[Cite as *In re Adoption of A.J.W.*, 2023-Ohio-2609.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

IN THE MATTER OF THE ADOPTION OF A.J.W., A MINOR	:	
	:	C.A. No. 29712
	:	Trial Court Case No. 2020 ADP 00147
	:	(Appeal from Common Pleas Court-Probate Division)

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O P I N I O N

Rendered on July 28, 2023

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T.F., Pro Se Appellant

JULIA C. KOLBER, Attorney for Appellee

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LEWIS, J.

{¶ 1} Appellant T.F., the biological father of A.J.W., appeals from an order of the probate division of the Montgomery County Court of Common Pleas denying his motion to vacate the court's prior judgment, which had granted a petition for adoption filed by A.J.W.'s maternal grandparents. For the reasons that follow, we will reverse the probate court's order and remand the cause for further proceedings consistent with this opinion.

I. Facts and Course of Proceeding

{¶ 2} A.J.W. was born A.J.F. in August 2018.[1] The birth certificate listed T.F. as the father and R.W. as the mother. On November 24, 2019, R.W. died. On March 4, 2020, a "Magistrate's Decision and Judge's Order" was filed in Case No. G-2019-005712-01 in the juvenile division of the Montgomery County Court of Common Pleas. The decision granted legal custody of A.J.W. to his maternal grandparents, effective March 4, 2020. The decision stated that "[t]he father is unsuitable for custody of the child because a preponderance of the evidence shows that the [sic] he abandoned the child." A copy of this decision is included in the record before us. No other decisions or documents from the juvenile case are included in the record before us.

{¶ 3} On December 11, 2020, the maternal grandparents filed a petition in the probate division of the Montgomery County Court of Common Pleas to adopt A.J.W. The petition identified T.F. as a person whose consent to the adoption was not required, because he had failed without justifiable cause to provide more than de minimis contact with the minor and had failed without justifiable cause to provide maintenance and support of the minor for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the petitioners' home. The petition also stated that A.J.W.'s mother was deceased and that the address of the father was unknown.

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[1] A.J.F.'s name was changed to A.J.W. when the probate court granted the petition for adoption that is the subject of this appeal. To protect the identity of the minor, we will refer to the minor and the biological parents by their initials.

{¶ 4} On December 14, 2020, the maternal grandparents filed an affidavit with the probate court relating to their search for T.F. They stated that they had been unable to provide personal service on T.F., because they had been unable to find his address with reasonable diligence. The probate court affidavit form provided several boxes for the affiants to check if they had attempted to find T.F. through the following means: "Asking relatives and next of kin of the person to be served; Checking local telephone books; Calling the local telephone company; Checking local directories; Checking local county records, such as those held by the auto title department and board of elections; Asking former neighbors of the person to be served; Checking social media; Other." The petitioners checked only the "Other" box and then wrote "Last Known Address" in the blank beside that category. The petitioners also filed an "Affidavit Whereabouts Unknown – Adoption." The affidavit provided, in part, "the whereabouts of [the biological father of the minor child] whom affiant is applying to adopt, is unknown and for the purpose of serving him with notice of this adoption proceedings [his] place of residence cannot with reasonable diligence be ascertained; and further affiant sayeth not."

{¶ 5} The probate court scheduled a hearing for April 2, 2021, to consider the petition for adoption. Prior to the hearing, on December 23, 2020, the probate court found, based on the maternal grandparents' affidavit, that the address of T.F. was unknown and could not with reasonable diligence be ascertained. The probate court ordered that notice be given to T.F. "by publication, all as prescribed by law, the last publication being not less than twenty (20) days before the date of hearing as set forth above." On March 16, 2021, an affidavit of a legal representative of the Dayton Daily

News was filed with the probate court alerting it that the attached legal advertisement had been published in the Dayton Daily News three times; the last publishing date was February 15, 2021. The attached advertisement provided, among other things, the father's full name, his last known address on Embassy Place in Dayton, Ohio, information about the adoption petition, the legal effect if the adoption were to be granted, and the date and location of the adoption hearing.

