

Delaney, J.

{¶1} Appellants B.S. and J.S. appeal from the Licking County Probate Court's decision and entry of July 1, 2010 denying and dismissing their petition to adopt a minor child, C.M. (DOB 10/23/94).¹

{¶2} Appellants raise two Assignments of Error:

{¶3} "I. THE PROBATE COURT ERRED WHEN IT FOUND CONSENT TO ADOPTION BY THE BIOLOGICAL FATHER WAS NECESSARY.

{¶4} "II. THE PROBATE COURT ERRED WHEN IT FOUND CONSENT TO ADOPTION BY THE BIOLOGICAL MOTHER WAS NECESSARY."

{¶5} Appellee/Cross-Appellant K.M. raises one Assignment of Error:

{¶6} "I. APPELLANTS INCORRECTLY ASKED THE TRIAL COURT TO GRANT THEIR PETITION TO ADOPT C.M. BASED UPON THE ONE YEAR TIME PERIODS IMMEDIATELY PRECEDING BOTH THE FILING OF THE ADOPTION PETITION AND THE PLACEMENT OF C.M. IN THEIR HOME."

{¶7} The record reflects that on March 29, 2005, the Mahoning County Common Pleas Court, Juvenile Division, placed legal custody of C.M. with Appellant J.S., the child's maternal aunt. Thereafter, on November 24, 2008, J.S. and her spouse filed with the Licking County Probate Court a petition for adoption under R.C. 3107.05. They alleged that the biological father had failed to communicate with or support C.M. for one year immediately preceding the filing of the adoption petition. In addition, they alleged that both biological parents had failed without justifiable cause to provide for the

¹ For purposes of our analysis, we will identify the parties and the child only by their initials.

maintenance and support of C.M. for a period of at least one year immediately preceding the filing of the adoption petition or the placement of C.M. in the home of J.S. Therefore, they contend that the biological parents' consent to the adoption was not required. Simultaneously, Appellants filed an application to dispense with the preplacement requirements of R.C. 5103.16. They alleged that the procedures were not necessary in this case, because the juvenile court had placed C.M. in the legal custody. The probate court granted the motion to dispense with the placement on March 5, 2009.

{¶8} A hearing on the petition was conducted on July 14, 2009 and April 22, 2010. On July 1, 2010, the probate court denied the adoption petition, finding the consent of the biological parents was required. This appeal ensued and was assigned to the expedited calendar.

{¶9} On July 15, 2010, the Ohio Supreme Court issued its ruling in the case of *In re Adoption of J.A.S.*, 126 Ohio St.3d 145, 2010-Ohio-3270. The syllabus of the Court holds: "The procedures in R.C. 5103.16(D) for placing a child for purposes of adoption with a prospective adoptive parent apply even when the child has been living with the prospective adoptive parents pursuant to an award of legal custody by order of the juvenile court."

{¶10} R.C. 5103.16(D), states, in part:

{¶11} "(D) No child shall be placed or received for adoption or with the intent to adopt unless placement is made by a public children services agency, an institution or association that is certified by the department of job and family services * * *, or

custodians in another state or foreign country, or unless all of the following criteria are met:

{¶12} “(1) Prior to the placement and receiving of the child, the parent or parents of the child personally have applied to, and appeared before, the probate court of the county in which the parent or parents reside, or in which the person seeking to adopt the child resides, for approval of the proposed placement specified in the application and have signed and filed with the court a written statement showing that the parent or parents are aware of their right to contest the decree of adoption subject to the limitations of section 3107.16 of the Revised Code;

{¶13} “(2) The court ordered an independent home study of the proposed placement * * * and after completion of the home study, the court determined that the proposed placement is in the best interest of the child;

{¶14} “(3) The court has approved of record the proposed placement.”

{¶15} In *J.A.S.*, the Ohio Supreme Court found that R.C. 5103.16(D) preplacement requirements were necessary even when the child has been living with the prospective adoptive parents pursuant to a grant of legal custody. The Court found the General Assembly has expressly excluded adoptions by a stepparent, a grandparent, or a guardian, but makes no exception for a legal custodian. “The General Assembly when amending R.C. 5103.16(D) did not exclude a legal custodian from the statute’s application, and we will not judicially add such an exception to the statute.” *Id.* at ¶ 15. See also, R.C. 5103.16(E).

