

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000199-MR

MICHAEL J. SILLOWAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 98-FC-003165

JANICE DAGMAR SILLOWAY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING

** ** * * * * *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE. Michael J. Silloway appeals from an order of the Jefferson Family Court determining that it lacked jurisdiction to consider his motion to modify his child support obligation, to set a specific visitation schedule, and to provide for the renewal of his daughter's passport. We affirm in part, reverse in part, and remand.

Michael and Janice Dagmar Silloway were married in Tennessee in 1984. They have three minor children. On May 8, 1998, while the parties were living in Kentucky, Dagmar filed a petition for legal separation in the Jefferson Family Court. The parties soon moved to Germany, and on June 4, 1999, the court dismissed Dagmar's petition without prejudice.

While in Germany, Dagmar filed a petition for divorce with the family court in Geislingen, Germany. On September 29, 2000, the German family court entered a decree and granted the parties a divorce. Dagmar was granted custody of the children, and she and the children remained in Germany. Michael, who was ordered to pay child support, eventually returned to Kentucky.

At various times, the Jefferson Family Court has exercised jurisdiction over this case. On April 23, 2001, Dagmar filed a motion with the court and asked it to extend full faith and credit to the German divorce decree so that the Defense Finance and Accounting Service (DFAS) would recognize the decree and enforce certain property rights due her pursuant to the Former Spouses Protection Act.¹ On May 1, 2001, the court entered an order granting full faith and credit to the German divorce decree.

On March 20, 2002, the court entered an agreed order between Dagmar and Michael setting Michael's child support

¹ Michael had retired from the U.S. military.

payment at \$650.00 per month pursuant to the order of the German family court. The agreed order recognized that the trial court and the German family court both had jurisdiction over the parties' case in that the agreed order could only be modified by written agreement between the parties, by order of the German family court, or by order of the trial court. The court entered a second agreed order, also on March 20, 2002, in which Michael agreed to pay an extra \$100.00 per month in child support.

In May 2002 Dagmar once again filed a motion with the court. Therein, she requested an order regarding her and Michael's identity to fulfill some requirement of the DFAS. On June 3, 2002, the court entered an order which set forth both Dagmar's and Michael's social security numbers. On August 22, 2002, Dagmar filed a motion for Michael to reimburse her for extraordinary medical expenses in connection with one of the children. The court entered an order regarding the expenses on September 4, 2002.

On October 31, 2002, Michael filed a motion with the Jefferson Family Court that ultimately led to this appeal. In his motion, Michael requested a reduction in his child support obligation based on a material change in circumstances. He also requested the court to set a specific visitation schedule with the children while in Germany for the Christmas holidays. He further requested the court to force Dagmar to renew his

daughter's passport or, in the alternative, to force her to relinquish the child's expired passport to him so he could renew it.

On December 18, 2002, the court entered an order denying Michael's motion on the ground that it lacked jurisdiction to consider it. First, the court determined that Dagmar had previously requested the court to exercise jurisdiction strictly for purposes of enforcing Michael's spousal and child support obligations under the German decree. Further, based on its review of documents filed with the German court and based on a letter received from Dagmar's attorney in Germany, the court found that Michael had motions currently pending before the German court concerning the same issues contained in his motion before the trial court.²

The court based its decision on Kentucky's version of the Uniform Child Custody Jurisdiction Act (UCCJA). See KRS³ 403.400-.620. Specifically, the court relied on KRS 403.450(1) which states as follows:

A court of this state shall not exercise its jurisdiction under KRS 403.420 to 403.620 if at the time of filing the petition a proceeding concerning the custody of the

² The record does contain evidence that Michael had filed a motion concerning visitation with the German court. However, there is nothing in the record to indicate that he ever filed a motion to modify his child support with the German court.

³ Kentucky Revised Statutes.

child was pending in a court of another state exercising jurisdiction substantially in conformity with KRS 403.420 to 403.620, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.⁴

The court also relied on KRS 403.530(1) which states as follows:

If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with KRS 403.420 to 403.620 or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.

Because the court found that the action in the German court had not been stayed, it concluded that only the German court had jurisdiction to resolve the issues raised by Michael in his motion. Following the entry of the court's order denying Michael's motion based on lack of jurisdiction, Michael filed this appeal.

