IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 10/02/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

TINA P.,	)	1 CA-JV 12-0082
	)	
Appellant,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
KENNETH B., KELLY B., EMILY P., JACOB P.,	)	Ariz. R.P. Juv. Ct. 103(G); ARCAP 28)
	)	
Appellees.	)	
	)	

Appeal from the Superior Court in Navajo County

Cause No. S0900JD20090016

The Honorable Michala M. Ruechel, Judge

AFFIRMED

Katz & Bloom — Phoenix
By Norman M. Katz
Attorneys for Appellant

Riggs, Ellsworth & Porter, P.L.C. — Show Low
By Michael R. Ellsworth
Attorneys for Appellees

W I N T H R O P, Chief Judge

¶1 Tina P. ("Appellant") appeals the juvenile court's order denying her second motion to excuse the untimely filing of

her notice of appeal. Appellant seeks a delayed appeal challenging the court's underlying order terminating her parental rights to Emily P. and Jacob P. ("the children") based on abandonment.[1] *See* Ariz. Rev. Stat. ("A.R.S.") § 8-533(B)(1) (West 2012).[2] For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[3]

¶2 Appellant is the biological mother of the minor children. The children were allegedly severely neglected by Appellant, and the children's maternal uncle and aunt (Kenneth and Kelly B., a/k/a "the petitioners") have had physical care, control, and custody of the children since at least August 2003, pursuant in part to a decree of dissolution and settlement agreement entered by Appellant and Father.[4] Father paid monthly

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[1] The court did not terminate the parental rights of the children's biological father ("Father"), who is not a party to this appeal.

[2] We cite the current Westlaw version of the statutes because no revisions material to our analysis have since occurred.

[3] Many of the underlying facts of the case are provided in this court's previous opinion involving the parties. *See Kenneth B. v. Tina B.*, 226 Ariz. 33, 243 P.3d 636 (App. 2010). In general, we view the facts in the light most favorable to affirming the juvenile court. *In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994). To the extent conflicts exist in the evidence, it was for the juvenile court to resolve them. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12, 53 P.3d 203, 207 (App. 2002).

[4] Appellant and Father were divorced in 2004. Appellant is the adopted sister of Kenneth B.

child support, and both Appellant and Father were provided regular if not unlimited visitation, although Appellant did not visit the children regularly. In 2006, Appellant abducted the children, but she was arrested, pled guilty to custodial interference, and placed on probation. The children were returned to the petitioners, and Appellant was eventually allowed to resume supervised visits with the children. Nonetheless, Appellant's visits continued to be sporadic, she often left before the approved time, she provided no monetary support and was not involved in decision-making regarding the children, and she made repeated unsubstantiated reports to Child Protective Services and the police against the petitioners.[5]

¶3 In early 2009, Appellant moved for a change of physical custody. In response, the petitioners filed a petition seeking to terminate both Appellant's and Father's parental rights as to the children based on abandonment. *See* A.R.S. § 8-533(B)(1). The petition further alleged that Appellant was unable to discharge parental responsibilities because of mental illness or mental deficiency, and reasonable grounds existed to believe that the condition would continue for a prolonged indeterminate period. *See* A.R.S. § 8-533(B)(3). Additionally,

[5] At the subsequent termination/guardianship hearing, Appellant's ex-husband from a previous marriage testified that she had also made false claims against him to the police, including with regard to their child.

the petition alleged that severance was in the children's best interest and stated that the petitioners sought to adopt the children.

¶4 The court agreed to bifurcate the trials against Appellant and Father, with the trial against Appellant to proceed first. On October 19 and November 12, 2009, the juvenile court held a termination and guardianship hearing limited to the allegations asserted against Appellant. After taking the matter under advisement, the court denied the motion to terminate the parental rights of Appellant but granted the request of the petitioners for guardianship of the children.

¶5 The petitioners appealed the court's order denying their petition to terminate Appellant's parental rights, and on November 18, 2010, this court issued its opinion in *Kenneth B*. After determining that the juvenile court had misapplied the law in deciding whether Appellant had abandoned the children, we vacated that part of the juvenile court's order denying the petition to terminate Appellant's parental rights and remanded for supplemental proceedings. 226 Ariz. at 37-38, ¶ 22, 243 P.3d at 640-41.

