IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00502 COA

IN RE: ADOPTION OF S.C.A.: P.L.G.

APPELLANT

v.

L.J.G. AND WIFE, S.M.G.

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. PAT H. WATTS, JR.

COURT FROM WHICH APPEALED: CHANCERY COURT OF JACKSON COUNTY

ATTORNEY FOR APPELLANT:

BRILEY RICHMOND

ATTORNEY FOR APPELLEES:

E. FOLEY RANSON

NATURE OF THE CASE: DOMESTIC RELATIONS: MOTION TO SET ASIDE ADOPTION

TRIAL COURT DISPOSITION: DENIED MOTION TO SET ASIDE ADOPTION

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This appeal arises from an attempt to set aside an adoption. The child was adopted in October 1990

by her maternal grandparents with the written consent of both natural parents. P.L.G., the natural mother of the child, sought to have the adoption set aside in June 1993. The Chancery Court of Jackson County denied P.L.G.'s petition to set aside the adoption. Feeling aggrieved, P.L.G. files this appeal raising the following issues: (1) the trial court erred in failing to set aside the adoption when it realized that the child was not originally a party to the adoption, nor had a guardian ad litem been appointed to represent the child in the original adoption action; (2) the trial court erred in its factual determination that it would be in the child's best interest for the adoption to stand when no evidentiary hearing was ever held on the matter; and (3) the trial court erred in failing to set aside the adoption because the child's due process rights were violated at the time of the original adoption.

STATEMENT OF THE FACTS

The child was born February 7, 1989. In October 1990, L.J.G. and S.M.G., maternal grandparents of the child and parents of P.L.G., filed a petition for adoption of the child in the Chancery Court of Jackson County. Both natural parents executed written consent to the adoption. The Honorable Kenneth B. Robertson granted the adoption. In June 1993, P.L.G. filed a motion to set aside the adoption. In March 1995, a hearing was held on the motion to set aside the adoption before the Honorable Pat Watts. In April 1995, Chancellor Watts entered an order denying P.L.G.'s motion to set aside the adoption.

ARGUMENT AND DISCUSSION OF THE LAW

First, we note that P.L.G.'s action is time-barred in that no action to set aside a final decree of adoption can be considered unless filed within six (6) months of that decree. Miss. Code Ann. § 93-17-15 (1972). The only ground for setting aside a decree after six months is to establish jurisdictional defects. Miss. Code Ann. §§ 93-17-15 to -17 (1972). In the present case, the final decree of adoption was entered October 23, 1990. P.L.G. filed her motion to set aside the adoption on March 16, 1993. Clearly, P.L.G.'s motion was outside the six-month time frame in which to challenge an adoption in the State of Mississippi. Thus, P.L.G.'s only alternative was to allege jurisdictional defects. *See* Miss. Code Ann. §93-17-17 (1972).

Next, we turn to the issues outlined by P.L.G. on appeal.

> I. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE ADOPTION WHEN IT REALIZED THAT THE CHILD WAS NOT ORIGINALLY A PARTY TO THE ADOPTION, NOR HAD A GUARDIAN AD LITEM BEEN APPOINTED TO REPRESENT THE CHILD IN THE ORIGINAL ADOPTION ACTION.

P.L.G. argues that the child should have been a party to the original adoption action. In the present case, both parents executed consents to the adoption of the child. We examine section 93-17-5 to identify who should be made parties to an adoption proceeding.

Section 93-17-5 reads:

> There shall be made parties to the proceeding by process or by the filing therein of a consent to the adoption proposed in the petition, which consent shall be duly sworn to or

> acknowledged and executed only by the following persons, but not before three (3) days after the birth of said child: (1) *the parents*, or parent, if only one (1) parent, though either be under the age of twenty-one (21) years; or, (2) in the event both parents are dead, then any two (2) adult kin of the child within the third degree computed according to the civil law, provided that, if one of such kin is in possession of the child, he or she shall join in the petition or be made a party to the suit; or, (3) the guardian ad litem of an abandoned child, upon petition showing that the names of the parents of such child are unknown after diligent search and inquiry by the petitioners. In addition to the above, there shall be made parties to any proceeding to adopt a child, either by process or by the filing of a consent to the adoption proposed in the petition, the following:
>
> (a) Those persons having physical custody of such child, except persons having such child as foster parents as a result of placement with them by the department of public welfare of the State of Mississippi.
>
> (b) Any person to whom custody of such child may have been awarded by a court of competent jurisdiction of the State of Mississippi.
>
> (c) The agent of the county department of public welfare of the State of Mississippi that has placed a child in foster care, either by agreement or by court order.
>
> *Such consent may also be executed and filed by the duly authorized officer or representative of a home to whose care the child has been delivered. The child shall join the petition by its next friend.*
>
> In the case of a child born out of wedlock, the father shall not be deemed to be a parent for the purpose of this chapter, and no reference shall be made to the illegitimacy of such child. If such consent be not filed, then process shall be had upon the parties as provided by law for process in person or by publication, if they be nonresidents of the state or are not found therein, after diligent search and inquiry, or are unknown after diligent search and inquiry; provided that the court or chancellor in vacation may fix a date in term time or in vacation to which process may be returnable and shall have power to proceed in term time or vacation. *In any event, if the child is more than fourteen (14) years of age, a consent to the adoption, sworn to or acknowledged by the child, shall also be required or personal service of process shall be had upon the child in the same manner and in the same effect as if it were an adult.*

Miss. Code Ann. § 93-17-5 (1972) (emphasis added). The child was more than one year old at the time of the adoption. Therefore, because the child was not fourteen years of age at the time of the adoption, the portion of the statute addressing service upon the child is not applicable.

The provision in the statute which requires that the child be joined in the petition by its next friend could be construed to apply only where the child has been placed in the custody of someone other than the parents or in the care of the state. In the present case, the parents had physical custody of the child and both joined in the petition for adoption by the grandparents. Even if the provision about joinder of the child by next friend is construed to stand alone in the statute, this is not an issue that may be raised collaterally.

> We have the unfortunate habit of using the term jurisdictional when referring to functionally different requisites to suit, matters of pleading and practice. Whether the label is apt, however, we need not decide. What is important is that matters of this sort may aid a party only if timely raised or noticed by the Court. I refer here to matters which may be waived and which, once the judgment becomes final and the time for appeal has expired, are surely lost forever.

In re Adoption of R.M.P.C., 512 So. 2d 702, 706 (Miss. 1987). Further, after searching the Mississippi case law, we find that our supreme court has never held that the joinder of the child by its next friend is a jurisdictional requirement. We find this issue to be without merit.

> II. THE TRIAL COURT ERRED IN ITS FACTUAL DETERMINATION THAT IT WOULD BE IN THE CHILD'S BEST INTEREST FOR THE ADOPTION TO STAND WHEN NO EVIDENTIARY HEARING WAS EVER HELD ON THE MATTER.

P.L.G. argues that no evidentiary hearing was ever held, and therefore the chancellor had no basis upon which to make a determination of the best interest of the child. However, both parties appeared before the chancellor on March 7, 1995, and agreed that the matter should be submitted on briefs. To argue that the chancellor had no basis upon which to determine the best interest of the child is unfounded. The chancellor heard the arguments of counsel, and each side was afforded the opportunity to submit briefs.

Furthermore, such an argument does not attack the jurisdiction of the chancellor in granting the adoption and is not proper in seeking to set aside the adoption outside the six-month window following the adoption. *See* Miss. Code Ann. §§ 93-17-15 to -17 (1972).

> III. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE ADOPTION BECAUSE THE CHILD'S DUE PROCESS RIGHTS WERE VIOLATED AT THE TIME OF THE ORIGINAL ADOPTION.

Here, P.L.G. argues that the child's due process rights were violated because she was not made a party, nor was a guardian ad litem appointed to represent her interests. P.L.G. argues that the child was not afforded notice or a hearing. We find this argument to be essentially the same as presented under Issue I. Accordingly, we need not repeat ourselves and merely reference our discussion under Issue I.

THE JUDGMENT OF THE CHANCERY COURT OF JACKSON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.