[Cite as *In re J.N.N.Z.*, 2012-Ohio-3544.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re Adoption of:	:	
J.N.N.Z.,	:	No. 12AP-51 (Prob. No. 545982)
(M.Z.,	:	
		(REGULAR CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on August 7, 2012

Eric Hoffman; Teresa Villarreal, for appellant.

Thomas Taneff, and *Kate O. Vidovich*, for appellees.

APPEAL from the Franklin County Probate Court.

BROWN, P.J.

{¶ 1} M.Z., appellant, appeals the judgment of the Franklin County Probate Court in which the court overruled his objections to a July 29, 2011 magistrate's decision and approved the magistrate's decision.

{¶ 2} J.N.N.Z. ("the child") was born in April 2005. In November 2008, the child was abandoned by her biological mother, E.N. ("the mother"). Effective January 29, 2009, the child's maternal grandmother was the child's caretaker pursuant to a caretaker authorization affidavit. In April 2009, the child was placed in the care of her adoptive parents. On April 28, 2009, the adoptive parents filed an application for guardianship in the probate court. Notice was sent via certified mail to the mother and appellant at their last known addresses. Appellant's certified mail notice was returned, and notice by publication was subsequently completed in May 2009. On June 9, 2009, the probate court held a hearing on the application for guardianship, after which the court appointed the adoptive parents temporary guardians of the child.

{¶ 3} On July 28, 2009, appellant filed a complaint to establish the father-child relationship and to allocate parental rights and responsibilities in the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch. Appellant's attempted service upon mother via certified mail was returned unclaimed, and he then sent notice via ordinary mail.

{¶ 4} On October 16, 2009, the adoptive parents filed in the probate court a motion to convert the minor child's temporary guardianship to a permanent guardianship for purposes of adoption, and a hearing was scheduled. The probate court appointed a special master commissioner to use due diligence in attempting to locate mother and appellant. The commissioner was unable to locate either mother or appellant.

{¶ 5} On December 1, 2009, the probate court ordered that the adoptive parents be appointed permanent co-guardians of the child, and the adoptive parents filed a petition for adoption that same day. Appellant and mother were served notice by publication in December 2009. On January 25, 2010, the probate court issued a final adoption decree.

{¶ 6} On February 9, 2010, a juvenile court magistrate held a hearing on appellant's complaint to establish the father-child relationship and allocate parental rights and responsibilities, at which only appellant and his counsel appeared. On March 5, 2010, the magistrate recommended that appellant's motion be granted, established a father-child relationship, ordered a new birth certificate be issued indicating appellant's parentage, and designated appellant residential parent and legal custodian of the child. On April 6, 2010, the juvenile court adopted the magistrate's decision. On May 25, 2010, appellant, along with the local police, attempted to retrieve the child from the home of the child's maternal grandmother, and the maternal grandmother informed appellant and the police that the child had been adopted.

{¶ 7} On February 11, 2011, appellant filed a motion to vacate the adoption of the minor child in the probate court. On July 29, 2011, the magistrate issued a decision, finding that the one-year statute of limitations found in R.C. 3107.16(B) barred appellant's motion. Appellant filed objections to the magistrate's decision, which the trial court overruled on December 20, 2011. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> I. The Probate Court erred in denying Appellant-Father's Motion for Relief from Judgment pursuant to Ohio Civ. Proc. 60(B).
>
> II. The Probate Court lacked subject matter jurisdiction to proceed on Appellees' petition for adoption when there was a pending juvenile court case by a biological parent seeking to determine the allocation of parental rights and responsibilities.
>
> III. The Probate Court erred in failing to find that a lack of proper service of process, as required by Ohio R.C. 3107.11(A), or that the Appellant was given valid constructive notice as grounds for vacating a final order of adoption.

{¶ 8} We will address appellant's assignments of error together, as they all fail based upon the same rationale. Appellant argues in his first assignment of error that the trial court erred when it denied his motion to vacate pursuant to Civ.R. 60(B). Appellant argues in his second assignment of error that the probate court lacked subject-matter jurisdiction to proceed on the petition for adoption because there was a pending juvenile case regarding the child. Appellant argues in his third assignment of error that the probate court erred when it failed to find that he was not served properly or given valid constructive notice of the adoption proceedings in the probate court. Civ.R. 60(B) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶ 9} In order to prevail on a Civ.R. 60(B) motion, the movant must demonstrate (1) a meritorious defense or claim to present if relief is granted, (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), and (3) a timely motion, i.e., "the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The *GTE* requirements "are independent and in the conjunctive," and, thus, "the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174 (1994). An appellate court reviews a trial court's decision on a Civ.R. 60(B) motion under an abuse of discretion standard. *Id*.