¶6 On remand, the juvenile court scheduled a telephonic conference, and counsel for both the petitioners and Appellant agreed that the court could apply the proper definition of abandonment to the evidence previously received. On January 18,

2011, the court issued its order severing the parent-child relationship between Appellant and the children.

¶7 On February 15, 2011, Appellant's counsel, Mr. Harlan Green, filed a notice of appeal. After receiving the notice of appeal, however, this court directed the juvenile court to review its file to determine if the notice of appeal was in accordance with Rule 104(B), Ariz. R.P. Juv. Ct. On April 12, 2011, the juvenile court issued an order striking the notice of appeal after reviewing its file and determining the notice did not contain the requisite avowal that counsel had communicated with Appellant after entry of judgment being appealed, discussed the merits of the appeal, and obtained authorization from Appellant to file the notice of appeal. In a follow-up order dated May 3, 2011, this court dismissed the appeal after further concluding that this court lacked jurisdiction because the notice of appeal had been due on February 2, 2011, but was not filed until February 15, 2011, and thus was untimely.[6]

¶8 Appellant eventually hired new counsel, who on December 23, 2011, filed a notice of appearance and a motion to excuse the untimely filing of Appellant's notice of appeal pursuant to Rule 108(B), Ariz. R.P. Juv. Ct., "on the grounds

[6] *See* Ariz. R.P. Juv. Ct. 104(A) (providing that a notice of appeal must be filed with the clerk of the superior court no later than 15 days after the final order is filed with the clerk); *In re Appeal in Pima County Juv. Action No. B-9385*, 138 Ariz. 291, 294-95, 674 P.2d 845, 848-49 (1983).

that the original Notice of Appeal was untimely and incorrectly filed by her prior counsel, and that due to said errors, the failure to file a timely and correct Notice of Appeal on behalf of [Appellant] was due to excusable neglect." Appellant argued that she "was completely unaware that her prior attorney did not file a correct or even a timely Notice of Appeal," her prior attorney had "failed to properly and timely communicate with her," and "[i]t was only due to her counsel's error that the Notice was rejected." The petitioners responded by arguing Appellant had failed to demonstrate excusable neglect and noting she had waited approximately seven months after this court's order to file her motion. Appellant replied by alleging that her previous counsel had not provided competent representation in failing to timely file the notice of appeal and include the requisite language as set forth in Rule 104(B), and had "cut off all communications with her and failed to respond to her requests for contact."

¶9 In a signed order filed February 10, 2012, the juvenile court denied Appellant's motion, reasoning as follows:

> 1) [Appellant]'s appeal time limits expired February 2, 2011. An appeal was filed on February 15, 2011 by [Appellant]'s counsel but did not comply with Rule 104(B) of the Arizona Rules of Procedure of Juvenile Court and the notice was stricken on April 12, 2011 by this Court. On May 3, 2011 the Court of Appeals again issued an order denying jurisdiction.

> 2) [Appellant] now alleges that she was not notified of the Court of Appeals rejection of her appeal by her attorney and that he stopped communicating with her. (The Court notes that these allegations are not accompanied by any affidavits or supporting documents.) Further, [Appellant] fails to state when she was made aware of the rejection of her appeal.
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> 3) [Appellant] did not take any legal action to request that this Court excuse an untimely filing of a notice of appeal until December 23, 2011. (More than seven months after the Court of Appeals issues its order denying jurisdiction.)
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> **ORDER**
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> Although the Court recognizes that the right to parent is a fundamental right which is given the highest regard by the Court and the Court understands [Appellant] alleged difficulties with her attorney; the Court does not find that the delay of an additional several months before filing her request to excuse an untimely appeal is excusable under Rule 108(B) of the Arizona Rules of Juvenile Procedure even given [Appellant]'s financial situation and lack of legal training. The Rules are available to the public and are capable of being read and understood by someone of [Appellant]'s education (which includes a college degree).
>
> Therefore, [Appellant]'s motion is hereby denied.

