indicating that Amber suffered from claustrophobia. Loretta further stated that she did not drive.

<sup>7</sup> The distance between Louisville and Beattyville is approximately 150 miles.

judge further noted that the visitation issue was moot since James had agreed not to push the issue until he was transferred to a facility closer to Loretta and Amber.

The judge then proceeded to question James concerning his ability to pay child support. James testified that he earned \$1.25 a day, seven days a week. Consequently, the family court set James's child support obligation at \$60.00 per month effective April 4, 2001, payable upon his release from prison.<sup>8</sup> As for James's request that Amber's last name be changed to reflect that he is her father, the family court concluded that it was in Amber's best interests that her last name remain Wooden for the time being.<sup>9</sup>

On August 29, 2001, the family court entered an order denying James's request for visitation. The order reads, in relevant part, as follows:

1. Amber shall have no visitation with her father as long as he is in a prison three and one half hours away. The child shall have no visitation with the Father until such time as the child therapist recommends the same. The child therapist needs to be consulted before Amber is told that Mr. Wright is her biological Father.
2. Mr. Wright shall correspond with Amber in writing and by telephone at his own

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<sup>8</sup> At the time of the hearing, James had not made any child support payments.

<sup>9</sup> Loretta did not object to James's request that Amber's birth certificate be changed to reflect that he is her father. Nevertheless, Loretta's counsel correctly pointed out that the family court lacked the authority to modify Amber's birth certificate. See KRS 213.046(10)(b).

expense. Mr. Wright is to forward the cost of long distance telephone calls prior to making the same. The Court finds that it is in the child's best interest that she not change her last name to Wright until such time as the child's therapist recommends the same.

3. The Father shall pay child support in the amount of \$60.00 per month effective April 4, 2001. While the Father is incarcerated, child support shall accrue and be payable upon his release from incarceration.

This appeal followed.

We will first address James's contention that the family court incorrectly found that he earns \$1.25 per hour in its order. As previously discussed, James testified at the hearing that he earned \$1.25 per day in prison. The family court's order reads, in relevant part, as follows: "The Father testified that while in prison he earns \$1.25 per hour." While we agree with James that the family court erred in this respect, it is evident that this error caused no prejudice to his substantial rights. The family court assessed James's child support obligation at \$60.00 per month, which is the minimum amount set by the child support guidelines.<sup>10</sup> Simply stated, the

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<sup>10</sup> See KRS 403.212(4).

error had no bearing on the outcome of the family court's decision.<sup>11</sup> Accordingly, we affirm on the child support issue.

James's primary argument on appeal is that the family court erred by denying his request for visitation.<sup>12</sup> "[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."<sup>13</sup> An initial request for visitation is governed by KRS 403.320(1), which reads, in relevant part, as follows:

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.<sup>14</sup>

In Hornback v. Hornback,<sup>15</sup> this Court noted that a "noncustodial parent has absolute entitlement to visitation

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<sup>11</sup> See Kentucky Rules of Civil Procedure (CR) 61.01. "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

<sup>12</sup> Loretta did not file an appellate brief.

<sup>13</sup> Drury v. Drury, Ky.App., 32 S.W.3d 521, 525 (2000).

<sup>14</sup> "When visitation has already been denied, the standard for modification is not serious endangerment; rather, the best interests of the child governs." McNeeley v. McNeeley, Ky.App., 45 S.W.3d 876, 878 (2001). James's request for visitation must be viewed as an initial request given the absence of any previous orders granting or denying visitation.

<sup>15</sup> Ky.App., 636 S.W.2d 24 (1982).