We will address the portion of Michael's motion that requested the court to set specific visitation first. We begin by noting that the issue of custody had been finally determined in Dagmar's favor by the German decree. By seeking to establish specific visitation rights with the children in Germany, Michael

⁴ Although KRS 403.450(1) refers to a custody action pending in another state, the provisions of the UCCJA have international application. See KRS 403.620.

was essentially attempting to have the court modify the custody decree. He claims that Kentucky was the "home state of the child[ren]" and that the Jefferson Family Court had jurisdiction to modify the custody decree pursuant to KRS 403.420(1)(a). In support of his argument, Michael refers to Dagmar's petition for legal separation filed in May 1998.

We disagree with Michael's argument that Kentucky was the home state of the children. While it is true that Kentucky was the children's home state when the petition for legal separation was filed with the Jefferson Family Court in 1998, that action was eventually dismissed and the divorce was filed and obtained in Germany. The Kentucky action was reopened in 2001 so that Dagmar could obtain enforcement of the German decree. However, when Michael commenced his action by filing a motion to set specific visitation, Kentucky was not the children's home state. Rather, since the German court had already ruled on custody and Michael's visitation issues, the trial court correctly determined in accordance with KRS 403.530(1) that it did not have jurisdiction to consider Michael's motion as it related to visitation.⁵ In short, we affirm the trial court's ruling wherein it determined that it lacked jurisdiction to consider the visitation issue.

⁵ Where a court is without jurisdiction to award custody, it is also without jurisdiction in regard to visitation. See Gaines v. Gaines, Ky. App., 566 S.W.2d 814, 818 (1978).

However, we agree with Michael that the trial court erred in its determination that it lacked jurisdiction to consider his motion to modify his child support obligation. As we have noted, the trial court relied on the UCCJA in its determination that it lacked jurisdiction concerning this issue. Michael relies primarily on Hall v. Hall, Ky., 585 S.W.2d 384 (1979), to support his argument. We agree that the case is applicable to the facts herein.

In the Hall case the husband and wife were divorced in New Mexico, and the wife was granted custody of the two children. The husband was ordered to pay \$100 per month for the support of each child. The wife subsequently moved to Indiana with the children, and the husband subsequently moved to Kentucky. The wife then moved the Kentucky circuit court to modify the New Mexico decree and raise the husband's child support obligation. The circuit court granted the motion and raised the support obligation of the husband to \$200 per month per child. Although this court reversed the circuit court, the Kentucky Supreme Court granted discretionary review, reversed this court, and affirmed the trial court. Id. at 385.

Citing Kulko v. Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978), our supreme court determined that the Kentucky circuit court was "the proper forum to determine the amount he should be required to pay for the support of his

children." 585 S.W.2d at 386. In distinguishing between jurisdiction to decide child support issues and jurisdiction to decide child custody issues, the court stated as follows:

Jurisdiction to decide child support issues is conferred upon the circuit courts by KRS 403.210 independently of the stringent restrictions placed upon the exercise of the child custody jurisdiction conferred by KRS 403.260. [Footnote omitted.] It is clear to us that the theory of "divisible divorce," which recognizes that the multiple issues in domestic relations cases have distinct and separate jurisdictional foundations and may be determined independently of each other, is alive and well. [Citation omitted.]

Id. at 385-86. The only significant difference between the facts in the Hall case and the facts in the case *sub judice* is that the party moving for modification of child support in the Hall case was the obligee, while the party moving for modification in this case is the obligor. We do not believe this difference has any significance in determining jurisdiction.

In McCormick v. McCormick, Ky., 623 S.W.2d 909 (1981), our supreme court stated, "[i]t is axiomatic that we should provide a forum for those seeking to modify child support awards when there is a fair justification or legitimate reason for us to do so." Id. at 910. Further, the court stated that "[w]hile there is no comparable statute governing child support, the factors set forth in the child-custody statute, KRS 403.420,

offer instructive guidelines for determining this state's interest in assuming jurisdiction." Id. Considering those factors, we conclude that Kentucky was a proper forum for Michael to seek modification of his child support obligation. Our reasoning is based on the fact that Michael resides here and that the parties have previously availed themselves of the jurisdiction of this court in connection with the child support obligation. Further, there is nothing in the record indicating that Michael was also pursuing a motion to modify child support in the German court. Thus, we reverse the portion of the court's order determining that it lacked jurisdiction to modify the child support obligation and remand the case for further proceedings in that regard.

Finally, Michael moved the trial court to provide for the renewal of his daughter's passport. Although he appealed from the court's order denying jurisdiction, he did not raise any specific argument in his brief concerning this issue. Thus, we affirm the court on the issue.

We affirm in part, reverse in part, and remand.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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