¶10 Appellant did not file a notice of appeal from the court's order. Instead, thirty-five days later, on March 16, 2012, Appellant filed a second motion to excuse the untimely filing of her notice of appeal. In the second motion, she renewed the argument she had made in her first motion, and she attached to the motion an affidavit stating her previous attorney had never informed her that she had the option of seeking an appeal, she had learned of the rejection of the

untimely-filed notice of appeal sometime in late May or early June 2011, and she had been unaware of her legal options, including the option of asking the court to excuse the untimely filing. Appellant claimed she subsequently contacted numerous attorneys, all of whom declined to take her case and failed to advise her of any available options. She explained that, after consulting her current attorney, she was finally informed she could seek to excuse the untimely filing of her notice of appeal, and she "then needed additional time to gather the funds for [her counsel's] retainer and instructed him to file the appropriate motion with the Court." After a response and reply, the juvenile court summarily denied the second motion in a signed order.

¶11 Appellant filed a timely notice of appeal from the denial of her second motion to excuse the untimely filing of her notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 8-235(A), 12-120.21(A)(1), and 12-2101(A)(1)-(2) and (4), and Rule 103(A), Ariz. R.P. Juv. Ct.

ANALYSIS

¶12 Appellant argues the juvenile court erred by denying her second motion to excuse the untimely filing of her notice of appeal. We review the denial of a motion to extend the deadline for the filing of an appeal for an abuse of discretion. *See Haroutunian v. ValueOptions, Inc.*, 218 Ariz. 541, 544, ¶ 6, 189

P.3d 1114, 1117 (App. 2008); *see also Daou v. Harris*, 139 Ariz. 353, 360, 678 P.2d 934, 941 (1984) (stating that whether excusable neglect exists is a question directed to the sound discretion of the trial court). In our review, we keep in mind that the right to custody of one's children is fundamental, but it is not absolute. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). Rule 108(B), Ariz. R.P. Juv. Ct., provides as follows:

> Any requests for extensions of time for filing pleadings, motions, or other documents with the clerk of the superior court under the provisions of Rules 103 through 105 of these rules shall be made to the presiding judge of the juvenile court and shall be governed by the provisions of Rule 6(b), Ariz. R. Civ. P.; provided, however, that *the time specified in Rule 104(A) for filing a notice of appeal or cross-appeal may not be extended, but where the failure to timely file was the result of excusable neglect, the juvenile court may excuse the untimely filing upon motion made after the expiration of the specified period*.

(Emphasis added.) In general, neglect may be excusable in a delayed appeal where (1) the party did not receive notice of the final order, (2) the party promptly filed a motion for relief, (3) the party exercised due diligence in attempting to be informed of the decision, and (4) there is no prejudice to the other party. *See City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985) (citing *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983), *superseded in part as recognized by In re Stein*, 197 F.3d 421, 426 (9th Cir. 1999)).

¶13 We find no abuse of the juvenile court's discretion. In this case, Appellant did not appeal the court's signed written order denying her first motion to excuse the untimely filing of her notice of appeal. As we have noted, a notice of appeal must be filed no later than fifteen days after a final order is filed with the clerk. Ariz. R.P. Juv. Ct. 104(A). The order denying Appellant's first motion to excuse the untimely filing of her notice of appeal was filed on February 10, 2012. Appellant could have filed a timely notice of appeal from the denial of that order no later than Monday, February 27, 2012. Because she did not appeal the denial of that motion, the court's signed order became final, and she cannot obtain relief based on facts that could have been raised previously. *See generally In re Marriage of Rowe*, 117 Ariz. 474, 475, 573 P.2d 874, 875 (1978) (recognizing that the doctrine of res judicata prevents a person who does not appeal from obtaining a modification of an award of spousal maintenance based on facts that could have been raised at the dissolution hearing); *Funk v. Ossman*, 150 Ariz. 578, 580-81, 724 P.2d 1247, 1249-50 (App. 1986) (relying on the doctrine of collateral estoppel to bar a party from relitigating an issue that could have been raised on appeal). In effect, Appellant's second motion operates much like a collateral attack on the juvenile court's signed order denying her first motion, especially given that Appellant's

second motion raised no new issues or argument in support of her motion, but merely alleged additional facts that could have been raised previously.

