

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001073-MR

KEITH ALLEN ROACH

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 91-CI-00112

TAMMY THOMAS SALMON

APPELLEE

OPINION
VACATING AND REMANDING WITH DIRECTIONS

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Keith Allen Roach appeals *pro se* from the April 17, 2003, order of the Calloway Circuit Court declining jurisdiction to hear appellant's motion to modify custody. We vacate and remand with directions.

The parties were married in Kentucky in March 1987, and divorced by decree of dissolution of marriage entered by the Calloway Circuit Court on October 23, 1992. Three minor

children were born of the marriage and custody was awarded to appellee.

In March 1996, appellant filed a motion for reduction in child support and to establish visitation. In July 1996, the circuit court granted appellant's motion for reduction in support and reserved the issue of visitation for later adjudication. The court also granted appellee's request for continuance to obtain counsel.¹

Neither party took any further action until October 2002, when appellant filed a "Motion for Hearing."² The motion requested "the Court to intervene in the prior custody order," which had granted custody of the minor children to appellee. Appellant alleged the children were being abused in their current environment and sought a change in custody. As noted, appellant was incarcerated at the Kentucky State Reformatory and requested that a guardian ad litem be appointed for him. The circuit court appointed a guardian and a hearing was held on March 27, 2003. Appellee appeared *pro se*.

Following the hearing, the circuit court entered an order on April 17, 2003, finding that appellant was currently incarcerated, no third party had moved for custody, and the

¹ It appears from the record that appellee and the parties' children resided in Tennessee when these matters were ruled upon by the Calloway Circuit Court.

² Appellant was incarcerated at the Kentucky State Reformatory at the time of filing the motion.

Cabinet for Families and Children had not been named as a party. It further found that Kentucky did "not have jurisdiction to modify custody of children who have not been residents of Kentucky over the last eight to nine years. . . ." This appeal follows.

Appellant contends the circuit court erred by declining to exercise jurisdiction over this matter. He asserts the children have a "significant connection" with Kentucky and pursuant to Kentucky Revised Statutes (KRS) 403.420, the circuit court should have exercised jurisdiction. Appellant argues he was prepared to present evidence regarding the "connection" and was not allowed to proceed. He also asserts that in 1996, appellee and the children were already residing in Tennessee and the circuit court knowingly exercised jurisdiction to modify support.

We view KRS 403.420 as controlling the issue of jurisdiction in this case. The relevant portion of the statute is as follows:

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

. . .

(b) It is in the best interest of the child that a court of this state assume jurisdiction because the

child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

. . .

- (3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

KRS 403.420(1)(b) and (3).

In the case *sub judice*, the circuit court found that the minor children had resided with appellee outside the state of Kentucky for eight or nine years and that "Tennessee would appear to have subject matter jurisdiction over all future custody proceedings involving the minor children." However, the circuit court failed to make any finding regarding whether the children and appellant have a "significant connection" with Kentucky pursuant to KRS 403.420(1)(b). The mere fact that the children and their custodial parent reside in another state is not alone sufficient to divest the court of jurisdiction to modify its previously entered custody order. KRS 403.420(3); Dillard v. Dillard, Ky. App., 859 S.W.2d 134 (1993).

This Court is of the opinion that the circuit court erred by declining jurisdiction based upon the mere fact that

appellee and the children live just beyond the Kentucky border in the state of Tennessee. The connections asserted by appellant may or may not be significant enough to satisfy the requirements of KRS 403.420(1)(b); however, the circuit court is required to engage in that analysis.³

For the foregoing reasons, the order of the Calloway Circuit Court is vacated and this case is remanded with directions that the circuit court conduct an evidentiary hearing and make findings of fact consistent with KRS 403.420.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Keith Allen Roach, *Pro Se*
LaGrange, Kentucky

³ This opinion should not be construed as passing upon the issue of whether custody of the parties' minor children should, indeed, be modified.