

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001510-ME

WILLIAM HARRY MEECE

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 00-CI-00019

REGINA KRISTINE MEADE

APPELLEE

OPINION
REVERSING
AND
REMANDING

** ** *

BEFORE: BUCKINGHAM,¹ HENRY, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: William Harry Meece, an inmate at Eastern Kentucky Correctional Complex, appeals pro se from an order of the Fayette Family Court denying his motion to enforce the visitation rights with his children granted to him in a divorce decree with his ex-wife, Regina Kristine Meade. Due to numerous errors and lack of evidence, we reverse and remand for further proceedings.

¹ This opinion was completed and concurred in prior to Judge David C. Buckingham's retirement effective May 1, 2006. Release of the opinion was delayed by administrative handling.

Meece and Meade were married in 1991. They had three children, two girls and a boy. At the time the court entered its order in July 2005, the two girls were ages 13 and 11 and the boy was age 8.

Meece and Meade separated in November 1999. The following month, Meade filed rape charges against Meece. While that case was pending, Meece agreed not to contest Meade's request for a domestic violence order (DVO) based on the circumstances alleged in the criminal complaint.

The grand jury refused to indict Meece, and the case was returned to the district court. The charges against Meece were dismissed by the district court on the motion of the county attorney because Meade had been untruthful in her statements concerning the alleged rape. Meece then filed a motion seeking to have the DVO set aside.

While the above actions were pending, Meade filed a petition for divorce. The parties subsequently entered into a separation agreement that resolved many issues, including visitation, custody, and child support. Based on the separation agreement, the Fayette Circuit Court entered an uncontested divorce decree on November 28, 2000. The decree approved and incorporated the separation agreement.

Under the terms of the decree, Meece and Meade shared joint custody of their three children. Meade was designated the

primary residential custodian, although the parties split parenting time equally. Given the fact that each parent had the children half the time, the court approved the parties' agreement to waive child support. Further, pursuant to the parties' agreement, the DVO obtained by Meade was set aside.

The record reflects no problems with visitation and custody until Meece was taken into custody in late 2002 after being charged with criminal offenses. He was convicted and sentenced in 2003 to 12 years in prison for complicity to commit murder. Meece was ultimately housed in the Eastern Kentucky Correctional Complex (EKCC).

According to documents filed by Meece, Meade allowed visits in November 2003, March 2004, and December 2004. In addition, the children were allowed phone calls approximately once a month through Meade's father, Robert Meade.

Although the record is unclear as to the timing, at some point Meece was charged with three counts of murder in Adair County. He initially entered a guilty plea, but he was later allowed to withdraw that plea. Those charges were pending at the time this dispute came before the Fayette Family Court.

In August 2004, Meece filed a Motion to Compel Adequate Contact and Visitation. Meade did not file a response, and no action was taken by the court on Meece's motion. In January 2005, Meece filed a renewed motion requesting the same

relief. In addition, he filed a motion seeking a prompt and fair hearing. Once again, Meade did not file a response. On May 9, 2005, the court entered an order setting Meece's motion for a hearing on May 17, 2005.

Meade did not appear at the May 17 hearing, but her attorney was present and provided the court with a medical excuse indicating Meade had the flu. Because of Meade's absence, the court treated the hearing as a pretrial hearing. Prior to contacting Meece at EKCC by telephone, the court asked Meade's attorney what Meade's position was on visitation. Meade's attorney responded that they believed visitation should be allowed only on the recommendation of the children's counselors.

Once the court got Meece on the phone, Meece indicated his goal was adequate and reasonable visitation. He defined that as one visit and one phone call a month. The court then questioned Meece about his criminal status. Meece stated that the actions that led to his conviction for conspiracy to commit murder were influenced by his excessive use of alcohol. The court then questioned Meece on his intoxication while the children were in his care. The court did not swear Meece in as a witness before questioning him.

The discussion between the court and Meece then turned to the children's counselors. Meece indicated that Dr. Kim

Saylor was present at the December 2004 visit. He also indicated he had asked Dr. Saylor for information concerning the children's care but had received no response. The court thereafter indicated it would seek reports from both Dr. Saylor and Dr. Feinberg.²

The court then questioned Meece concerning the amount of support he had provided for the children. Meece indicated that prior to his incarceration, he had the children half of the time and thus owed no child support. In response to further questioning, he indicated the money he made through inmate employment simply did not allow any support. Finally, the court directed Meece to contact the friend of the court, attorney Barry Minton, to assist in subpoenaing anyone he desired to testify at the hearing.

A hearing on Meece's motion was held on June 30, 2005. Meade and her attorney were present, as were Robert Meade (Regina Meade's father) and Leah Bourne (a former babysitter for the children and friend of the family). Robert Meade and Bourne had been subpoenaed by Meece. The friend of the court was also present.

Prior to contacting Meece telephonically at EKCC, Meade's attorney provided the court with a copy of a report from

² Although it is unclear from the record, it appears that Meade sought counseling for the children through the office of Feinberg & Associates. Dr. Saylor apparently works for this group.