{¶ 10} In the present case, the trial court denied appellant's Civ.R. 60(B) motion on the grounds that the one-year statute of limitations provided in R.C. 3107.16(B) barred appellant's motion to vacate. R.C. 3107.16(B) provides:

> Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor, or, in the case of the adoption of a minor by a stepparent, the adoption would not have been granted but for fraud perpetrated by the petitioner or the petitioner's spouse, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.

{¶ 11} Appellant addresses R.C. 3107.16(B) under his third assignment of error and only briefly. Appellant's sole argument against the application of the extremely broad and all encompassing language in R.C. 3107.16(B) is that the one-year statute of limitations is unconstitutional as applied to cases in which it operates to deprive a biological parent of parental rights without valid constructive notice, citing *In re Adoption of Knipper*, 30 Ohio App.3d 214 (1st Dist.1986). Neither the trial court nor the magistrate addressed *Knipper*. In *Knipper*, a mother arranged to have another woman take care of her child. The woman lived with her parents, the Knippers, and eventually the child was staying full-time at the Knippers' home. The mother would occasionally visit the child at

the Knippers. The child was placed with the Knippers by order of the juvenile court when he was one year and three months old, of which the court assumed the mother was aware. The mother moved to Florida without telling the Knippers she was leaving permanently. The Knippers eventually adopted the child, after alleging that the mother's address was unknown and could not be ascertained with reasonable and ordinary diligence.

{¶ 12} Approximately four and one-half years after the adoption, the mother filed a motion for relief from judgment in the adoption case, pursuant to Civ.R. 60(B)(3) and (5) and, concurrently, a petition for declaratory judgment, asking the court to declare R.C. 3107.16(B) unconstitutional. The court granted the Civ.R. 60(B) motion and set aside the adoption finding that the mother was not notified of the pendency of the petition for adoption, and the attempted service by publication was faulty in that reasonable diligence was not exercised in an effort to determine the address of the mother.

{¶ 13} Upon appeal, the court of appeals agreed that the Knippers did not use reasonable diligence to locate the mother. The court found that the adoptive parents knew the mother and had met the mother's mother and grandmother; the adoptive parents knew that the mother had moved to Florida, even though they did not have her street address; they knew the mother's employer but failed to inquire about her location after being told she had married and quit her job; the child's birth certificate revealed mother's maiden name, there is one person with that name in the local phone book, and this person was the mother's grandmother who knew the mother's address in Florida; they failed to contact the grandmother; they knew the mother would not consent to the adoption; and they interposed a degree of psychological resistance to the maintenance of either an ongoing relationship or occasional communication between the mother and child.

{¶ 14} With regard to R.C. 3107.16(B), the court found the Knippers' attempt to use constructive notice was flawed by their failure to use reasonable diligence in an effort to discover the mother's Florida address. The court held that R.C. 3107.16(B) was unconstitutional and, therefore, ineffective as applied in that case because the Ohio legislature does not constitutionally have the power to deprive a biological mother of her parental rights without valid constructive notice. The court refused to characterize the Knippers' conduct as working a fraud on the court but held only that their actions did not

rise to the degree of reasonable diligence required by the Ohio Rules of Civil Procedure, the Ohio statutes, the Ohio Constitution, and the United States Constitution.

{¶ 15} Finally, the court concluded that an adoption decree, defective because it violated the biological mother's due process rights, may be set aside under Civ.R. 60(B)(5). The court found it was proper to invoke that rule when a parent's constitutional rights to due process have been violated. The court held the motion did not have to be filed within one year after the adoption decree and, under the circumstances, the trial court did not abuse its discretion when it concluded that the motion was filed within a reasonable time.

{¶ 16} In the present case, appellant argues that notice of the adoption proceedings was unsuccessfully served upon him at an address at which he did not reside. He points out that, although a master commissioner was appointed to conduct a diligent search of his address, this person failed to go to the juvenile court to review records showing a pending juvenile court case involving the same child. Thus, appellant contends that, because the adoptive parents failed to establish reasonable diligence in discovering his proper address for notice, the subsequent service by publication was insufficient, as was found in *Knipper*.

