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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-73

WILLIAM SMITH and MINDY SMITH	**Opinion Delivered** January 4, 2012
APPELLANTS	APPEAL FROM THE CLEVELAND COUNTY CIRCUIT COURT
V.	[NO. PR2010-12-1]
LORI SMITH	HONORABLE HAMILTON H.
APPELLEE	SINGLETON, JUDGE
	AFFIRMED

JOSEPHINE LINKER HART, Judge

William Smith and Mindy Smith (the Smiths) appeal from an order of the Cleveland County Circuit Court setting aside an interlocutory adoption decree. On appeal, the Smiths argue that the trial court erred because the one-year statute of limitations had elapsed; the court had lost jurisdiction after ninety days; and it erred in finding that there was fraud. We affirm.

William Smith is the biological father of T.S. and W.S. Mindy Smith is William Smith's wife. Appellee Lori Smith (Lori) is the children's biological mother. William has had physical custody of the minor children since his divorce from Lori in 2005. William remarried. In 2009, William persuaded Lori to allow his new wife Mindy to become the adoptive mother of the minor children. In exchange for her consent to the adoption, Lori received assurances from William that she would be given regular visitation with the minor children. On April 13, 2009, an interlocutory adoption decree was entered.

Four months later, William filed a petition in Drew County seeking to modify the visitation agreement. The trial court found that it had lost jurisdiction to hear visitation issues due to the adoption. On April 7, 2010, Lori filed a petition to set aside the adoption, alleging "fraud, duress, and intimidation." After a hearing in which she testified that she would "absolutely not" have consented to the adoption if she had known she would be unable to exercise the visitation that she had bargained for, the trial court set aside the adoption. The Smiths timely filed a notice of appeal.

We review probate matters de novo and will not reverse probate findings of fact unless they are clearly erroneous. *Carr v. Millar*, 86 Ark. App. 292, 184 S.W.3d 470 (2004). A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed. *Id.* We also defer to the superior position of the lower court sitting in a probate matter to weigh the credibility of the witnesses. *Id.*

We first consider the Smiths' argument that the trial court did not have jurisdiction to set aside the adoption. While conceding that Arkansas Code Annotated section 9-9-216 (Repl. 2009) gives a person the opportunity to object to an adoption, they rely on *Mayberry v. Flowers*, 69 Ark. App. 307, 12 S.W3d 652 (2000), for the proposition that the trial court lost jurisdiction to entertain Lori's petition to set aside the adoption after ninety days. We disagree.

The Smiths' reliance on *Mayberry* is misplaced in that *Mayberry* expressly states that the ninety-day limitation imposed by Rule 60 of the Arkansas Rules of Civil Procedure does not apply "if there was a showing of fraud, duress, or intimidation." As noted previously, Lori pleaded that her consent to the adoption was procured by fraud, duress, and intimidation, and the trial court found that it was procured by fraud. Accordingly, we hold that the trial court did have jurisdiction to hear Lori's petition.

We next consider the Smiths' argument that the order setting aside the adoption was barred by the one-year statute of limitations codified in Arkansas Code Annotated section 9-9-216.[1] While it is true that the order setting aside the petition was entered on October 26, 2010, which is more than a year after the adoption decree was entered, it is settled law that, unless a statute of limitation expressly provides otherwise, its operation is ordinarily tolled by the commencement of an action rather than by its prosecution to judgment. *General Am. Life Ins. Co. v. Cox*, 215 Ark. 860, 223 S.W.2d 775 (1949). We find no such limitation in section 9-9-216. Accordingly, we hold that the trial court did not err when it rejected the Smiths' contention that Lori's petition was time-barred.

Finally, without citation of authority, the Smiths argue that the trial court erred in finding that the adoption was procured by fraud. They assert that William was not seeking to deny Lori visitation and that the Drew County Circuit Court's conclusion that it did not have jurisdiction to enforce visitation did not "preclude" Lori's "ability" to see her biological

[1]Although the statute of limitations was not pled as an affirmative defense, it was nonetheless brought before the trial court during the hearing and was dealt with in Lori's post-trial brief.

children. We likewise find this argument unpersuasive.

In the first place, it is settled law that we will not address an argument on appeal that is not supported by convincing legal authority. *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997). However, to the extent that the Smiths are merely challenging the factual basis of the trial court's ruling, we nonetheless find no error. We note that the trial court's finding that Lori's consent to the adoption was procured by fraud is based on testimony that, despite being unrepresented by legal counsel, Lori bargained for the same visitation afforded her in her domestic-relations case, and while in the presence of the Smiths' attorney, she was led to believe that she would have a legal right to that visitation. It was also not disputed that four months after the interlocutory adoption decree was entered, the Smiths sought to limit Lori's visitation. We cannot say that the trial court's conclusion that Lori's consent to the adoption was procured by fraud is clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and ABRAMSON, JJ., agree.

The Harper Law Office, PLLC, by: *Kenneth A. Harper*, for appellants.

Potts Law Office, by: *Gary W. Potts*, for appellee.