Dr. Saylor. In addition, Meade's attorney provided the court with an affidavit from Rabbi Marc Kline. Meade's attorney indicated Kline had been out of the country and was currently out of Kentucky. He also indicated that Kline was available by telephone. In addition to these documents, the friend of the court provided the court with a confidential letter from Dr. David Feinberg. Although the court reviewed these documents and apparently relied on them in making his decision, they were not entered in the record. Other than Kline's affidavit, which was faxed to Meece unsigned, Meece had no access to the contents of these documents.

After the documents were given to the court, the court initiated telephone contact with Meece at EKCC. Once Meece was on the phone, he indicated he thought Meade had the burden to show that reasonable and adequate visitation would seriously endanger the children. The court interrupted him and indicated that as it was his motion, Meece had the burden of proof. Before Meece called his two witnesses to testify, the court questioned him concerning his motive for doing so.

Meece then called Bourne as his first witness. Based on the exchanges between Meece, the court, and Bourne, it appears that Bourne had been a babysitter for the children. In addition, at one time Bourne had agreed to facilitate the transfer of the children so they could visit Meece at EKCC.

However, at the time of the hearing, Bourne indicated she no longer wanted to have anything to do with the situation.

When Meece attempted to question Bourne as to the reason for her change of heart, the court cut him off despite no objection from Meade's attorney. Although Meece indicated he believed Rabbi Kline and others might have influenced Bourne's decision, the court stated it would not consider such information and did not allow him to pursue the line of questioning. Meade's attorney neither asked any questions nor entered any objections during Bourne's testimony. Bourne was then excused as a witness without having to answer further.

Meece then called Robert Meade as a witness. Mr. Meade testified as to the role he had played, and was willing to play, in assisting in visitation and phone contact. In response to a question by Meece, Mr. Meade testified he believed it would be harmful to deny the children contact and visitation if they desired it. He also testified that he would be available to facilitate visitation on various weekends each month. Mr. Meade was then excused as a witness without any questioning from Meade's attorney.

At the conclusion of Robert Meade's testimony, the court indicated to Meece that it had an affidavit from Rabbi Kline. Meece objected to the affidavit, indicating he felt Rabbi Kline had a partisan role in the affair and that he had no

ability to question him. The court then informed Meece of the letter from Dr. Saylor. Again, Meece objected. He indicated he had no knowledge of the letter's contents. Further, he indicated Dr. Saylor had refused to respond to his requests for information concerning the children's treatment and that Dr. Saylor may be partisan. The court then lectured Meece on the idea that he should consider the counselors as being on the children's side, not Meade's side. Meece responded by again noting Dr. Saylor's refusal to respond to his requests for information. He requested that Dr. Saylor be present and placed under oath so that he could question her as to her opinions.

The court then questioned Meece about the support he had provided the children since his incarceration. The court informed Meece that the obligation to support one's children did not end merely because one is in prison. Meece responded by noting that his salary as an inmate did not allow for such support. The court then advised Meece that his parental rights could be terminated for nonsupport. Again, the court did not swear Meece in as a witness prior to questioning him.

Meade did not testify, and no witnesses were called to testify on her behalf. The only sworn testimony at the hearing came from Leah Bourne and Robert Meade. There is no indication that the affidavit of Rabbi Kline, the report of Dr. Saylor, or the letter of Dr. Feinberg were introduced into evidence,

although the court obviously relied upon them in denying Meece's motion. Furthermore, the aforementioned documents were not included in the record.

The hearing came to a conclusion with the court again lecturing Meece on his failure to perceive the counselors as acting in the best interests of the children. The court then reiterated to Meece that his parental rights could be terminated for nonsupport. The court concluded that it did not think visitation would be in the best interests of the children. As for future visitation, the court indicated it would leave the matter to the discretion of the counselors. At the conclusion of these statements to Meece, the court terminated the telephone connection with EKCC.

Having set out the terms of its ruling, the court informed those in the courtroom that, based on its experience with abuse and neglect cases, sometimes it was better simply to remove the father from the picture. The court suggested to Meade that Meece could have his parental rights terminated for nonsupport. After initially directing Meade's attorney to draft the order denying Meece's motion, the court directed the friend of the court to draft the order.

On July 7, 2005, Meece filed a Motion for Production of Secret Evidence. In the motion, he sought any and all confidential letters upon which the court relied. The record

reflects no action on this motion. The following day, the court entered the final order denying Meece visitation. This appeal by Meece followed.

Meece's first argument is that the court erred in placing the burden of proof on him rather than on Meade since she was the party who was seeking to deny visitation. Meade did not respond to this argument in her brief. We agree with Meece that the court erroneously assigned the burden of proof.

Meece already had equal time-sharing with the children in accordance with the divorce decree. Due to the circumstance of his incarceration, this arrangement became unworkable. Apparently, Meade allowed visitation and phone calls several times during the early part of Meece's incarceration. She eventually disallowed any contact, however.