¶14 However, even if we assume *arguendo* that Appellant was not precluded from relitigating her argument in a second motion, we cannot say the juvenile court abused its discretion in denying that motion. The juvenile court, which had previously listened to and considered Appellant's testimony during the termination/guardianship hearing, was in the best position to weigh the credibility of Appellant's assertions and affidavit. *See Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205 ("The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." (citation omitted)); *see also Daou*, 139 Ariz. at 359, 678 P.2d at 940 (recognizing that trial judges are in a better position to determine matters such as whether excusable neglect exists); *cf. Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (recognizing that even an affidavit may be insufficient to withstand a motion for summary judgment).

¶15 Additionally, Appellant blames her previous attorney for a lack of communication, but her argument fails to acknowledge that she, too, had an obligation to exercise due

diligence in attempting to be informed of any court decision. Further, even assuming that her allegation is correct that her previous attorney failed to properly and timely communicate with her and in fact "cut off all communications with her," she acknowledges that she received notice of the rejection of the untimely-filed notice of appeal no later than late May or early June 2011. Rather than promptly filing a motion for relief, however, she waited approximately seven months to file such a motion (and approximately nine to ten months to file the motion from which she appeals). In her affidavit filed with her second motion, she avows that, during that seven-month interim, she sought the advice of counsel. Conspicuously absent from her affidavit, however, are any dates, a timeline, or reference to any other evidence demonstrating when she undertook the task of hiring new counsel. Finally, even assuming *arguendo* there is no prejudice to the petitioners themselves, we note the strong policy consideration of providing children with permanence and stability in their lives. *See Kent K. v. Bobby M.*, 210 Ariz. 279, 286, ¶ 34, 110 P.3d 1013, 1020 (2005) (noting that in severance cases, although a parent has a fundamental interest in parenting, children have "an interest in a 'normal family home'" (quoting *Santosky v. Kramer*, 455 U.S. 745, 759 (1982))); *Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 101, 876 P.2d 1121, 1136 (1994) (recognizing that in parental

severance matters, judges must protect a child's interest in stability and security, even if the result for the parent is "harsh"); *see also Panzino v. City of Phoenix*, 196 Ariz. 442, 448, ¶ 19, 999 P.2d 198, 204 (2000) (recognizing the strong public policy favoring the finality of judgments); *Daou*, 139 Ariz. at 359, 678 P.2d at 940 (recognizing that there exists "a principle of finality in proceedings which is to be recognized and given effect" (citations omitted)). We conclude that the juvenile court did not abuse its discretion in denying Appellant's second motion to excuse the untimely filing of her notice of appeal.

¶16 The petitioners request an award of attorneys' fees incurred on appeal. We decline to award attorneys' fees. The petitioners cite only Rule 21, ARCAP, which merely sets forth the procedure for requesting attorneys' fees and may not be cited as a substantive basis for an award of fees.[7] *See Freeman v. Sorchych*, 226 Ariz. 242, 252-53, ¶ 31, 245 P.3d 927, 937-38 (App. 2011) (citations omitted).[8]

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[7] Also, although the Arizona Rules of Procedure for the Juvenile Court incorporate many of the Arizona Rules of Civil Appellate Procedure, they do not expressly incorporate Rule 21, ARCAP. *See* Ariz. R.P. Juv. Ct. 103(G).

[8] Effective January 1, 2012, ARCAP 21 was amended in an effort to make clear that a party requesting attorneys' fees must cite a statute or other applicable authority for an award of fees. *See* ARCAP 21(c) ("All claims for attorneys' fees must

CONCLUSION

¶17 The juvenile court's order is affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
MICHAEL J. BROWN, Presiding Judge

_____/S/_____
JOHN C. GEMMILL, Judge

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specifically state the statute, rule, decisional law, contract, or other provision authorizing an award of attorneys' fees.").