

RENDERED: AUGUST 25, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001874-ME

LOLA MAE BOATMAN

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 05-CI-00118

EDWARD F. FULLER

APPELLEE

OPINION
VACATING AND REMANDING WITH DIRECTIONS

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Lola Mae (Fuller) Boatman appeals from an August 12, 2005, order of the Casey Circuit Court declining to exercise jurisdiction over her petition for modification of custody. We vacate and remand.

On August 12, 1993, Lola and Edward F. Fuller were divorced by decree of dissolution entered in Canyon County, Idaho. The decree granted custody of the parties' three minor

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

children to Lola.² Edward was awarded reasonable visitation. In June 2000, Lola and the children moved to Kentucky. Apparently, the decree of dissolution was modified to provide that Edward would be responsible for providing transportation at the commencement of visitation and Lola would provide the return transportation. The children have allegedly had little contact with their father since moving to Kentucky in 2000.

On June 3, 2005, Edward filed a motion seeking an award of sole custody in Canyon County, Idaho. On July 11, 2005, Lola filed a petition for custody in the Casey Circuit Court. In the motion, Lola requested that the Casey Circuit Court "communicate" with the Idaho court and conduct a hearing on the issue of jurisdiction. On August 12, 2005, the Casey Circuit Court entered an order declining to exercise jurisdiction. Therein, the court stated that Idaho has jurisdiction over the custody matter. This appeal follows.

Lola contends the circuit court erred by not giving her notice of its communication with the Idaho court and by not allowing her to present facts and legal arguments before a decision on the issue of jurisdiction was rendered. Pursuant to Kentucky Revised Statutes (KRS) 403.816(2) of the Uniform and Child Custody Jurisdiction and Enforcement Act (UCCJEA), Lola

² Since entry of the decree, the parties' eldest child has reached the age of majority and is emancipated. This appeal concerns the parties' two younger children.

argues she was entitled to notice of the court's communication with the Idaho court and was entitled to present facts and legal arguments on the issue of jurisdiction before the court entered its order on jurisdiction.

KRS 403.816 provides, in relevant part, as follows:

- (1) A court of this state may communicate with a court in another state concerning a proceeding arising under KRS 403.800 to 403.880.
- (2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they shall be given an opportunity to present facts and legal arguments before a decision on jurisdiction is made.

Pursuant to KRS 403.816(1), a Kentucky court is clearly permitted to communicate with the court of another state concerning custody matters. Under subsection (2), a court is vested with discretion regarding whether to permit a party to participate during its communication with the other state's court. However, if the party does not participate in the communication, KRS 403.816(2) plainly provides the court "shall" permit the party to present facts and legal arguments on the issue of jurisdiction before the court enters an order deciding the issue.

In the case *sub judice*, the Casey Circuit Court communicated with the Idaho court pursuant to KRS 403.816(1).

The court did not give Lola notice or the opportunity to be present during its communication with the Idaho court. Pursuant to KRS 403.816(2), the Kentucky court has discretion regarding whether to permit a party to participate in the communications. Thus, we believe the Casey Circuit Court did not err by prohibiting Lola from participating in its communication with the Idaho court.

The more troublesome issue is Lola's contention that she was not provided the opportunity to present facts and legal arguments before the circuit court entered an order on the issue of jurisdiction. KRS 403.816(2) is clear that if a party is unable to participate in such communications, the party "shall" be permitted to present facts and legal arguments to the court before it decides the jurisdictional issue. 15 *Graham & Keller, Kentucky Practice*, § 14.30 (2d ed. 1997).

From a review of the record on appeal, it appears that Lola was not given the opportunity to present facts or legal arguments after the circuit court communicated with the Idaho court and before the circuit court entered its order dismissing. We believe the circuit court's entering an order without providing Lola the opportunity to present facts and legal arguments was contrary to statutory mandate. As such, we vacate and remand the matter with directions for the circuit court to provide Lola the opportunity to present facts and legal

arguments upon the issue of jurisdiction and for the circuit court to reconsider its order on the jurisdiction issue.

We believe Lola's remaining argument is moot.

For the foregoing reasons, the order of the Casey Circuit Court is vacated and this cause remanded with directions for the circuit court to provide Lola the opportunity to present facts and legal arguments upon the issue of jurisdiction and for the circuit court to then reconsider its order on jurisdiction.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Laura Henry Harris
HARRIS & HARRIS, P.S.C.
Columbia, Kentucky