"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). "[T]he non-custodial parent cannot be denied reasonable visitation with his or her child[ren] unless there has been a finding that visitation will seriously endanger the child." Id., citing KRS³ 403.320(1). In short, although Meece brought the matter before the court by the filing of his motion, upon a showing that visitation was being

³ Kentucky Revised Statutes.

denied, the burden of proving that visitation would harm the children was on Meade.

The Smith case is strikingly similar to this one. Like Meece, Smith was an inmate at EKCC. Smith was serving a life sentence for murder, robbery, and kidnapping. When his ex-wife stopped bringing the child to the prison to visit him, Smith moved the court to allow him to have visitation.⁴ As in this case, the lower court denied the motion for visitation even though the ex-wife filed no response to it.

This court reasoned in the Smith case that:

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.

Id. at 57. As in the Smith case, the court here was required to give reasonable visitation rights to Meece unless Meade proved that visitation would harm the child. See id. at 56. There is no finding in the record by the court that visitation would seriously endanger the child's physical, mental, moral, or emotional health,⁵ and there is no evidence in the record to

⁴ The matter of visitation was deferred in the divorce decree because Smith was a prisoner.

⁵ See KRS 403.320.

support such a finding.⁶ Furthermore, it was error for the court to use the best interests standard in denying visitation rather than the standard set forth above.

Meece next argues that the court committed reversible error by considering out of court statements from Rabbi Marc Kline and Dr. Kim Saylor. As we have noted, an affidavit by Rabbi Kline and a report from Dr. Saylor were given to the court by Meade's attorney. Also, the friend of the court submitted a letter from Dr. Feinberg. Meece objected to the affidavit of Kline and the report of Dr. Saylor on various grounds, including that he did not have the opportunity to cross examine those witnesses. There is no indication in the record that Meece was ever even made aware of Dr. Feinberg's letter, much less its content.

We again note that there is nothing in the record that indicates any of these documents were admitted into evidence. If they were, it was error because they constituted inadmissible hearsay evidence. See KRE⁷ 802. Also, since they are not a part of the record, we have no way of knowing whether the documents support the court's ruling since they have not been preserved for our review.

⁶ Again, we note that the affidavit of Rabbi Kline, the report of Dr. Saylor, and the letter from Dr. Feinberg were not introduced into evidence and were not even included in the record for our review.

⁷ Kentucky Rules of Evidence.

Meade responds by arguing that the facts in the documents had no impact on the court's decision. The tape of the hearing clearly shows that the court received the documents and reviewed them. In addition, the court's order makes it clear that the court is relying on the judgment of the counselors to determine when visitation with Meece would be in the best interests of the children. Thus, for Meade to argue that the contents of the documents had no impact on the order is disingenuous at best. Likewise, Meade's argument that the court's error was harmless is without merit.

KRS 403.290(2) provides as follows:

The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request. Counsel may examine as a witness any professional personnel consulted by the court.

Pursuant to this statute, the court had the right to seek the advice of professional personnel such as Dr. Saylor and Dr. Feinberg. However, Meece, who represented himself, had the right to question them, as well as Rabbi Kline, as witnesses. See id. He was improperly denied such a right despite his request. In fact, Meece was not even made aware of the contents of the documents upon which the court relied in denying visitation.

Meade argues that this appeal by Meece should be abated until after the murder charges against Meece are resolved. This court made it clear in the Smith case that the fact of incarceration alone does not justify denial of visitation as a matter of law. Id. at 57. Therefore, Meece is entitled to visitation unless the court determines otherwise after a proper hearing. See Alexander v. Alexander, 900 S.W.2d 615, 616 (Ky.App. 1995).

Meece is in prison for conspiracy to commit murder and is charged with three counts of murder. However, we are unaware of whether visitation would seriously endanger his children's physical, mental, moral, or emotional health. The evidence to support such a finding is lacking since Meade neither testified nor presented witnesses to sustain the burden of proof assigned to her by the statute and the Smith case.

In addition to erroneously assigning the burden of proof to Meece, the court erred by improperly considering inadmissible hearsay evidence. Even if the evidence could be said to have been admissible, it does not appear anywhere in the record and there is no indication that it was actually admitted as part of the record or even that it supported the court's order.

The order of the Fayette Family Court is reversed, and this matter is remanded for the entry of an order granting Meece visitation commensurate with his circumstances.

TACKETT, JUDGE, CONCURS.

HENRY, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

HENRY, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I agree with the reasoning of the majority as well as with the conclusion that this case must be remanded to the trial court because of the errors discussed in the majority opinion. I respectfully dissent only from the majority's decision to reverse and remand with instructions to the trial court to enter an order granting Meece visitation. I would vacate the trial court's order and remand with instructions to conduct a new hearing using the correct burden of proof and properly admitted evidence. The possibility exists that it could be properly shown by clear and convincing evidence that visitation with the appellant in the prison setting, given his history of violence, brutality and lawlessness, could seriously endanger the mental, moral or emotional health of these children. Therefore, I dissent.

BRIEF FOR APPELLANT:

William Harry Meece, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

David M. Kaplan
Lexington, Kentucky