[under KRS 403.320(1)] unless there is a finding of serious endangerment to the child."<sup>16</sup> The family court in the case sub judice never made such a finding. Moreover, as previously discussed, the family court noted that its primary concern was "whether visitation at a prison is in [Amber's] best interests." As this Court stated in Hornback, "[n]o 'best interests' standard is to be applied; denial of visitation is permitted only if the child is seriously endangered."<sup>17</sup> Put differently, "[t]he noncustodial parent is not required to show visitation is in the child's best interest" when proceeding under KRS 403.320(1).<sup>18</sup>

In Smith, supra, this Court was faced with a similar issue. Robert Smith was an inmate at the Eastern Kentucky Correctional Complex where he was serving a life sentence for murder, robbery, and kidnapping.<sup>19</sup> Two months prior to his incarceration, Robert fathered a child, Amanda, with his former wife, Edna. Edna took Amanda to visit Robert in prison for several years after his incarceration. In 1989 Robert filed a petition for dissolution of his marriage to Edna, and in November 1990, a decree of dissolution was entered. The decree

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<sup>16</sup> Id. at 26.

<sup>17</sup> Id.

<sup>18</sup> Smith v. Smith, Ky.App., 869 S.W.2d 55 (1994).

<sup>19</sup> Id.

provided that all issues concerning visitation were "deferred" due to Robert's status as an inmate. Shortly thereafter, Edna stopped bringing Amanda to visit her father.<sup>20</sup> Consequently, Robert filed a pro se motion requesting visitation on weekends and holidays with Amanda, who was 11-years old at the time. The trial court subsequently denied Robert's request, reasoning that it was inappropriate to consider his motion due to his status as an inmate.<sup>21</sup> The trial court did not hold a hearing prior to denying Robert's visitation request, and it failed to issue any findings concerning whether Amanda would be endangered in any manner by visiting her father in person.<sup>22</sup>

This Court reversed and noted that "[i]n this jurisdiction the non-custodial parent cannot be denied reasonable visitation with his or her child unless there has been a finding that visitation will seriously endanger the child."<sup>23</sup> The Court went on to note that "the statute [KRS 403.320(1)] has created the presumption that visitation is in the child's best interest[,] and, that "[t]he burden of proving that visitation would harm the child is on the one who would

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<sup>20</sup> Id.

<sup>21</sup> Id. at 56.

<sup>22</sup> Id.

<sup>23</sup> Id.

deny visitation."<sup>24</sup> In closing, the Court remarked that one's "status as an inmate in a penal institution alone does not make visitation with his child inappropriate."<sup>25</sup>

In light of this Court's previous holdings in Hornback, supra, and Smith, supra, and the unequivocal language contained KRS 403.320(1), we conclude that the Jefferson Family Court abused its discretion in the case sub judice. As previously discussed, the family court completely failed to make any findings concerning whether Amber would be seriously endangered by visiting her father in prison, and, the family court erroneously applied the "best interests" standard to a situation in which it was wholly inapplicable.<sup>26</sup> Consequently, we must vacate the family court's order as it pertains to James's request for visitation.<sup>27</sup>

James further contends that the family court incorrectly ordered that a child therapist should be consulted before Amber is told that he is her father. Given the lack of adequate factual findings contained in the family court's

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<sup>24</sup> Id.

<sup>25</sup> Id. at 57.

<sup>26</sup> Hornback, 636 S.W.2d at 26; Smith, 869 S.W.2d at 56.

<sup>27</sup> We are unpersuaded that James waived his right to appeal the family court's ruling in respect to his request for visitation by agreeing not to push the issue until he was transferred to a facility closer to Loretta and Amber. A thorough review of the videotape of the visitation hearing indicates that James simply intended to withdraw his request for visitation until he was in a better position to accommodate his daughter's precarious condition.

analysis of the issues presented by James at the visitation hearing, we conclude that the family court's order must be vacated on this issue as well.

Based upon the foregoing reasons, the order of Jefferson Family Court is affirmed as to the amount of child support ordered and vacated in respect to all issues concerning James's request for visitation.

ALL CONCUR.

BRIEF FOR APPELLANT:

James R. Wright, Pro Se  
Beattyville, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed