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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

ROBERT J NICAISE, JR., *Petitioner/Appellee*,

v.

APARNA SUNDARAM, *Respondent/Appellant*.

No. 1 CA-CV 17-0334 FC
FILED 6-28-2018

Appeal from the Superior Court in Maricopa County
Nos. FC2014-094949
FC2014-095056
(Consolidated)
The Honorable Theodore Campagnolo, Judge

REVERSED AND REMANDED

COUNSEL

Law Offices of Karla L. Calahan, Scottsdale
By Karla Lynn Calahan
Counsel for Petitioner/Appellee

Horne Slaton PLLC, Scottsdale
By Sandra L. Slaton, Kristin M. Roebuck Bethell, Matthew J. Monaco
Counsel for Respondent/Appellant

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MEMORANDUM DECISION

Presiding Judge James B. Morse Jr. delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Lawrence F. Winthrop joined.

M O R S E, Judge:

¶1 Aparna Sundaram ("Mother") appeals from an order denying her motion for leave to file an attorneys' fee application. For the reasons stated below, we reverse and remand to allow Mother to file the fee application. We also grant Mother's motion to strike portions of the answering brief that include matters not in the record on appeal but deny her motion for sanctions.

BACKGROUND

¶2 Mother and Robert John Nicaise, Jr. ("Father") are the parents of one minor child. The custody litigation has been highly contentious. *See Nicaise v. Sundaram*, No. 1 CA-CV 17-0069 FC, 2018 WL 1101654, at *1, ¶ 6 (Ariz. App. Mar. 1, 2018). In February 2017, the trial court denied Mother's motion to modify parenting time but awarded attorneys' fees to Mother based on Father's unreasonable conduct. The order stated that Mother's fee application was due no later than March 15, 2017, and cautioned that no fees would be awarded if Mother's counsel failed to submit the application by that date.¹ Mother did not submit a fee application by March 15, 2017.

¹ The order stated:

Not later than March 15, 2017, counsel for Mother shall submit all necessary and appropriate documentation to support an application for an award of attorney fees and costs, including a *China Doll* Affidavit and a form of order. By **no later than March 31, 2017**, Father shall file any written objections. The Court shall determine the award and enter judgment upon review of the Affidavit as well as any objections. If Mother's counsel fails to submit the application by March 15, 2017, no fees or costs will be awarded. (Emphasis in original).

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¶3 On March 27, 2017, Mother filed a motion for leave to file her fee application, stating that her attorneys' paralegal inadvertently calendared the due date as March 31, 2017, instead of March 15, 2017. Father opposed the motion, arguing that Mother's attorneys should be accountable for their errors, inadvertent or not.

¶4 The court denied the motion and found that Mother "should have properly calendared the deadline." The court also denied Mother's subsequent motion for reconsideration without comment. Mother filed a timely notice of appeal from the signed, final order denying her motion for leave to file her fee application. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2).

DISCUSSION

¶5 Mother contends the trial court abused its discretion as a matter of law in denying her motion because the undisputed evidence established that the failure to file the motion in a timely manner was a result of excusable neglect. Arizona Rule of Family Law Procedure 85(C)(1)(a), like Arizona Rule of Civil Procedure 60(b), authorizes a court to grant relief from a final judgment, order, or proceeding for mistake, inadvertence, or excusable neglect. Generally, we review these rulings under an abuse of discretion standard "unless 'undisputed facts and circumstances require a contrary ruling,' in which event this court can and will overturn the trial court's discretionary ruling." *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 330 (1985) (quoting *Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 121 (1957)). An abuse of discretion exists when the court's ruling is unsupported by the facts or where the court misapplies the law or a legal principle. *Geyler*, 144 Ariz. at 328-29 (citations omitted).

¶6 In seeking leave to file the fee application, Mother's attorneys submitted the paralegal's uncontroverted affidavit in which she stated that it was her duty to calendar deadlines in this case; that she inadvertently calendared the March 31, 2017 response due date as the fee application deadline, instead of March 15, 2017; and that she informed the attorneys as soon as she discovered the mistake on March 24, 2017, after 5 p.m. In the motion for reconsideration, both of Mother's attorneys submitted affidavits, which confirmed that the paralegal calendars all deadlines, that they rely exclusively on the paralegal for that task, and that she had not made any previous errors in her two-year tenure with the firm. Additionally, Attorney Slaton stated she was hospitalized on March 15, 2017, and did not return to the office until March 22, 2017. This was the only evidence presented to the trial court, and Father did not dispute it.

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¶7 In determining whether the attorney's conduct is excusable, the general rule "is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances." *Coconino Pulp & Paper*, 83 Ariz. at 120; *see also Geyler*, 144 Ariz. at 331-32. It is reasonable for attorneys to delegate calendaring duties to staff and rely on such staff to keep the attorney informed of deadlines "*absent some showing of inefficiency or undependability of the secretary.*" *Coconino Pulp & Paper*, 83 Ariz. at 120-21 (emphasis added). "If through some inadvertent clerical error the lawyer is not informed, his conduct resulting therefrom we believe is excusable." *Id.* at 121.

¶8 In *Coconino Pulp & Paper*, the attorney's secretary did not distribute a calendar sheet advising the attorney when an answer was due; as a result, the attorney missed the due date, and default judgment was entered against his client. *Id.* at 119. There was no evidence the support staff was unreliable or that the firm's calendaring system was unreliable. *Id.* at 120-21. Thus, the court held it was an abuse of discretion as a matter of law to deny the motion for relief. *Id.* at 121.

¶9 In *Geyler*, the Arizona Supreme Court reaffirmed the reasonably prudent person standard for assessing excusable neglect and noted "that clerical and secretarial errors in office procedures are 'unavoidable and ... [often] excusable.'" 144 Ariz. at 332 (quoting *Daou v. Harris*, 139 Ariz. 353, 360 (1984)). The court concluded that the trend in excusable neglect cases was "that diligence is the final arbiter of whether mistake or neglect is excusable." *Geyler*, 144 Ariz. at 332 (citations omitted). In *Geyler*, the attorney and his secretary incorrectly calendared a filing date based on the date an order was *received* by the court's central mail distribution center instead of the earlier date on which the order was *filed*. *Id.* at 326-27. Thus, the attorney filed an untimely motion for relief from the judgment. *Id.* at 327. The court held this was "the type of clerical error which might be made by a reasonably prudent person who attempted to handle the matter in a prompt and diligent fashion." *Id.* at 332.

¶10 Here, the trial court gave no reason for denying Mother's motion, other than to state that she should have properly calendared the deadline. However, the law permits relief for excusable neglect. *See* Ariz. R. Fam. Law P. 85(C)(1). The only evidence in the record indicates the attorneys reasonably relied on the paralegal to calendar deadlines; the paralegal's mistake was inadvertent; and the request for relief was promptly filed.

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¶11 There was no evidence to suggest the attorneys' calendaring system was unreliable or that the attorney had reason to suspect the paralegal was unreliable. *Coconino Pulp & Paper*, 83 Ariz. at 121; compare *Hauskins v. McGillicuddy*, 175 Ariz. 42, 49 (App. 1992) (finding a question of fact existed regarding excusable neglect where attorney had no calendaring procedures or system in place to track deadlines); with *Sax v. Superior Court*, 147 Ariz. 518, 520-21 (App. 1985) (finding no excusable neglect for missed filing deadline where secretary "was under no duty to calendar due dates or to remind counsel to file pleadings"). Mother's attorney stated this was the first calendaring mistake the paralegal had made in the two years she worked with her. The paralegal promptly notified the attorney of her mistake, and the appropriate pleading was filed the next business day. Thus, the mistake was inadvertent and diligently addressed. Given these undisputed circumstances, there is no basis in the record for the court to find that it was unreasonable to rely on the calendaring system or the paralegal.² See *Geyler*, 144 Ariz. at 332; *Coconino Pulp & Paper*, 83 Ariz. at 120-21; *Cook v. Indus. Comm'n*, 133 Ariz. 310, 312-13 (1982) (recognizing a long-standing rule that an inadvertent secretarial error can excuse an untimely filing as a matter of law); *United Asphalt of Ariz. v. Indus. Comm'n*, 141 Ariz. 209, 212 (App. 1984) (holding as a matter of law, secretary's failure to properly calendar request for review of order warranted relief from the untimely filing). Because the trial court did not apply the proper standard, it abused its discretion. We reverse the order and remand to allow Mother leave to file her fee application.

¶12 Mother also moved to strike several portions of the answering brief and Exhibit 1 thereto. These portions pertain to the arguments raised for the first time on appeal, which we decline to consider. See *supra* ¶ 11 n.2. Nonetheless, to the extent the answering brief includes facts unsupported by the trial court record, we grant Mother's motion to strike.

² Father argues on appeal that the calendaring error was not excusable because the paralegal was unreliable and unsupervised. However, Father did not make these allegations or present any supporting evidence below and we will not consider these arguments. See *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990) (noting that arguments not raised below are deemed waived).

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¶13 Mother also asks this court to sanction Father for failing to cite to the record in his answering brief, defending the appeal for purpose of harassment, and/or taking unreasonable positions on appeal. *See* A.R.S. §§ 12-349(A)(2) and 25-324(A); ARCAP 25. The answering brief includes several assertions unsupported by citations to the record as required by ARCAP 13(d). Some of these state Father's agreement with Mother's factual assertions. As to the remaining unsupported allegations, we have stricken Exhibit 1 and declined to consider arguments not raised below. *See supra* ¶¶ 11 n.2 and 12. In the exercise of our discretion, we decline further sanctions.

¶14 Mother also contends A.R.S. §§ 12-349 and 25-324(A) warrant sanctions because Father included a memorandum decision from the paralegal's unrelated custody litigation which discussed the paralegal's personal issues. Mother contends Father cited this decision to harass and embarrass Mother, her attorneys, and paralegal. We can take judicial notice of our own decisions; however, we disagree with the implication Father attempts to draw from the memorandum decision. *See Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 197 (1949). The incidents occurred in 2014, well before the clerical error occurred in this case, and it is not apparent from the record that the paralegal worked for these attorneys in 2014. Father admits his claims are "conjecture or supposition on his part." However, we cannot say that these allegations were intended to harass, as opposed to an attempt to lend some support to the trial court's ruling. We do not condone Father's speculative arguments but decline to award sanctions.

¶15 Both parties request an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324. In the exercise of our discretion, we order each party to bear his or her own attorneys' fees on appeal. However, as the successful party, Mother is entitled to an award of costs on appeal upon compliance with ARCAP 21. *See* A.R.S. § 12-342.

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CONCLUSION

¶16 We reverse the order and remand to allow Mother to file a fee application. We strike Exhibit 1 and the portions of the answering brief not supported by citations to the record but deny Mother's motion for sanctions. Mother is awarded her costs on appeal upon compliance with ARCAP 21.



AMY M. WOOD • Clerk of the Court
FILED: AA