

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

M.W.,
Petitioner,

v.

HON. SUSAN KETTLEWELL,
JUDGE PRO TEMPORE OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

ARIZONA DEPARTMENT OF ECONOMIC SECURITY;
AND RICARDO M.,
Real Parties in Interest.

No. 2 CA-SA 2013-0079
Filed December 3, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Special Action Proceeding from the Superior Court in Pima County
No. JD192874

JURISDICTION ACCEPTED; RELIEF GRANTED

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COUNSEL

Pima County Office of Children's Counsel, Tucson
By Nicholas Knauer
Counsel for Petitioner

Thomas C. Horne, Arizona Attorney General
By Erika Z. Alfred, Tucson
Counsel for Real Party in Interest ADES

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Real Party in Interest Ricardo M.

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Kelly and Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 In this special action, M.W., a minor, challenges the respondent judge's grant of his father Ricardo M.'s motion to file a delayed appeal. For the following reasons, we accept jurisdiction and grant relief.

¶2 After a contested hearing, the respondent judge signed an order terminating Ricardo M.'s parental rights to M.W. on time-in-care grounds pursuant to A.R.S. § 8-533(B)(8)(c). That order was entered on August 2, 2013. Ricardo filed his notice of appeal Wednesday, August 28—twenty-six days later and well beyond the fifteen-day limit for filing a notice of appeal of a juvenile court's final ruling. *See* Ariz. R. P. Juv. Ct. 104(A). In his simultaneous motion to file a delayed notice of appeal, Ricardo's counsel asserted that he did not receive the respondent's ruling until August 9 (a Friday), that he informed Ricardo on August 12 (the following Monday), and that

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Ricardo did not inform counsel that he wished to pursue an appeal until August 28. The motion cited no basis for the respondent to grant relief, stating only that the “termination of [Ricardo’s] parental rights involves a constitutionally protected right to parent.”

¶3 M.W. objected, arguing Ricardo had not demonstrated excusable neglect as required by Rule 108(B), Ariz. R. P. Juv. Ct. The respondent, however, granted the motion, citing “good cause appearing” as the basis for her decision. This petition for special action followed. Because M.W. has no “equally plain, speedy, and adequate” remedy by appeal, we accept jurisdiction. Ariz. R. P. Spec. Actions 1(a); *cf. Ariz. Dep’t of Econ. Sec. v. Don*, 165 Ariz. 407, 408, 799 P.2d 27, 28 (App. 1990) (accepting special action jurisdiction to review denial of motion to permit delayed appeal).

¶4 A party must file its notice of appeal within fifteen days of entry of a juvenile court’s final order. Ariz. R. P. Juv. Ct. 104(A). A juvenile court may permit an untimely notice of appeal to be filed only if “the failure to timely file was the result of excusable neglect.”¹ Ariz. R. P. Juv. Ct. 108(A). We review the respondent judge’s ruling for an abuse of discretion. *See Haroutunian v. ValueOptions, Inc.*, 218 Ariz. 541, ¶ 6, 189 P.3d 1114, 1117 (App. 2008). An abuse of discretion occurs when the record is “‘devoid of competent evidence to support’ the [court’s] decision.” *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999), *quoting Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963).

¶5 M.W. argues the respondent judge employed the wrong standard in reviewing Ricardo’s motion because the respondent determined Ricardo had shown “good cause” instead of “excusable neglect” and did not provide any factual findings supporting its conclusion. But “good cause” merely means there is a legal

¹Rule 108(A) requires that a motion for delayed appeal be made to the “presiding judge of the juvenile court.” Nothing in the record before us indicates that Ricardo complied with that requirement. But, because M.W. does not suggest the respondent judge thus lacked authority to rule on Ricardo’s request, we do not address this potential issue.

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justification or excuse for the party's conduct. *See State v. Churchill*, 82 Ariz. 375, 380, 313 P.2d 753, 756 (1957) ("Good cause means substantial reason, that is, one that [a]ffords a legal excuse."). Thus, excusable neglect is a species of good cause and the respondent's reference to "good cause" does not compel the conclusion that she applied the wrong standard—particularly given that the ruling was a form of order generated by Ricardo's counsel. And we presume trial courts know and follow the law. *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32, 97 P.3d 876, 883 (App. 2004). Nor is it material that the respondent did not explain her ruling; a court generally is not required to "give reasons for discretionary rulings." *City of Phoenix v. Geyler*, 144 Ariz. 323, 329 n.3, 697 P.2d 1073, 1079 n.3 (1985).

¶6 We agree with M.W., however, that the record does not contain a reasonable basis for the respondent judge's implicit finding of excusable neglect. "To establish that its failure to timely file . . . is excusable, a party seeking relief must demonstrate that its actions were those of a reasonably prudent person under the circumstances." *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 231 Ariz. 236, ¶ 22, 293 P.3d 512 (App. 2012). "[M]ere carelessness is not a sufficient reason." *Id.*, quoting *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984) (alteration in *Searchtoppers.com*). Excusable neglect justifying a delayed appeal may exist when 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 date of the decision, and 4) there is no prejudice to the other party. *Geyler*, 144 Ariz. at 328, 697 P.2d at 1078.

¶7 Despite Ricardo's claimed lack of notice, "counsel has an obligation to check the court records to determine the exact date of the entry of a final order so he can preserve his client's right to appeal." *In re Pima Cnty. Juv. Action No. S-933*, 135 Ariz. 278, 280, 660 P.2d 1205, 1207 (1982). The delay before counsel became aware of the order, however, was only seven days and there is no indication that counsel had a reason to believe the respondent judge's order would be issued on a particular date. *See Davis v. Davis*, 143 Ariz. 54, 59, 691 P.2d 1082, 1087 (1984) (distinguishing *Pima Cnty. Juv. Action No. S-933* based on length of delay). And,

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having received notice of the order on a Friday, the respondent reasonably could have concluded it was permissible for counsel to wait until the following Monday to inform Ricardo and thus the respondent could have decided the first *Geyler* factor weighed in favor of excusing the first ten days of the delay. We note, however, that Ricardo did not attempt to show his counsel had been diligent in attempting to be informed of the respondent's ruling. Thus, there is no basis to conclude the third *Geyler* weighs in favor of permitting a delayed appeal.

¶8 As for prejudice, the abbreviated, fifteen-day deadline for filing a notice of appeal in a juvenile action, in contrast to the thirty-day period for a civil appeal, is intended to promote finality and permanency for at-risk children. See *Joshua J. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 417, ¶¶ 15-17, 286 P.3d 166, 171 (App. 2012) (dependent children have interest in finality and stability); cf. *In re Alton D.*, 196 Ariz. 195, ¶ 9, 994 P.2d 402, 404 (2000); see also Ariz. R. P. Juv. Ct. 104(A); Ariz. R. Civ. App. P. 9(a) (notice of appeal of ruling in civil action must be filed within thirty days). These concerns are arguably less pronounced with regard to M.W. because he already has lived with his maternal grandparents his entire life and possibly will be adopted by them. And the respondent encouraged the grandparents to continue to allow a relationship between M.W. and Ricardo. M.W. has not alleged any other prejudice caused by the delay—he focuses only on finality concerns. Thus, the respondent reasonably could have concluded any prejudice to M.W. was not outweighed by Ricardo's right to appeal the termination of his parental rights. Cf. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 24, 110 P.3d 1013, 1018 (2005) (parents have "fundamental liberty interest in the care, custody, and management of their children"); but see *Geyler*, 144 Ariz. at 328, 697 P.2d at 1078 ("principle of finality carries greater weight" following litigation on merits).

¶9 The second *Geyler* factor turns on the party's diligence in seeking relief. This factor weighs entirely against permitting Ricardo a delayed appeal. He waited eleven days past the deadline before filing a notice of appeal and seeking relief and did not explain this excessive delay. And, even if we find excusable the ten days

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between entry of the respondent judge's final order and Ricardo being notified by counsel of that order, Ricardo nonetheless waited an additional sixteen days to file a notice of appeal. That span alone exceeds the time limit for filing a notice of appeal under Rule 104(B). Ricardo has offered no justification for failing to file his notice of appeal promptly upon learning of entry of the respondent's order terminating his parental rights. In light of this unexplained and excessive delay, there is no reasoned basis for the respondent judge to have found Ricardo's late notice of appeal a result of excusable neglect and thus no basis for the respondent to permit Ricardo to file a delayed appeal. *See Little*, 193 Ariz. 518, ¶ 5, 975 P.2d at 110.

¶10 For the reasons stated, jurisdiction is accepted and relief is granted. The respondent judge's order granting Ricardo's motion for a delayed appeal is vacated.