

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000971-ME

MICHAEL KEVIN ROWE

APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 05-CI-00584

LARRY HICKS; LINDA HICKS; AND LARISSA ROWE

APPELLEES

OPINION
REVERSING

** ** *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: Michael Kevin Rowe appeals from an order of the Madison Circuit Court awarding grandparent visitation to Larry and Linda Hicks. He argues that Madison Circuit Court was not the proper venue for adjudicating a request for grandparent visitation of a child who resides in Rockcastle County. For the reasons stated below, we reverse the order on appeal.

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

Michael Kevin Rowe (“Kevin”) and Larissa Lynn Rowe (“Larissa”) were married on July 3, 2004. The parties had one child, namely Lindsay Nichole Rowe, who was born on January 20, 2005.

On May 8, 2005, Kevin filed a petition for dissolution in Rockcastle Circuit Court. The same day, Larissa filed a petition for dissolution in Madison County, Kentucky. The matter proceeded in Madison Circuit Court, where Larissa and Lindsay were residing with Larissa’s parents, Larry and Linda Hicks. Kevin unsuccessfully moved for a change of venue to Rockcastle County where the marital home was located.²

After proof was heard, the Madison Circuit Court awarded temporary custody of Lindsay to Larissa. The court ordered each parent to undergo drug screening. In a separate criminal proceeding, Larissa also was charged with various drug offenses. Though not contained in the record on appeal, those charges apparently resulted in a conviction and order of community service. That conviction, and/or the order of the Madison Circuit Court in the matter at bar, resulted in Larissa undergoing drug screening on an ongoing basis.

Larissa tested positive for methadone on subsequent drug tests, and a report was given to the circuit court by a drug testing entity indicating that Larissa engaged in deception by submitting urine for analysis which had been tampered with and “was not consistent with normal human urine.” Based on this finding, on December 8, 2005, the circuit court awarded temporary custody of Lindsay to Kevin. A final hearing on the

dissolution proceeding was conducted on February 16, 2006, and on March 9,

² The record contains no evidence that the motion was ruled on.

2006, Kevin was awarded permanent primary residential custody of Lindsay as part of the court's Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage. Larissa continued to test positive for illegal drug use, and later was imprisoned on a conviction for obtaining controlled substances by fraud.

On August 16, 2006, Mr. and Mrs. Hicks moved to intervene in the action for the purpose of establishing grandparent visitation. Kevin raised the defense of improper venue and moved to transfer the action to Rockcastle County. Kevin's motion was overruled by way of an order rendered on September 28, 2006. As a basis for the order, the court cited *Pettit v. Raikes*, 858 S.W.2d 171 (Ky. 1993), for the proposition that Madison County continued to be the proper forum because the motion of Mr. and Mrs. Hicks involved the same child who was the subject of the recent custody action. The court also noted that there was no testimony that Larissa, though incarcerated in another county, no longer considered Madison County as her county of residence.

The court first denied the motion of Mr. and Mrs. Hicks for visitation on February 7, 2007, upon finding that such visitation was not in Lindsay's best interest. After various motions were filed, the court reversed its ruling and rendered an order on March 26, 2007, awarding visitation to Mr. and Mrs. Hicks on every Thursday from 5:30 p.m. to 8:30 p.m., as well as one weekend per month. Citing Larissa's imprisonment - which occurred subsequent to the February 7, 2007, order - as a change in circumstances justifying visitation, the court awarded visitation to Mr. and Mrs. Hicks only for the duration of Larissa's imprisonment, and/or as long as she was unable or unwilling to

participate in visitation. Kevin's subsequent motion to alter, amend or vacate was overruled, and this appeal followed.

Kevin now argues that the Madison Circuit Court erred in denying his motion to transfer the action based on improper venue. He notes that Lindsay lives with him in Rockcastle County where venue was proper, and maintains that the circuit court improperly adjudicated the grandparent visitation issue as part of the prior dissolution proceeding. Kevin also argues that the court improperly failed to make sufficient findings of fact on the issue of visitation, and erred in awarding visitation to Mr. and Mrs. Hicks over his objection. In sum, he seeks an order remanding and dismissing the matter for improper venue, or, in the alternative, remanded for proper findings and re-evaluation of the visitation issue. Mr. and Mrs. Hicks did not file a responsive brief.

After closely examining the record and the law, we must conclude that the action to establish grandparent visitation must be brought - if at all - in Rockcastle Circuit Court. KRS 405.021 states:

(1) The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so. Once a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.

