

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: NOVEMBER 23, 2005

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000253-MR

DATE 12-14-05 E.A. Grounhaug

KATHERINE ZOELLER

APPELLANT

V.

ON APPEAL FROM THE COURT OF APPEALS  
2005-CA-000142  
JEFFERSON CIRCUIT COURT NO. 04-AD-500266

HON. DOLLY WISMAN BERRY, JUDGE  
JEFFERSON FAMILY COURT, ET AL.

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal follows the granting of a writ of prohibition by the Court of Appeals. Appellant, Katherine L. Zoeller (Zoeller), the petitioner for whom the writ was granted, nevertheless appeals to this Court seeking further relief. She requests that we enter an order declaring that the trial court, Jefferson County Family Court, is without subject matter jurisdiction to hear this grandparent visitation proceeding. This requested relief was denied in the Court of Appeals. Appellant prevailed however, on her claim for a stay of the family court's January 11, 2005 order which granted visitation with the child in question to Appellee/Real Party-in-interest, John K. Gutterman (Gutterman).

Mr. Gutterman and Ms. Zoeller were married from 1980 until 1992. Two children, Ashley and John, II, were born of the marriage. On January 22, 2000, Ashley,

then 15 years of age and unmarried, gave birth to Peyton Michael Gutterman (Peyton). In July of 2002, Ashley, the birth mother, formally consented to Appellant Zoeller and her husband, Robert Zoeller, being the Court-appointed guardians for Peyton. Ashley died on May 3, 2004. On July 2, 2004, the Zoellers filed a petition for adoption. On July 13, 2004, Mr. Gutterman filed his petition for grandparent visitation pursuant to KRS 405.021(1). The grandparent visitation proceeding is pending before the Appellee Judge and is the basis of this claim.

The adoption of Peyton was finalized by an August 23, 2004 judgment. On September 17, 2004, the biological maternal grandfather, Gutterman, filed his first amended complaint in the family court case. Approximately one week later, Zoeller filled a response stating, in part, that Gutterman had no standing to seek any grandparent visitation since the parental rights of the mother, Ashley, had been terminated by reason of the adoption. Zoeller cited KRS 405.021, the grandparent visitation statute, as authority for her position. She claimed that under the statute, a grandparent's visitation must have been established by court order before the termination of the parental rights.

In the grandparent visitation case, the trial court appointed a Guardian Ad Litem (GAL) for the child. On October, 20, 2004, the GAL filed her report and motion. In that motion, the GAL requested that Gutterman be granted immediate visitation with Peyton. On October 27, 2004, the family court entered several orders. One of the orders set an evidentiary hearing for February 7, 2005. Another order entered on that date stated that the parties could confer prior to the February 7, 2005 hearing date, but that there would be no actual visitation by Gutterman with Peyton until further order of court.

On January 5, 2005, Gutterman filed a motion requesting immediate temporary visitation. By order of January 11, 2005 the trial court directed the GAL to contact Ashley's brother, John Gutterman, II, to see if he would agree to act as a visitation supervisor. The order also provided that Gutterman would have temporary visitation with Peyton every weekend until the February 7, 2005 court date.

On January 21, 2005, Zoeller filed an original action in the Court of Appeals seeking a writ of prohibition. Zoeller asserted that the Appellee Judge should be stayed on the grounds that the lower court was acting outside of its jurisdiction or, in the alternative, that no visitation be ordered before the Family Court conducted an evidentiary hearing. Gutterman did not file any response to the petition in the Court of Appeals. On February 24, 2005, the Court of Appeals entered its order partially granting the petition. Zoeller filed her notice of appeal to obtain appellate review by this Court. She sought review of the Court of Appeals' failure to hold that the family court was without jurisdiction by virtue of the adoption.

The posture of this case is somewhat unusual. The party who partially prevailed in the Court of Appeals is the appellant here. The issue is whether the Family Court had subject matter jurisdiction to hear Gutterman's petition for grandparent visitation despite the adoption of the child by the Zoellers.

There are two classes of writ cases, those (1) where the lower court is acting without jurisdiction, and those (2) where the lower court is acting incorrectly within its jurisdiction.<sup>1</sup> Zoeller asserts that this case is encompassed by the former class of writ cases, and that the family court was acting without jurisdiction when it heard the grandparent visitation case.

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<sup>1</sup> Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961).

Section 112 of the Kentucky Constitution provides, in relevant part, as

follows:

- (5) The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court. It shall have such appellate jurisdiction as may be provided by law.
- (6) The Supreme Court may designate one or more divisions of Circuit Court within a judicial circuit as a family court division. A Circuit Court division so designated shall retain the general jurisdiction of the Circuit Court and shall have additional jurisdiction as may be provided by the General Assembly.

A family court's jurisdiction is defined by KRS 23A.100, which provides, in relevant part, as follows:

- (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.

....

- (3) Family court divisions of Circuit Court shall be the primary forum for cases in this section, except that nothing in this section shall be construed to limit the concurrent jurisdiction of District Court.

The issues brought before the trial court include adoption, visitation, and possibly, termination of parental rights. In view of the constitutional and statutory provisions quoted hereinabove, it would be impossible to reach a conclusion that a family court was without subject matter jurisdiction. Our view in this regard is strengthened by numerous cases wherein the issue of subject matter jurisdiction is

addressed. One such decision is Duncan v. O’Nan<sup>2</sup> in which this Court said that subject matter jurisdiction does not mean “this case” but “this kind of case.”<sup>3</sup> Duncan also makes it clear that a court will be deprived of subject matter jurisdiction only in cases “where the court has not been given any power to do anything at all.”<sup>4</sup> In Gordon v. NKC Hospitals, Inc.<sup>5</sup> we said that in order “[t]o determine subject matter jurisdiction, the pleadings should be taken at face value and so long as the ‘kind of case’ identified in the pleadings is within the court’s jurisdiction, one claiming a legal bar must plead it affirmatively.”<sup>6</sup>

The family court has not yet had an opportunity to decide whether the adoption of the child forecloses the biological maternal grandfather from visitation. As a Court possessing appellate jurisdiction only,<sup>7</sup> this Court is not authorized to make such an initial determination. That determination is for the appropriate general jurisdiction court.

For the foregoing reasons, we affirm the Court of Appeals.

All concur.

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<sup>2</sup> 451 S.W.2d 626 (Ky. 1970).

<sup>3</sup> Id. at 631.

<sup>4</sup> Id. at 631.

<sup>5</sup> 887 S.W.2d 360 (Ky. 1994).

<sup>6</sup> Id. at 362.

<sup>7</sup> Ky. Const. § 110(2)(a).

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