



## James R. v

2003 | Cited 0 times | Nebraska Court of Appeals | January 14, 2003

(Not Designated for Permanent Publication)

James R. filed a petition seeking to establish visitation rights with his daughter, Gina R., whom he had been prohibited by court order from seeing since 1992. The district court for Lancaster County, Nebraska, found that James failed to demonstrate a material change in circumstances to warrant a change in the earlier order. James appeals.

### FACTUAL BACKGROUND

It appears from the record that James and Mary Ann P. were involved in a romantic relationship, and on May 2, 1987, the couple had a daughter, Gina. Sometime thereafter, the relationship soured, and a custody dispute regarding Gina arose. On August 12 and 13, 1992, trial was had in the district court for Lancaster County involving the issues of paternity, custody, and visitation. The trial court found by James' admission and by virtue of blood tests that he was the father of Gina. The court made a specific finding that James had physically abused Mary Ann. Additionally, the court made a specific finding, although not reciting precise details, that James had "physically and sexually abused his daughter and minor child, Gina." The court found Mary Ann to be a fit and proper person to provide for the care and welfare of Gina, awarded Mary Ann custody, and ordered James to pay child support. Citing the findings of abuse of Mary Ann and Gina, the court entered an order which prohibited James from having contact of any kind with Mary Ann. The court made a finding that Gina was in need of additional counseling, which Mary Ann was ordered to provide. We quote the trial court's order concerning visitation by James with Gina as follows:

This [c]ourt further finds that it is in the best interest of Gina [R.] that the visitation rights of James [R.] be limited to no visitation at this time. The [c]ourt points out to [James] that while limiting visitation rights at this time, this [c]ourt retains continuous review of visitation rights; and, upon a proper showing of a change of circumstances, such limitations on visitation will be reviewed.

### PROCEDURAL BACKGROUND

Approximately 9 years later, on September 20, 2001, James filed a petition in the district court for Lancaster County seeking modification of the above-described decree to provide for visitation with Gina. The petition alleged that Gina was now 14 years of age, that James had not been allowed visitation for 10 years, and that an order should be entered which would facilitate the introduction of visitation between James and Gina.



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On February 8, 2002, Mary Ann answered, and on March 25, trial was had in the district court for Lancaster County. James testified that since 1992, he had not seen Gina but had seen Mary Ann once around Easter 2001. He "totally and completely" denied that he had physically and sexually abused Gina. James said that he drank alcohol on a consistent basis in 1992, but quit "seven or eight years" ago. He testified that he married Terry R. on October 14, 1995, and had lived with her and her two daughters since that time. James testified that he was making his child support payments on time, with an extra payment toward an arrearage which accumulated while he was disabled. He ended his testimony by stating, "I just want to see my daughter."

Terry testified that she had been married to James for 7 years at the time of trial. She stated that since their marriage, James had been around her two daughters and her grandchildren, and that James was "absolutely" not a danger to the children. Terry further testified that she did not believe that James was a danger to Gina.

After Terry's testimony, James' counsel rested. Mary Ann's counsel moved for a directed verdict on the ground that James had not met his burden to show a material change in circumstances. The trial court overruled the motion. Mary Ann's counsel then rested without presenting any evidence.

On March 26, 2002, the district court dismissed James' petition for visitation, finding the following:

The evidence adduced at trial fails to convince the court that there has been a material change of circumstances showing that it would be in the best interests of the minor child, Gina [R.], to now have visitation with [James]. Considering the findings made by another judge of this court in 1992 after a two-day trial, the law requires more than [James] has presented to the court.

### ASSIGNMENT OF ERROR

James asserts that the district court abused its discretion in denying his petition for visitation.

### STANDARD OF REVIEW

Child visitation determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record by the appellate courts, the trial court's determination will normally be affirmed absent an abuse of discretion. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

### ANALYSIS

James asserts that the district court abused its discretion in denying his petition for visitation of Gina. James argues that since the original custody decree in 1992, almost 10 years have past, that he



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quit drinking alcohol over 7 years ago, that he has been married for 7 years since the time of trial to a woman who has daughters and claims that he is no danger to children, and that he has a genuine interest in Gina. On this evidence, he asserts that he has shown a material change in circumstances sufficient to justify an order for visitation.

But, the fundamental problem with James' evidence and his argument is that while he may have shown that he has changed his life, the record is lacking of any evidence about Gina, her life circumstances, and how a reintroduction of James, a complete stranger at this point, into her life would affect her, given the history of abuse. Most significantly for us, there is no evidence that visitation with James would now be in Gina's best interests.

We point out that the finding of sexual abuse of Gina by James was not appealed and is now final and binding on the trial court and us. A final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. In re Estate of Wagner, 246 Neb. 625, 522 N.W.2d 159 (1994). As a result, despite James' denials in our record, we decide this case from the standpoint that James previously physically and sexually abused Gina.

The best interests of the child is the primary and paramount consideration in determining and modifying visitation rights. See Neb. Rev. Stat. § 42-364 (Reissue 1998); Weinand v. Weinand, 260 Neb. 146, 616 N.W.2d 1 (2000). The best interests inquiry has its foundation in both statutory and case law. See Hoins v. Hoins, 7 Neb. App. 564, 584 N.W.2d 480 (1998). Section 42-364(1) and (2) directs courts to consider the best interests of the minor child in determining custody arrangements and time to be spent with each parent. Section 42-364(2) sets forth a nonexhaustive list of factors to be considered in determining the best interests of a child in this regard, including the relationship of the minor child to each parent; the desires and wishes of the minor child if of an age of comprehension, when such desires and wishes are based on sound reasoning; the general health, welfare, and social behavior of the minor child; and "[c]redible evidence of abuse inflicted on any family or household member." See, also, Smith-Helstrom v. Yonker, 253 Neb. 189, 569 N.W.2d 243 (1997).

Gina has no relationship with James, the record is silent on her desires, and she obviously is at an age where her wishes typically would be considered. The record tells us nothing about the person Gina is now and her life circumstances, and there is a conclusive and binding adjudication of prior sexual and physical abuse of Gina, as well as physical abuse of Mary Ann. Finally, the record does not have any evidence from a qualified professional, such as a counselor or therapist, showing that attempting to establish a relationship between Gina and James would be feasible, let alone that it would be in Gina's best interests.

Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the child. Poll v. Poll, 256 Neb. 46, 588 N.W.2d 583 (1999), disapproved on other grounds, Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002). In 1992, the district court denied



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James any visitation or contact with Gina, and that decision was not appealed, meaning that we must treat the restriction as completely warranted by the record produced in 1992.

We conclude, as did the trial court, that the evidence in this record is wholly insufficient to show that it is in Gina's best interests to change the earlier decree so as to establish visitation with James, despite his showing that his personal circumstances have changed. Proof that James has changed his life does not prove, by itself, that visitation between James and Gina is in Gina's best interests. This is not to say that such visitation could never be ordered, but, rather, that the record before us fails to prove that such is in Gina's best interests, which is our touchstone for deciding this case. Thus, we affirm the trial court's decision.

Affirmed.

