

RENDERED: FEBRUARY 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000945-ME

NANCY JEAN LITTON SMITH

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 03-CI-00283

GLADYS FAYE SMITH

APPELLEE

OPINION

REVERSING

** ** * * * * * * * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Nancy Jean Litton Smith, the mother of Robert Christopher Smith and Samantha Jean Smith, appeals from an order of the Martin Circuit Court awarding visitation privileges to the children's paternal grandmother, Gladys Faye Smith. Nancy contends that Martin Circuit Court did not have

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

jurisdiction to consider Gladys' petition for visitation and, even if it did, that the circuit court erred by awarding visitation without conducting an evidentiary hearing. Because Martin Circuit Court did not have jurisdiction to consider the petition for visitation filed by the appellee, we reverse.

Nancy Jean Litton Smith and Donald Smith were married on November 26, 1994. During their marriage Nancy and Donald had two children, Samantha Jean, born October 11, 1995, and Robert Christopher, born May 27, 1998. During their marriage Donald and Nancy resided in Martin County, Kentucky. Donald passed away on September 17, 2003. In October 2003, following Donald's death, Nancy and the two children moved to Panama City, Florida.

On December 17, 2003, Gladys, who lives in Nashville, Tennessee, filed a petition for visitation in Martin Circuit Court. The petition alleged that since Donald's death, despite requests by the appellee, Nancy had denied her visitation with the children.

On February 16, 2004, Nancy filed a "Motion to Contest Jurisdiction." The motion stated that Nancy and the children had moved to Panama City, Florida in October 2003; that they intended to remain there for an indefinite amount of time; that Nancy had procured permanent employment, registered her vehicles, and signed a lease for a house in Florida; that the

children were enrolled in school in Florida; and that the family now resides there.

On February 16, 2004, the circuit court entered an order determining that it had jurisdiction pursuant to Kentucky Revised Statutes (KRS) 403.420(1)(a). KRS 403.420(1)(a), a section of the now repealed Uniform Child Custody Jurisdiction Act,² provides as follows: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:

(a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; (Emphasis added.)

In this case, Nancy, the only surviving parent, does not continue to live in this state. Thus the trial court erred by assuming jurisdiction pursuant to KRS 403.420(1)(a).

Moreover, KRS 405.021(2), this Commonwealth's grandparents visitation statute, provides that an action for grandparent visitation "shall be brought in Circuit Court in the county in which the child resides." The statute, of course,

² The Kentucky Uniform Child Custody Jurisdiction Act was repealed effective July 13, 2004.

presupposes that the child resides in this jurisdiction. Here, neither the child, the surviving parent, nor the grandparent reside in this state. Perforce, we are constrained to hold that this action may not be maintained in this jurisdiction under KRS 405.021.

The appellee argues that Martin Circuit Court has jurisdiction in this matter because Nancy continues to own property in Martin County, and because she is acting as the personal representative of Donald's estate therein. However, we are not persuaded that these factors, which are unrelated to the matter at hand, confers jurisdiction upon Martin Circuit Court.

The appellee argues that this appeal should be dismissed because the orders appealed from are interlocutory. However, because those orders are void for lack of jurisdiction, and based upon our disposition of this case, this issue is moot.

For the foregoing reasons the judgment of the Martin County Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kimberly D. Osborne
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Brian Cumbo
Inez, Kentucky