RENDERED: January 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002327-MR

JOSEPH MILTON APPELLANT

APPEAL FROM BOONE FAMILY COURT
v. HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 97-CI-01184

REGINA HUBBARD APPELLEE

OPINION
VACATING
AND
REMANDING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM and KNOPF, JUDGES.

BUCKINGHAM, JUDGE: Joseph Milton appeals from an order of the Boone Family Court denying his petition for visitation. Because the court did not make the required findings set forth in KRS[1] 403.320(1) before denying the petition, we vacate and remand for further proceedings.

Milton and Regina Hubbard, the appellee, had three children out of wedlock. On July 16, 1997, Milton assaulted

[1] Kentucky Revised Statutes

Hubbard by tying her to back of his vehicle and dragging her across the ground. As punishment for the crime, Milton was sentenced to ten years in the penitentiary.

On October 8, 1997, Milton's parents, Joseph and Nancy Milton, filed a petition in the Fayette Circuit Court for the custody of two of the children.[2] On October 24, 1997, the Fayette Circuit Court entered an order transferring the case to the Boone Circuit Court. On February 11, 1998, an order was entered by the Boone Circuit Court denying the Miltons' motion for temporary custody and continuing their alternative motion for visitation with their grandchildren.

On April 29, 1999, the Boone Circuit Court entered an order granting the Miltons visitation with the children. On June 7, 1999, the Boone Circuit Court entered an *ex parte* order suspending the Miltons' visitation due to allegations of abuse. On January 18, 2001, the Boone Circuit Court entered an order denying the Miltons' motion for visitation, their motion for temporary custody, and their motion to vacate the *ex parte* order suspending visitation.

On April 12, 2002, the appellant, an inmate at the Kentucky State Penitentiary, filed a petition for visitation in

---

[2] The Miltons did not petition for custody of the third child because that child had not yet been born when the Miltons filed their petition. Hubbard was three months pregnant in 1997 when Milton assaulted her, and this was the child that was born thereafter.

the Boone Circuit Court. Rather than file the petition as an original action, the clerk filed it as a part of the action initiated by Milton's parents for custody or visitation. On the same day, the court entered an order appointing Marcia Thomas as guardian ad litem for Milton due to his incarceration. On April 19, 2002, the clerk entered an appointment of Stuart P. Brown as guardian ad litem for Milton. We are unaware as to why this appointment was made by the clerk since the court had ordered seven days earlier that Marcia Thomas be guardian ad litem for Milton.

On April 26, 2002, Milton filed a motion to strike his parents as petitioners on the ground that he was the sole petitioner for visitation at that point. There is no indication that the court ruled on that motion. On May 2, 2002, Milton filed an affidavit for the recusal of the Boone Family Court judge, Judge Linda Bramlage. On May 20, 2002, Chief Justice Joseph E. Lambert denied Milton's request to disqualify Judge Bramlage.

On August 21, 2002, a hearing was held before Judge Bramlage in the Boone Family Court on Milton's motion for visitation. Milton was not present at the hearing, but he was represented by Brown as his guardian ad litem. The record in this case contains a court calendar initialed by Judge Bramlage which indicates the motion was denied. The calendar contains

writing, presumably by Judge Bramlage, which states that "it is not in the best interest of the children to visit with the Pet. at this time." Further, the court determined that "visitation with the Pet. at this time would be traumatic and harmful to the children." However, the court allowed Milton to write letters to the children through his guardian ad litem if the children's counselor determined that the letters were appropriate for them. No formal order was entered denying Milton's petition for visitation. Milton's appeal from the court's order on the calendar followed.[3]

Milton attacks the family court's order on two fronts. First, he alleges several procedural due process violations. Second, he maintains that the court erred by denying his motion without making the findings required by KRS 403.320(1). As for any procedural errors by the court, we find any error in that regard to be harmless. However, we agree with Milton that the court failed to make the requisite findings required by the statute.

Concerning Milton's argument that the court violated his due process rights in connection with the proper procedure, he raises several arguments. First, he argues that the court erred in "reassigning" him from being the "real" petitioner to

[3] Hubbard did not file a brief for our consideration. The record indicates that the children are now in the custody of Billie Huff, Hubbard's mother. Hubbard apparently has no involvement with the children.

being a "co-respondent." In support of this argument he cites CR[4] 17.01 which states in part that "[e]very action shall be prosecuted in the name of the real party in interest."

We find nothing in the record to indicate that the court "reassigned" Milton from his status as a petitioner to a status of being a co-respondent. It may be that Milton's petition for visitation should have been filed by the clerk as an original action rather than as a motion in the same action filed by Milton's parents for custody or visitation. However, regardless of what status Milton was assigned or reassigned, we find any error in this regard to be harmless.[5] The court considered Milton's petition for visitation regardless of the proper procedural posture of the case.

Second, Milton argues that the court erred by "incorrectly assigning the action to be prosecuted (defended) by parties who were prohibited by statute KRS 405.021." KRS 405.021 is the statute dealing with grandparent visitation rights. We assume that this argument relates to his first argument concerning his proper designation as a petitioner. It is clear that the court did not consider Milton's petition for visitation to be a petition also on behalf of his parents.