{¶ 6} On April 2, 2021, the probate court issued a judgment entry finding that T.F.'s consent was not required pursuant to R.C. 3107.07, because T.F. had failed without justifiable cause to provide (1) more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition; and (2) for the maintenance and support of the minor for a period of at least one year immediately preceding the filing of the adoption petition. On that same day, a magistrate's decision and final decree of adoption was issued, granting the petition for adoption. No timely objections were filed, and the magistrate's decision was adopted as an order of the probate court.

{¶ 7} Over a year later, on May 3, 2022, T.F. filed a handwritten statement in the probate court, stating in part: "Since my sons mothers death (11-24-2019) the maternal grandparents have not allowed me to have any communication with [A.J.W.]. So I filed for custody. I object the adoption, I DID NOT consent for my son to be adopted, I WAS NOT notified by anyone that my son was going to be adopted. I again OBJECT the adoption of [A.J.W.]." (Emphasis sic.) T.F. signed his name and provided a telephone number and an address on Timberlake Drive in Dayton, Ohio.

{¶ 8} On June 15, 2022, T.F., through counsel, filed a "MOTION TO VACATE JUDGMENT, MOTION FOR RELIEF FROM JUDGMENT." T.F. contended that he had never received notice of the adoption proceedings and that the maternal grandparents had not exercised reasonable diligence in trying to locate T.F. According to T.F.:

> [T]he Petitioners were well aware of Father's location when they filed their Petition and Affidavit. They were aware that Father was incarcerated without having to exercise any reasonable diligence. Had they exercised reasonable diligence by searching Montgomery County Public Records, these records would have revealed that Father was incarcerated on June 20, 2020 for a period of 9 months with credit for 60 days. Furthermore, the Petitioners are related to Father's family members, in that Father's Aunt * * * has children with [maternal grandfather's] brother * * * . Rather than putting Father on notice, the Petitioners rushed and concealed the fact that Father was incarcerated such that he would have been unable to contest the adoption.

Motion to Vacate, p. 9. T.F. contended the judgment of adoption was void due to lack of notice and that he was entitled to relief from judgment pursuant to Civ.R. 60(B)(1), (3), and (5).

{¶ 9} In their memorandum in opposition to T.F.'s motion to vacate, the maternal grandparents stated, in part:

> [T.F.] makes no argument as to why he thinks Adoptive Parents knew where he was incarcerated. Further, Adoptive Parents are not required to

> search the jail records of every county at the time of filing a petition for adoption (there is no central database for jail records). That would be unduly burdensome and a near impossible task. A search of the Montgomery County jail at the time of filing did not produce a record of incarceration. As a resident of this county, both [T.F.] and Adoptive Parents, that was the reasonable and diligent place to search. Obviously, [T.F.'s] incarceration in an outside county, whether that was Darke or Shelby at the time of filing, did not show up in a reasonable search of Montgomery County jail records. Adoptive Parents knew that Father was incarcerated, did not know where he was incarcerated, and provided his last known address to this Court, for the purposes of publication, as indicated in the docketed publication. Adoptive Parents used reasonable diligence and proceeded with publication.

The maternal grandparents also noted that they had not had contact with T.F.'s aunt in over ten years. The maternal grandmother attached an affidavit to her memorandum in opposition to T.F.'s motion to vacate. In the affidavit, she stated, in part: "I was aware that [T.F.] was incarcerated, but was not aware of which county he was incarcerated in."

{¶ 10} The probate court denied T.F.'s motion for relief from or to vacate the judgment of adoption. T.F. filed a timely notice of appeal.

