

[Cite as *In re Burrows*, 2004-Ohio-2619.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
SENECA COUNTY**

IN THE MATTER OF:

KELSEY C. BURROWS

CASE NO. 13-04-03

A MINOR CHILD

OPINION

[MARY BROOKMAN - APPELLANT]

IN THE MATTER OF:

SHANE BURROWS

CASE NO. 13-04-04

A MINOR CHILD

OPINION

[MARY BROOKMAN - APPELLANT]

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court, Juvenile Division**

JUDGMENTS: Judgments Affirmed

DATES OF JUDGMENT ENTRIES: May 24, 2004

ATTORNEYS:

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ROGERS, J.

{¶1} Although originally placed on our accelerated calendar, we have elected, pursuant to Loc.R. 12(5), to issue a full opinion in lieu of a judgment entry.

{¶2} Appellant, Mary Brookman, appeals two judgments of the Juvenile Court of Seneca County, which judgments dismissed, for lack of subject matter jurisdiction, Brookman's motion for visitation with her grandchildren, Kelsey and Shane Burrows. Brookman asserts that R.C. 2151.23(A)(2) grants juvenile courts subject matter jurisdiction in such cases. A review of the pertinent case law reveals that the juvenile court was correct in finding that it did not have subject matter jurisdiction over R.C. 3109.11 motions for visitation. Accordingly, we overrule Brookman's assignment of error and affirm the decision of the trial court.

{¶3} It is undisputed that Brookman is the maternal grandmother of Kelsey and Shane Burrows, and that Brookman's daughter, Kelsey and Shane's mother, had died while still married to the father/appellee. Brookman, desiring a regular visitation schedule with her grandchildren, filed a motion for visitation

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pursuant to R.C. 3109.11. The father objected to Brookman's motion for visitation and sought to have the issue dismissed for lack of subject matter jurisdiction.

{¶4} The issues were heard by a magistrate, who found in favor of Brookman and denied the father's request to dismiss for lack of jurisdiction. The father filed an objection to the magistrate's ruling. After a hearing on the father's objection to the magistrate's decision, the trial court sustained the objection, finding that juvenile courts do not have original subject matter jurisdiction over visitation motions brought under R.C. 3109.11. The trial court rejected the magistrate's decision and dismissed Brookman's motion for visitation. From this judgment Brookman appeals, presenting the following assignment of error for our review.

Assignment of Error

The juvenile court erred in finding it did not have jurisdiction to establish rights of visitation for a non-parent.

{¶5} In her sole assignment of error, the appellant, Brookman, maintains that the trial court erred in ruling that juvenile courts do not have original subject matter jurisdiction over grandparent visitation motions under R.C. 3109.11.

{¶6} R.C. 2151.23(A)(2) states that: "[t]he juvenile court has exclusive original jurisdiction *** to determine the custody of any child not a ward of another court of this state." Brookman contends that this language gives juvenile

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courts jurisdiction over visitation determinations as well as custody determinations. She bases this interpretation of the statute on R.C. 2151.23(F)(1), which provides that: “[t]he juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04, 3109.21 to 3109.36, and 5103.20 to 5103.28 of the Revised Code.” R.C. 3109.21(B) states:

“Parenting determination” means a court decision and court orders and instructions that, in relation to the parents of a child, allocates parental rights and responsibilities for the care of the child, including any designation of parenting time rights, and designates a residential parent and legal custodian of the child or that, in relation to any other person, provides for the *custody of a child, including visitation rights.*” (Emphasis added.)

Brookman claims that because custody and visitation rights are included under the same statutory definition of parenting determination, that custody as used in R.C. 2151.23(A)(2) also includes visitation decisions.

{¶7} This issue has previously been addressed by the Ohio Supreme Court in *In re Gibson* (1991), 61 Ohio St.3d 168. The appellant in *Gibson* also argued that because the statutory definition of “parenting determination” in 2151.23(F)(1) incorporated both custody and visitation, that custody as used in R.C. 2151.23(A)(2) included visitation issues. *Id.* at 170. In ruling that visitation and custody were separate and distinct legal concepts, the Supreme Court stated that “[c]ustody’ resides in the party or parties who have the right to ultimate legal

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and physical control of a child. ‘Visitation’ resides in a noncustodial party and encompasses that party’s right to visit the child.” Id. at 171.

{¶8} The *Gibson* Court held that because custody and visitation were separate and distinct concepts, jurisdiction over visitation issues was not granted to juvenile courts by R.C. 2151.23(A)(2), which references custody only. “The complaint of a grandparent seeking only visitation with a grandchild may not be determined by the juvenile court pursuant to its authority to determine the ‘custody’ of children under R.C. 2151.23(A)(2).” Id. at the syllabus.

{¶9} Brookman claims that *Gibson* is not applicable to the facts herein, because her motion for visitation was preceded by her daughter’s death, which qualifies under R.C. 3109.11 as a “disrupting precipitating event.” This attempt to distinguish *Gibson* from the present case is without merit. While *Gibson* did not involve a “disrupting precipitating event,” such as the death of a parent, this had no bearing on the Court’s ruling that R.C. 2151.23(A)(2) did not grant juvenile courts original jurisdiction over visitation cases. The fact that there was no “disrupting precipitating event” in *Gibson* affected the grandparent’s substantive right to file for a visitation motion. It did not affect the jurisdiction of the juvenile court as established by statute. Likewise, the presence of a “disrupting precipitating event” in the facts herein affects the underlying merits of

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Brookman's motion for visitation and not the issue of which court has proper jurisdiction to decide the motion.

{¶10} Accordingly, we find that the trial court did not err in dismissing Brookman's motion for a lack of subject matter jurisdiction.

{¶11} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgments of the trial court.

Judgments affirmed.

SHAW, P.J., and CUPP, J., concur.