

RENDERED: NOVEMBER 9, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001695-ME

JEREMY BALL;
AND ABIGAIL BALL

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION
v. HON. ANGELA J. JOHNSON, JUDGE
ACTION NO. 13-CI-500731

CYNTHIA DUFF

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jeremy Ball and Abigail Ball bring this appeal from a September 29, 2016, Order of the Jefferson Circuit Court, Family Court Division, denying their motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 to set aside a June 26, 2014, order granting grandparent visitation to Cynthia Duff.

We affirm.

Jeremy Ball and Allison Ball (now Schweitzer) were previously married and had three children together. The children were born in 2005, 2006, and 2007. Allison suffered from psychological problems, and her mother, Cynthia Duff, frequently cared for the children. In 2009, Allison and Jeremy separated; Allison and the children moved in with Cynthia for several months. Jeremy and Allison were granted a decree of dissolution of marriage on August 14, 2009. Jeremy was granted sole custody of the children; Allison was granted supervised visitation.

Jeremy subsequently married Abigail Ball. Thereafter, Jeremy asked Allison to voluntarily terminate her parental rights to the children; Allison agreed. Cynthia learned from Jeremy that Allison had agreed to terminate her parental rights and that he and Abigail intended to pursue a step-parent adoption. Upon learning of Jeremy and Abigail's intention to limit Cynthia's involvement with the children following the adoption, Cynthia filed a petition for grandparent visitation on March 7, 2013.¹ Then, on April 9, 2013, Jeremy and Abigail (the Balls) filed the petitions for step-parent adoption of the three children.² On July 31, 2013, Cynthia and Jeremy appeared before the court and agreed, through counsel, that Cynthia would be permitted to proceed to trial on her petition for grandparent

¹ Cynthia Duff's Petition for Grandparent Visitation was filed in the Jefferson Circuit Court, Family Court Division, Division 7, Action No. 13-CI-500731.

² The petition for Step-Parent Adoption was filed by Jeremy Ball and Abigail Ball, in Jefferson Circuit Court, Family Court Division, Division 1, Action No. 13-CI-500731. By order entered April 11, 2013, the Petition for Grandparent Visitation was subsequently transferred from Division 7 to Division 1.

visitation notwithstanding the pending adoption proceeding. Consequently, orders granting the step-parent adoptions were entered on August 19, 2013, and on August 20, 2013. An order was subsequently entered on June 26, 2014, granting Cynthia's petition for grandparent visitation.

The Balls pursued a direct appeal (Appeal No. 2014-CA-001501-ME) from the June 26, 2014, order awarding grandparent visitation to Cynthia. By Opinion rendered August 28, 2015, this Court affirmed the family court's decision as follows:

Mr. and Mrs. Ball assert that the circuit court erred by awarding [Cynthia] grandparent visitation rights. The Balls claim that [Cynthia] failed to show more than just a loving relationship, or that [Cynthia] failed to show that harm would result from deprivation of visitation. However, Dr. [Patricia] McGinty's testimony seems to indicate that [the two older children] would be harmed by deprivation of visitation with [Cynthia]. Dr. McGinty indicated that the [c]hildren's behavior had worsened since they stopped seeing [Cynthia], and that removing another stable adult relationship from their lives could be detrimental. Since the circuit court conducted a thorough review of the evidence, expert witness testimony, and all of the *Walker [v. Blair]*, 382 S.W.3d 862 (Ky. 2012) factors, we are not inclined to reverse the circuit court's conclusion.

August 28, 2015, Opinion at 7.

Over eighteen months after the order was entered granting Cynthia grandparent visitation, and four months after this Court affirmed the same on appeal, on January 19, 2016, the Balls filed a motion pursuant to CR 60.02 to set

aside the June 26, 2014, order awarding grandparent visitation. Therein, the Balls asserted that the family court was without subject matter jurisdiction to grant Cynthia's motion for grandparent visitation. We note that the Balls did not raise the jurisdiction issue before the circuit court or the Court of Appeals during the prior litigation and appeal. Only after a change in counsel did the Balls pursue this collateral attack on the previous order granting grandparent visitation. By order entered September 29, 2016, the family court denied the Balls' CR 60.02 motion. This appeal follows.

The Balls raise one issue on appeal, arguing that the family court did not possess the requisite subject matter jurisdiction to order grandparent visitation following entry of the order granting the step-parent adoption. In support thereof, the Balls assert that Cynthia no longer had a legal relationship with the children entitling her to petition for grandparent visitation. The Balls specifically argue that as Cynthia "was not a grandparent . . . the Court was without subject matter jurisdiction to grant grandparent visitation. In other words, this Court was without subject matter jurisdiction as it relates to granting grandparent's rights to persons whom are not grandparents." Appellants' Brief at 5.

It is well-established that subject matter jurisdiction does not refer to jurisdiction over "this case;" rather, it refers to jurisdiction over "this kind of case." *Daugherty v. Telek*, 366 S.W.3d 463, 466 (Ky. 2012) (quoting *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970)). The Kentucky Supreme Court has emphasized

that a court lacks subject matter jurisdiction in a case “where that court has not been given, by the constitutional provision or statute, the power to do anything at all.” *Id.* at 467 (citations omitted). In other words, a court obtains subject matter jurisdiction where the “kind of case” is one that “the court has been empowered, by statute or constitutional provision, to adjudicate.” *Id.* at 467. And, once a court has obtained subject matter jurisdiction, “challenges to its subsequent rulings and judgment are questions incident to the exercise of jurisdiction rather than to the *existence* of jurisdiction.” *Id.* at 467 (citation omitted).

A family court has subject matter jurisdiction over the following cases pursuant to Kentucky Revised Statutes (KRS) 23A.100:

(1) As a division of Circuit Court with general jurisdiction pursuant to [Section 112\(6\) of the Constitution of Kentucky](#), a family court division of Circuit Court shall retain jurisdiction in the following cases:

- (a) Dissolution of marriage;
- (b) Child custody;
- (c) Visitation;
- (d) Maintenance and support;
- (e) Equitable distribution of property in dissolution cases;
- (f) Adoption; and

(g) Termination of parental rights.

KRS 23A.100(1). Thus, under the plain terms of KRS 23A.100(1), the family court's subject matter jurisdiction is clearly extended to cases involving grandparent visitation.

In this case, the issue presented to the family court was Cynthia's entitlement to grandparent visitation. The motion was filed prior to the termination of Allison's parental rights. In light of KRS 23A.100(1), it is clear that the family court possesses subject matter jurisdiction over cases involving grandparent visitation; thus, the family court has subject matter jurisdiction over "this kind of case." *Daugherty*, 366 S.W.3d at 466. Furthermore, the propriety of awarding grandparent visitation to Cynthia was previously reviewed by this Court in the direct appeal (Appeal No. 2014-CA-001501-ME) pursued by the Balls, and such award was affirmed.

Therefore, we conclude that the family court possessed subject matter jurisdiction to decide grandparent visitation and that it properly denied the Balls' CR 60.02 motion to set aside the award of grandparent visitation to Cynthia.

For the foregoing reasons, the Order of the Jefferson Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

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