{¶16} Furthermore, the Court emphasized:

{¶17} “Although J.A.S and J.N.S. had been living with the appellants under an order of legal custody, the probate court had not formally placed the children with them for purposes of adoption. The juvenile court’s order of legal custody is not a placement for adoption under R.C. 5103.16(D). No court has approved placement for purposes of adoption.” Id. at ¶ 19.

{¶18} We have observed in this case, like *J.A.S.*, no court has approved placement of C.M for purposes of adoption. The juvenile court only awarded legal custody of C.M. to J.S. The biological parents retained residual parental rights. The termination of parental rights and subsequent adoption were not issues in the juvenile court. Nor did the legal custodians pursue termination of the parental rights in the juvenile court in order to proceed with the adoption.

{¶19} No party herein raised the issue of the application of R.C. 5103.16 in their initial briefs, however, at oral argument, counsel for Appellee K.M. orally notified this Court of the decision in *J.A.S.* This Court permitted supplemental briefing on the issue and the parties thereafter separately filed additional briefing.

{¶20} Appellees contend that the requirements of R.C. 5103.16(D) are jurisdictional as the Ohio Supreme Court in *J.A.S.* stated the requirements must be “strictly” followed. Therefore, the requirements are not subject to waiver.

{¶21} Appellants, on the other hand, contend the probate court had “placement jurisdiction” in this case because relatives are seeking the adoption and the biological parents have waived the issue of placement by not raising the issue before the trial court.

{¶22} Initially, this Court must reject Appellants' contentions that the probate court had placement jurisdiction based upon their status as relatives of C.M.

{¶23} As the Supreme Court noted in *J.A.S.*, the General Assembly only excluded adoptions by a stepparent, a grandparent, or a guardian from the requirements of R.C. 5103.16(D). It is undisputed that Appellants are the maternal aunt and uncle of C.M. and therefore do not fall within these exclusions. Accordingly, the proposed adoption of C.M. would be subject to the preadoptive provisions of R.C. 5103.16(D).

{¶24} The next issue is whether the Appellees have waived any challenge to the trial court's decision to dispense with the preadoption requirements due to their failure to raise this issue before the trial court or as an assignment of error on appeal.

{¶25} We make two observations before addressing this issue. First, there is no provision in R.C. 5103.16(D) authorizing a probate court to ever dispense with the preadoption requirements of the statute or for a natural parent to waive such requirements. Secondly, the Ohio Supreme Court in *J.A.S.* instructed courts that strict compliance with the statutory requirements in R.C. 5103.16(D) is necessary. Therefore, we construe as a jurisdictional prerequisite the requirements of R.C. 5103.16(D).

{¶26} Subject-matter jurisdiction is the power conferred upon a court to decide a particular matter and render an enforceable judgment. *Morrison v. Steiner* (1972) 32, Ohio St.2d 86, paragraph one of the syllabus. Subject-matter jurisdiction is a condition precedent to a court's ability to hear a case, and, if a court acts without subject-matter jurisdiction, any proclamation by the court is void. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 11.

{¶27} A demonstration of a lack of subject matter jurisdiction is fatal to any action, and a party or the court, *sua sponte*, may challenge jurisdiction at any time during the pendency of a case. *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 238, 358 N.E.2d 536, overruled on other grounds, *Manning v. Ohio Library Board* (1991), 62 Ohio St.3d 24, 577 N.E.2d 650; *Jenkins v. Keller, Admr.* (1966), 6 Ohio St.2d 122, 216 N.E.2d 379, paragraph five of the syllabus. Subject matter jurisdiction is never waived. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941.

{¶28} We conclude the probate court lacked subject matter jurisdiction over Appellants' petition, and thus properly denied and dismissed it, albeit on different grounds. R.C. 5103.16 requires the biological parent to seek court approval of the placement prior to the probate court proceeding on the adoption petition, even when the child has been living with the prospective adoptive parents pursuant to an award of legal custody by order of the juvenile court. The requirements of R.C. 5103.16(D) were not strictly complied with in this case and accordingly dismissal of Appellants' petition was proper.

{¶29} All assignments of error are thereby overruled.

{¶30} The judgment of the Licking County Probate Court is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

Wise, J., concurring

{¶31} I concur with the majority's decision to affirm the ruling of the trial court. However, I do not find it necessary to conclude that the failure to comply with R.C. 5103.16(D) constitutes a jurisdictional defect, as the probate court has subject matter jurisdiction over all adoption proceedings. The failure to comply with the statute instead simply renders the adoption proceeding procedurally invalid.

JUDGE JOHN W. WISE