(2) The action shall be brought in Circuit Court in the county in which the child resides.

(3) The Circuit Court may grant noncustodial parental visitation rights to the grandparent of a child if the parent of the child who is the son or daughter of the grandparent is deceased and the grandparent has assumed the financial obligation of child support owed by the deceased parent, unless the court determines that the visitation is not in the best interest of the child. If visitation is not granted, the grandparent shall not be responsible for child support. (Emphasis added).

“Shall” means “[h]as a duty to; more broadly, is required to This is the mandatory sense that drafters typically intend and that courts typically uphold.”

Blacks Law Dictionary, 8th Ed. 2004.

“If a grandparent wishes to have visitation with a grandchild, he or she must petition the circuit court in the county in which the child resides and must prove by clear and convincing evidence that visitation is in the child’s best interest.” *VanWinkle v. Petry*, 217 S.W.3d 252 (Ky.App. 2007). (Emphasis added). In *VanWinkle*, a panel of this Court recognized that grandparents may intervene in an ongoing dissolution action for the purpose of seeking custody or visitation. Nothing in *VanWinkle*, however, supports the conclusion that the parties or the trial court may disregard the mandatory language of KRS 405.021 requiring the visitation action to proceed in the county of the child’s residence. While we recognize that the Madison Circuit Court was familiar with the facts of the case by virtue of its involvement in the prior dissolution action, and that this would have rendered that court the more logical venue for purposes of adjudicating the claim of Mr. and Mrs. Hicks, the fact remains that KRS 405.021

is subject to but one interpretation. It requires a grandparent visitation action to proceed in the county of the child's residence.

In the matter at bar, it is uncontroverted that the March 9, 2006, decree of dissolution awarded residential custody of Lindsay to Kevin, and that pursuant to that order they reside at Kevin's residence in Rockcastle County. Lindsay obviously does not reside with Larissa, who is in prison, and the county of residence of Mr. and Mrs. Hicks has no bearing on the determination of proper venue. Pursuant to KRS 405.021 and *VanWinkle*, we must conclude that Rockcastle Circuit Court was the sole appropriate venue for the resolution of the claim of Mr. and Mrs. Hicks, and that the Madison Circuit Court erred in failing to so find.

Lastly, we note that the circuit court's reliance on *Pettit v. Raikes*, *supra*, is misplaced. *Pettit* addressed the issue of whether a claim of improper venue in a custody proceeding was properly resolved by way of a writ of prohibition or direct appeal. In finding that a direct appeal was the appropriate mechanism for addressing a claim of improper venue, *Pettit* did not address KRS 405.021 nor the proper venue for grandparent visitation proceedings.

The instant facts are also distinguishable from dissolution and custody proceedings, wherein the legislature has allowed for a choice of venues. For example, KRS 452.470 allows for a dissolution proceeding to be adjudicated in a county "where the husband or the wife usually resides." In choosing to accept or decline jurisdiction in

such actions, the court should look to a number of factors including the county of the parties' marital residence prior to separation, the usual residence of the children, if any, and the accessibility of witnesses and the economy of offering proof. *Hummeldorf v. Hummeldorf*, 616 S.W.2d 794 (Ky.App. 1981).

In contrast, the legislature has not provided for a choice of venues in an action to establish grandparent visitation. It has directed that such actions shall be brought in circuit court in the county in which the child resides. We interpret this to mean the child's residency at the time the grandparent visitation action was filed, not residency at some point months or years earlier. Had Mr. and Mrs. Hicks asserted visitation rights prior to the entry of the decree of dissolution on March 9, 2006, Madison Circuit Court arguably would have been a proper venue under KRS 405.021 because Lindsay's permanent residence had not been established. That is to say, there were times at which Lindsay was residing with Larissa and/or Mr. and Mrs. Hicks in Madison County, and other times she was living with Kevin in Rockcastle County. After the decree was rendered, however, there is little doubt but that Lindsay's residence was permanently established in Rockcastle County. As such, the motion of Mr. and Mrs. Hicks for visitation, which was filed some five months after the dissolution proceeding had concluded, should have been filed with the Rockcastle Circuit Court. Kevin's remaining arguments are moot.

For the foregoing reasons, we reverse the order of the Madison Circuit Court awarding visitation to Mr. and Mrs. Hicks.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE WAS FILED.

Jerry W. Gilbert
Richmond, Kentucky