{¶ 17} We disagree with appellant's contentions. The facts in *Knipper* are inapposite to those in the present case. The bases for the finding in *Knipper* that the adoptive parents did not use reasonable diligence to locate the mother were that the adoptive parents had a relationship with the mother, knew the state to which she had moved, knew the mother's former employer, and knew the mother's grandmother lived in the same area and was listed in the phone book. In the present case, there is no evidence that the adoptive parents had a prior relationship with appellant, knew the state in which he lived, or knew his employer. Furthermore, unlike in *Knipper*, the probate court here appointed a special master commissioner for the sole purpose of using due diligence to locate mother and appellant. Appellant was also served the application for guardianship and notice of hearing via certified mail at an address that he gave to local police during a traffic stop 11 months earlier on May 27, 2008, which was returned, and then notification was served by publication. There is also no evidence that appellant ever filed with Ohio's putative fathers registry. We note that the record before us contains only those pleadings

commencing with appellant's motion to vacate. We have no evidence before us relating to what specific actions the special master commissioner took.

{¶ 18} Importantly, other courts have limited the application of *Knipper* to cases in which the biological parent did not have actual knowledge of the adoption within the one-year statute of limitations in R.C. 3107.16(B). In *In re Adoption of A.C.*, 8th Dist. No. 95612, 2011-Ohio-1809, ¶ 7, the court explained that:

> [S]ubsequent case law has constrained the holding in *Knipper*. The Third District held in the case of *In Re Adoption of Miller*, Logan App. Nos. 8-02-22 and 8-02-23, 2003-Ohio-718, that the holding in *Knipper* does not apply in an instance where, as here, the biological parent had actual knowledge of the adoption within the one-year statute of limitations yet failed to challenge the adoption until after the one-year period had elapsed. Id., citing *Wiley v. Rutter* (Oct. 12, 1983), Tuscarawas App. No. 1772 and *In re Adoption of Moore* (Aug. 15, 1989), Franklin App. No. 88AP-746.

Accordingly, in *A.C.*, the court found that, because the biological mother possessed knowledge of the adoption, at the latest, less than seven full months after it was finalized, and she did not contest the adoption for more than four years after finalization, *Knipper* did not apply, and the one-year statute of limitations in R.C. 3107.16(B) does not run afoul of constitutional prohibitions. *Id*. at ¶ 9.

{¶ 19} The court in *In re Adoption of Fenimore*, 2d Dist. No. 17902 (Jan. 28, 2000), agreed with *Knipper* in concluding that the one-year statute of limitations in R.C. 3107.16(B) was unconstitutional as applied to a biological parent when adequate notice of adoption proceedings has not been given. However, although it is clear in *Fenimore* that the biological mother failed to challenge the adoption until after the one-year period in R.C. 3107.16(B) had elapsed, the facts do not specifically state whether the biological mother became aware of the actual adoption within the one-year statute of limitations. The court only indicated vaguely that the biological mother "did not learn that the adoption had actually taken place until sometime later." *Id*. Therefore, we cannot discern whether the facts in *Fenimore* fall within those cases that have constrained the holding in *Knipper* to situations in which the biological parent did not have actual knowledge of the adoption within the one-year statute of limitations in R.C. 3107.16(B).

{¶ 20} We therefore find *Knipper* unpersuasive and inapplicable to the facts before us. We follow the line of cases, including this court's *In re Adoption of Moore*, 10th. Dist. No. 88AP-746 (Aug. 15, 1989), referenced above in *A.C.*, that hold R.C. 3107.16(B) precludes a biological parent from bringing an untimely action to vacate an adoption, even when there is a claim of inadequate notice of the proceedings, when the biological parent had actual knowledge of the adoption within the one-year statute of limitations. *See, e.g., In re Rabatin*, 83 Ohio App.3d 836 (11th Dist.1992) (biological mother's motion for relief from judgment of adoption was untimely based on R.C. 3107.16(B), as appellant first discovered the adoption one month before the expiration of the one-year statute of limitations, and she had the opportunity to take immediate action to contest the adoption at that time); *In re Walters*, 5th Dist. No. 2005-CA-65, 2006-Ohio-631,¶ 21, affd. on other grounds in *In re Adoption of Walters*, 112 Ohio St.3d 315, 2007-Ohio-7 (R.C. 3107.16(B) prohibited untimely motion to vacate adoptions when biological father had actual knowledge of the adoptions within the one-year statute of limitations, because the father's parents knew of the adoptions around the time they occurred, and the father testified he had frequent contact with his parents); *In re Adoption of Miller*, 3d Dist. No. 8-02-22, 2003-Ohio-718, ¶ 8 (R.C. 3107.16(B) precluded untimely motion to vacate adoptions when biological mother admitted that adoptive mother had verbally represented to biological mother's mother that adoptive mother had adopted the children within the one-year statute of limitations; however, biological mother chose not to investigate the claim at that time and waited 16 months before challenging the adoptions); *Moore* (motion for relief from judgment was precluded under R.C. 3107.16(B) when the biological parent had actual notice within the one-year period of limitation provided for in R.C. 3107.16(B) but had failed to take any remedial action for substantial period of time thereafter); *Wiley v. Rutter*, 5th Dist. No. 1772 (Oct. 12, 1983) (the one-year statute of limitations in R.C. 3107.16(B) applied where biological mother claimed insufficient notice of adoption proceedings, but she had actual notice of the adoption within the one-year statute of limitations).

{¶ 21} In the present case, the record is clear that appellant knew of the adoption within the one-year period in R.C. 3107.16(B). In his motion to vacate, appellant states that, after contacting police when he arrived at the maternal grandmother's home, the

police spoke to the grandmother, and he was informed that the child had been adopted. He indicates the same in his supplemental memorandum in support of motion for relief from judgment, his reply to the adoptive parents' brief, and in his appellate brief before this court. Although appellant complains that this notice was not official notice by a court and was only hearsay, the notice found sufficient in several of the cases cited above was similar in nature. *See Walters* (biological father's parents knew of the adoptions around the time they occurred, and father testified he had frequent contact with his parents); *Miller* (adoptive mother told biological mother's mother that she had adopted the children); *Wiley* (biological mother was advised of adoption during a telephone conversation with adoptive mother). Therefore, this argument is unpersuasive.

{¶ 22} Furthermore, we acknowledge the unfairness a biological parent may perceive as a result of the expansive statute of limitations language contained in R.C. 3107.16(B). However, as the court in *A.C.* at ¶ 8 explained:

> The present case concerns more than the sole interests of the appellant. The interests of the adopted child and adoptive parents are protected by R.C. 3107.16(B). The court in *Wiley* explained, "[t]he legislature, in enacting R.C. 3107.16, would have been well aware of various instances where natural parents have attacked the finality of adoption decrees. The legislature would have been well aware of the devastating effect of such an attack, even an unsuccessful one, upon adoptive parents and adopted children. It would have been aware of the worry and chilling effect placed upon the developing parent/child relationship by the knowledge that the relationship could be completely severed if some legal error were made in the prior proceeding, and that the adoptive parent and child would be virtually helpless if such error were made. The legislature has not deprived appellant of constitutional rights. The legislature has struck a balance in enacting R.C. 3107.16(B) to give the natural parent a reasonable time to make either direct or collateral attack upon an adoption decree. After that reasonable time, one year, the adoptive parents and child should be allowed the certainty of their ongoing relationship."

This court echoed a similar sentiment in *Moore*:

> Patently clear here is the recognition, though tacit, by both [*Wiley* and *Knipper*], that there are interests of others, other than the two parties, which are to be considered. It has been

> well-stated in *Rodriguez v. Koschny* (1978), 373 N.E.2d 47 at 51:
>
> " 'The adoption decree is sui generis because it closely concerns the life of someone other than the contending parties, the child. A rule that an individual's right to set aside a judgment entered without jurisdiction over him cannot be cut off by lapse of time (assuming there is such a rule) does not and should not apply to the case where interests exist superior to those of the party whose rights are terminated.' " Citing H. Clark, Domestic Relations, (1968), Section 18.10, at 667.
>
> Both of the above courts in reaching their decision attached substantial weight to the interests of the adopted child in addition to the interests of the litigants. The fundamental interest in all cases is the need for certainty and stability that is promoted by R.C. 3107.16(B).

Thus, although we acknowledge the sometimes harsh consequences that might perceivably result from the one-year statute of limitations in R.C. 3107.16(B), the stability afforded to the adopted child and adoptive parents is a very important objective. For these reasons, we find that appellant may not seek to vacate the adoption decree based upon any alleged failure of service of process pursuant to the broad language in R.C. 3107.16(B) and the one-year statute of limitations contained therein.

{¶ 23} Appellant fails to address R.C. 3107.16(B) as it relates to his arguments under his first and second assignments of error. We find the language and one-year statute of limitations in R.C. 3107.16(B) also precludes these arguments. Therefore, appellant's first, second, and third assignments of error are overruled.

{¶ 24} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Franklin County Probate Court is affirmed.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.

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