II. T.F. Was Denied His Right to Due Process When the Maternal Grandparents Failed to Show Reasonable Diligence in Searching for the Father's Residence

{¶ 11} Our analysis begins with the recognition that the right of a biological parent "to the care and custody of his children is one of the most precious and fundamental in law." *In re Adoption of Masa*, 23 Ohio St.3d 163, 165, 492 N.E.2d 140 (1986), citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In Ohio, "a petition to adopt a minor may be granted only if written consent to the adoption has been executed" by the persons whose consent is required under the adoption statutes. R.C. 3107.06. The mother of the child, the father of the child (by way of marriage, adoption, or court or administrative determination), or a putative father are presumed to have the right to withhold consent to an adoption. R.C. 3107.06(A)-(C).

{¶ 12} A party may overcome this presumption by establishing that an exception to the consent requirement applies. R.C. 3107.07. Because adoption terminates the fundamental rights of biological parents, we must construe strictly any exception to the requirement of parental consent to adoption to protect the right of biological parents to raise and nurture their children. *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976). The exception applied in this case by the probate court is found in R.C. 3107.07(A), which provides that consent is not necessary where the court finds by clear and convincing evidence "that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner."

{¶ 13} T.F. contends on appeal that he was denied his right to due process when

he did not receive notice of the adoption proceedings. According to T.F., the maternal grandparents improperly used notice by publication even though they knew where T.F. was located during the pendency of the adoption proceedings. T.F. also contends that he was denied his right to effective assistance of trial counsel.

{¶ 14} Pursuant to Civ.R. 60(B), the court may relieve a party from a final judgment, order, or proceeding for the following reasons: "(1) mistake, inadvertence, surprise or excusable neglect; * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; * * * or (5) any other reason justifying relief from the judgment."

{¶ 15} The decision to grant or deny a Civ.R. 60(B) motion is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 666 N.E.2d 1134 (1996). " 'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable." (Citation omitted.) *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *Id.* "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *Id.*

{¶ 16} The probate court overruled T.F.'s motion on several grounds. First, the

probate court found that T.F.'s motion for relief from or to vacate the judgment of adoption was based solely on the alleged failure of proper notice and, therefore, it was time-barred pursuant to R.C. 3107.16(B). That statute provides: "Subject to the disposition of an appeal, upon the expiration of six months 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 * * * ."

{¶ 17} A comparable situation was reviewed in *In re Adoption of Knipper*, 30 Ohio App.3d 214, 507 N.E.2d 436 (1st Dist.1986). There, a minor was placed with a couple ("the Knippers") by order of the juvenile division of the court of common pleas. The biological mother contended that the Knippers had made it difficult if not impossible for her to contact her child. The mother moved from Ohio to Florida without telling the Knippers that she was leaving permanently. The Knippers subsequently petitioned the probate court for adoption of the minor, alleging that the mother's address was unknown and could not be ascertained with reasonable and ordinary diligence. The court granted the petition for adoption.

{¶ 18} Over four years later, the biological mother filed a motion for relief from the judgment of adoption pursuant to Civ.R. 60(B)(3) and (5) and 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 the adoption was set aside based on the fact that the attempted service by publication was faulty because reasonable diligence was not exercised in an effort to determine the address of the biological mother. The adoptive

parents appealed.

{¶ 19} The adoptive parents argued that the probate court erred in not applying R.C. 3107.16(B) to bar all direct and collateral attacks on the decree of adoption. The First District rejected this argument, holding:

> The first assignment of error asserts that the trial court failed to apply R.C. 3107.16(B), the statute that purports to bar all direct and collateral attacks on a decree of adoption one year after it is issued. The assignment of error has no merit. In *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62, the Supreme Court held that the total absence of notice to a divorced father about the adoption proceedings that would terminate all his parental rights deprived him of due process and rendered the adoption decree constitutionally invalid. In the instant case, we do not have a total absence of notice, but the attempt to use constructive notice was flawed by the petitioners' failure to use reasonable diligence in an effort to discover the biological mother's Florida address. We hold that R.C. 3107.16(B) is unconstitutional, and therefore ineffective, as applied in this case, because the Ohio Legislature does not constitutionally have the power to deprive the biological mother of her parental rights without valid constructive notice. We will not characterize appellants' conduct as working a fraud on the court; we hold only that this action 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.