---

[4] Kentucky Rules of Civil Procedure.

[5] See CR 61.01.

Therefore, for the reasons cited in connection with his first argument, this argument is also without merit.

Milton's third argument regarding the proper procedure is that the court erred by "incorrectly appointing a current County Attorney to represent Appellant." He asserts that there was a conflict of interest by virtue of his being appointed a county attorney as his guardian ad litem. The record indicates that Marcia Thomas was appointed by the court as Milton's guardian ad litem on April 12, 2002, the same day Milton filed his petition for visitation. While Milton claims that Thomas was a county attorney, there is nothing in the record to support this claim. Further, the record indicates that Stuart P. Brown was assigned as guardian ad litem for Milton by the clerk seven days later. The record indicates that Brown, not Thomas, represented Milton at the hearing.

CR 17.03 provides for the appointment of a guardian ad litem for infants and persons of unsound mind in some circumstances. CR 17.04(1) provides that a guardian ad litem shall be appointed for a prisoner if he or she is unable to defend the action. It does not provide for the appointment of a guardian ad litem for a prisoner bringing a court action. Therefore, although Milton moved the court to appoint him a guardian ad litem, he was not entitled to have one appointed to represent him in this action.

There is nothing in the record to indicate to us that Milton was represented by the county attorney or an assistant county attorney in these proceedings. Furthermore, the record indicates Brown, not Thomas, represented Milton at the hearing. Finally, there is nothing in the record to indicate either that Milton objected to the appointment of the guardian ad litem or that Milton preserved any error in this regard. Thus, we reject his argument.

Milton's fourth argument in connection with the procedure was that the court condoned the clerk's action of appointing a second guardian ad litem in violation of CR 17.03 and CR 17.04, thereby violating his due process rights. For the reasons stated above, we likewise reject this argument.

Milton's fifth argument concerning the proper procedure is that the court improperly advised the clerk to file Milton's affidavit for recusal with the county-judge executive rather than with Chief Justice Lambert. Any error in this regard is also harmless because Chief Justice Lambert ultimately addressed and denied the request for disqualification a few short weeks after the affidavit was filed.

Milton's sixth argument regarding procedure was that the court deliberately refused to serve him with timely notice of the visitation hearing. He also argues that he did not

receive notice of the court's order denying his petition so as to allow him to file a timely notice of appeal to this court.

Milton, or at least the guardian ad litem representing him, was entitled to service of the written notice of the hearing date. CR 5.01. Although Milton claims not to have received notice of the scheduled hearing to be held on August 21, 2002, the record indicates that he was mailed a copy of the order and that Marcia Thomas, as his guardian ad litem, was also mailed a copy. Thomas apparently did not represent Milton at the hearing. Rather, Stuart P. Brown was present at the hearing as his guardian ad litem. Because Milton received notice of the hearing by mail and because he was represented by a guardian ad litem at the hearing, we find no error.[6]

As his final argument concerning procedural due process, Milton argues that he was deprived of his right to file a timely appeal to this court due to the clerk not sending him a copy of the order until it was too late to do so. Any error in this regard was harmless in that Milton was ultimately allowed by this court to file his appeal.

---

[6] Milton also asserts that his guardian ad litem did not adequately represent him and that it would have been beneficial had the court allowed him to attend the hearing. Concerning the adequacy of representation by the guardian ad litem, Milton neither cites authority nor are we aware of any that would require a vacating or reversing of the order due to ineffective assistance of counsel in this civil proceeding. Further, we know of no authority that would require the court to have Milton transported for the hearing. In this regard, see Alexander v. Alexander, Ky. App., 900 S.W.2d 615, 616 (1995).

We now turn to Milton's second attack on the court's order, the failure of the court to make requisite findings before denying his petition. As Milton notes in his brief, KRS 403.320(1) states in pertinent part that "[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." Further, the fact of incarceration alone does not deprive a noncustodial parent of the right to visitation as a matter of law. Smith v. Smith, Ky. App., 869 S.W.2d 55, 57 (1994). See also Alexander, 900 S.W.2d at 616.

In Hornback v. Hornback, Ky. App., 636 S.W.2d 24 (1982), the court held that "[u]nder 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." Id. at 26. In the case *sub judice* the requirements of the statute were not met. The trial court did not make any findings concerning whether visitation would seriously endanger the children's physical, mental, moral, or emotional health. Rather, the court stated only that visitation with Milton would not be in the best interests of the children and that visitation would be traumatic and harmful to them.

While visitation might be "traumatic and harmful" that does not necessarily mean it would seriously endanger the children. In short, the court erred by not making the specific findings required by the statute before denying the petition for visitation.

We vacate the order of the Boone Family Court denying Milton's petition for visitation and remand the matter for the entry of an order either granting or denying the petition pursuant to the requirements of KRS 403.320(1).

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph Milton, *Pro Se*
Eddyville, Kentucky

NO BRIEF FILED FOR APPELLEE: