



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**COX v. HON. PONCE/ ESPLIN *et al.*, REAL PARTIES IN
INTEREST
CV-20-0173-PR**

PARTIES:

Petitioner: Thomas Cox (Father).

Respondents: Makayla Esplin (Mother) and the Prospective Adoptive Couple.

FACTS:

Prior to 2019, Father and Mother were in a romantic relationship that resulted in a pregnancy. The child was due in September 2019. Throughout the majority of Mother’s pregnancy, the parties continued to reside together and Father expressed his desire to parent the unborn child. Despite this, Mother determined it would be in the child’s best interest if he were placed for adoption. On approximately August 12, 2019, the parties’ relationship ended. Prior to the birth of the child, Father hired an attorney, Kevin Whitacre (“Whitacre”), in order to help him preserve his parental rights. On August 22, 2019, Father filed a Notice of Claim of Paternity with the Arizona Putative Father Registry, as required by [A.R.S. § 8-106.01\(A\)](#). Arizona statute also required Father to file a Petition to Establish Paternity in order to preserve his parental rights. [A.R.S. § 8-106](#).

On August 26, 2019, the attorney for the Prospective Adoptive Couple (“Couple”), Brent Ellsworth, had a conversation with Attorney Whitacre’s paralegal Kim Hewes (“Hewes”). Ellsworth told Hewes (according to Hewes’s later affidavit) that, if Father sent Ellsworth a letter indicating an intention to be “involved in the child’s life,” Couple would “back out gracefully” from the adoption proceedings. The details of this conversation are disputed, but Ellsworth (according to his later affidavit) agrees at least that a conversation took place where he stated that, if Father properly asserted his paternity rights, Couple would abandon the adoption. Allegedly based on Ellsworth’s statements, Hewes failed to calendar a deadline to file Father’s Petition to Establish Paternity. Hewes, who was responsible for calendaring deadlines for Whitacre, did not inform Whitacre that she had not calendared the deadline to file the Petition to Establish Paternity.

On August 27, 2019, Mother served Father with a Notice to Potential Birth Father of the expected birth of a baby due on September 15, 2019. This notice advised Father that, to be able to withhold consent to an adoption, he would have to initiate paternity proceedings and serve Mother within 30 days of completion of service of the notice. The notice also stated that, for purposes of service in a paternity action, Mother would have an attorney, Marlane Porter, available to accept service during this thirty-day period.

On August 28, 2019—pursuant to the earlier conversation between Whitacre’s paralegal and Couple’s attorney—Hewes sent an e-mail to Couple’s lawyer with a letter attached, written by Attorney Whitacre. This letter stated that Father would be asserting parental rights over the child and intended to file a petition to establish paternity.

On September 27, 2019, Ellsworth concluded that Father had not filed a Petition to Establish Paternity by the statutory deadline. On October 11, 2019, Whitacre filed an untimely Petition to Establish Paternity on behalf of Father. On October 17, 2019, Whitacre requested that Mother’s counsel, Porter, accept service of the Petition to Establish Paternity. Because Porter was authorized to accept service only until the deadline for filing the Petition to Establish Paternity, Father was unable to serve Mother through Porter. Father then unsuccessfully attempted service at Mother’s last known address, last known employer’s address, and parents’ home address. Finally, after an unsuccessful “skip trace,” Father filed a Motion for Alternative Service, which the trial court denied.

On December 2, 2019, Couple moved to intervene in, and dismiss, the paternity action. On April 17, 2020, the trial court dismissed the paternity action, rejecting the argument that the failure to timely file the paternity action was excusable neglect because it was the result of Attorney Whitacre’s reasonable reliance on his paralegal to calendar deadlines. The superior court concluded that the neglect in the late filing of the Petition to Establish Paternity was not excusable, based upon an analysis of *Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 121 (1957) (finding excusable neglect by attorney because “[a]ny reasonable person under such circumstances would place reliance upon the proper performance of the services of such a secretary” and “[i]f through some inadvertent clerical error the lawyer is not informed, his conduct resulting therefrom. . . is excusable”) and *Jarostchuk v. Aricol Comm’s, Inc.*, 189 Ariz. 346, 349 (App. 1997) (declining to find excusable neglect by attorney, because a secretary’s misinterpretation of a calendaring rule was “intentional action on a matter requiring some legal competence”). The trial court further found that Father’s failure to serve Mother was a separate ground for dismissal of Father’s paternity action.

Father filed a Petition for Special Action to the Court of Appeals, which declined jurisdiction. Father then filed a Petition for Review and Request for Emergency Stay in the Arizona Supreme Court, which stayed the adoption and granted review.

ISSUES:

“Was petitioner Cox’s failure to timely file the paternity action excusable? Even if it was excusable, was the paternity action correctly dismissed on the alternate ground of failure of service?”

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