Knipper at 216-217.

{¶ 20} We agreed with the First District in *In re Adoption of Fenimore*, 2d Dist. Montgomery No. 17902, 2000 WL 204389, *2 (Jan. 28, 2000). There, we concluded that R.C. 3107.16(B) is unconstitutional as applied to a biological parent when adequate notice has not been given. As we explained, such a failure is a violation of the fundamental requirement of due process that the biological parent has an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* For the same reasons expressed in *Knipper* and *Fenimore*, we do not agree with the probate court's finding that R.C. 3107.16(B) precluded T.F. from challenging the judgment of adoption based on failure of notice.

{¶ 21} The probate court also found that the biological father, T.F., did not have a meritorious defense because "even if Father had received actual notice of the Petition, and had timely objected, and had participated in the hearing on April 2, 2021, the finding of the Court that Father's consent to the adoption was not required would not have changed." January 6, 2023 Decision, p. 5. But whether the probate court ultimately found T.F.'s consent was not required for the adoption to go forward is not relevant to whether he was deprived of his right to due process. *Starkey v. Knight*, 7th Dist. Carroll Nos. 717, 718, 2000 WL 817095, *4 (June 21, 2000). If T.F. was denied his right to due process and notice was not properly provided, then the probate court lacked jurisdiction to grant the judgment of adoption. "[T]he authority to vacate a void judgment is not derived from Civ.R. 60(B), but rather constitutes an inherent power possessed by Ohio

courts." *Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988). T.F., under these circumstances, is not subject to the Civ.R. 60(B) requirements of presenting a meritorious defense and timely filing. *Patterson v. Patterson*, 10th Dist. Franklin No. 93AP-708, 1994 WL 64261, *2 (Mar. 1, 1994).

{¶ 22} The key issue in this appeal is whether the maternal grandparents exercised reasonable diligence in locating T.F. prior to resorting to notice by publication. The probate court found that Civ.R. 73(E), rather than Civ.R. 4 or R.C. 3107.11, controlled service of notice in an adoption proceeding. According to the probate court, since Civ.R. 73(E) controls, "no particular level of diligence is necessary to justify service by publication." January 6, 2023 Decision, p. 8. We do not agree.

{¶ 23} Civ.R. 73(E) provides, in part:

> In any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court, and the statute providing for notice neither directs nor authorizes the court to direct the manner of its service, notice shall be given in writing and may be served by or on behalf of any interested party without court intervention by one of the following methods: * * * (6) By publication once each week for three consecutive weeks in some newspaper of general circulation in the county when the name, usual place of residence, or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained; provided that before publication may be utilized, the person giving notice shall file an affidavit which states that the name, usual place of residence,

> or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained[.]

{¶ 24} Contrary to the probate court's finding, under Civ.R. 73(E)(6), the party intending to use service by publication must first show that the person's residence could not with reasonable diligence be ascertained. The maternal grandparents made no such showing. Rather, the maternal grandparents simply told the probate court that they knew T.F. was not at the last address they had for him and then made the conclusory statement that they had exercised reasonable diligence in looking for him. But they failed to check any of the boxes on the probate form that would have established such reasonable diligence. Further, the maternal grandmother admitted in an affidavit that she filed in opposition to T.F.'s motion for relief from judgment that she had known that T.F. was in prison at the time she and her husband filed the petition for adoption. There is no evidence in the record that she revealed this important fact to the probate court before the court blessed the publication approach. Therefore, at the time the probate court allowed notice by publication, the only fact of which it was aware relating to whether the maternal grandparents had conducted a reasonably diligent search was that T.F. was not living at his last known address. That fact alone was insufficient to establish that the maternal grandparents had exercised reasonable diligence in looking for T.F. prior to requesting service by publication, especially in the context of a proceeding that terminates parental rights. Therefore, the notice by publication was insufficient to protect T.F.'s right to due process, and the judgment of adoption was void.

{¶ 25} Finally, the probate court found that "it does not appear that Father even

has the right to contest the adoption in any fashion because the Juvenile Court terminated his rights in March of 2020." January 6, 2023 Decision, p. 10. In reaching this conclusion, the probate court cited to paragraph 10 of our decision in *In re Adoption of J.M.N.*, 2d Dist. Clark Nos. 08-CA-23, 08-CA-24, 2008-Ohio-4394, where we stated: "One who seeks to adopt a minor child must ordinarily obtain the consent of both parents. In certain situations, however, consent is not necessary. One such situation is when a parent abandons the child. When a parent abandons her child, the parent also abandons her rights with respect to the child, including her right of refusal to an adoption." The probate court then stated that the juvenile court had previously found that J.F. had abandoned his child. Therefore, according to the probate court, our statement in ¶ 10 of the *In re Adoption of J.M.N.* decision meant that T.F. did not have standing to challenge the adoption. This is incorrect.

{¶ 26} The probate court apparently failed to follow the next paragraph of our decision in *In re Adoption of J.M.N.,* where we stated:

> The General Assembly has recognized this, and they have identified two duties that a parent has toward her child that when breached constitute abandonment for adoption purposes: The first is the parent's failure to communicate with the child, and the second is the parent's failure "to provide for the maintenance and support of the [child]." Accordingly, if "for the period of at least one year immediately preceding . . . the filing of the adoption petition," either one, or both, of these is true, and the parent is without justifiable cause for the failure–her consent to the child's adoption

> is not needed. R.C. 3107.07(A). The petitioner seeking to adopt the child has the burden to prove that at least one of these failures occurred, and then, assuming that the parent asserts justification, the petitioner has the heavy burden to prove a negative, that the parent was without justifiable cause for the failure.

{¶ 27} As ¶ 11 of *J.M.N.* explains, the General Assembly has established abandonment as a means to find that a parent's consent may not be necessary under certain circumstances. Whether T.F. had abandoned A.J.W. was one of the issues to be addressed at the hearing on the maternal grandparents' adoption petition. Only one side of that story regarding statutory abandonment was told at that hearing, because T.F. was not given proper notice of the adoption petition and hearing. Further, the only evidence in our record of an abandonment finding by the juvenile court is a March 4, 2020 document filed in the juvenile court case involving A.J.W. That document stated the juvenile court was granting legal custody of A.J.W. to his maternal grandparents, effective March 4, 2020. The decision also stated that "[t]he father is unsuitable for custody of the child because a preponderance of the evidence shows that the [sic] he abandoned the child." No other decisions or documents from the juvenile case are included in the record before us. The March 4, 2020 document did not make the finding that T.F.'s parental rights were terminated. Further, the finding of abandonment in the March 4, 2020 juvenile court decision was based on a preponderance of the evidence standard, not the more stringent clear and convincing evidence standard found in R.C. 3107.07. Therefore, nothing in the March 4, 2020 juvenile court decision precluded T.F. from

challenging the adoption of A.J.W.

{¶ 28} It may very well be that the probate court, after a full hearing, will find that T.F.'s consent to the adoption is not required because the clear and convincing evidence establishes that T.F. failed without justifiable cause to have more than de minimis contact with A.J.W. or failed without justifiable cause to provide for the maintenance and support of A.J.W. for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of A.J.W. in the home of the maternal grandparents. But such a finding should only be made after T.F. receives notice of the hearing and an opportunity to be heard at a meaningful time and in a meaningful manner.

{¶ 29} The probate court erred by overruling T.F.'s motion for relief from or to vacate the judgment of adoption. Therefore, his assignment of error is sustained. As such, we need not address his additional claim of ineffective assistance of trial counsel.

III. Conclusion

{¶ 30} Having sustained T.F.'s assignment of error, the judgment of the probate court will be reversed, and the cause will be remanded for further proceedings consistent with this opinion.

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TUCKER, J. and HUFFMAN, J., concur.