

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000062-ME

C.S., MOTHER AND
M.R., FATHER

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 09-AD-500162

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES; D.L.R., A MINOR
CHILD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,¹ SENIOR JUDGES.

ACREE, JUDGE: Appellant, C.S., appeals a December 28, 2009 order of the Jefferson Family Court denying reconsideration of a previous order terminating parental rights.² For the following reasons, we affirm.

¹ Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Appellant, M.R., filed no brief.

On November 6, 2009, the family court issued an order terminating C.S.'s parental rights with regard to her child, D.L.R., and committing the child to the custody of the Cabinet for Health and Family Services. The record shows the court clerk's certification that a copy of the order was sent by first class mail to all counsel of record and directly to all unrepresented parties on the same date.

Nothing further happened in the case until December 10, 2009. By that date, it was too late to file a motion under Kentucky Rules of Civil Procedure (CR) 52 or 59, and too late to file a notice of appeal under CR 73.02. The order had become final and non-appealable. Under such circumstances, the only "procedure for obtaining *any* relief from a judgment shall be as provided in Rule 60.02 or 60.03." CR 60.05 (emphasis added).

On December 10, 2009, C.S. filed a motion "to reconsider the Order Terminating Parental Rights and Order of Judgment[.]" The motion cited no rule. If intended as a motion pursuant to CR 59, it was untimely and denial was not an abuse of discretion. *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 483 (Ky. 2009)("ruling pursuant to CR 59.05 is reviewed by an appellate court under the abuse of discretion standard"). Time restrictions therefore prohibited the family court from granting any relief except as provided by CR 60.02.

As it turns out, while C.S. appears from the record to acknowledge that her motion to reconsider was based on CR 59, her reply to the Cabinet's response to her motion did invoke CR 60.02 as the authorization for the family court's consideration of the untimely motion to reconsider. She cites *Kurtsinger v. Board*

of *Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002), as presenting a compelling argument that “‘CR 60.02 is a mistake-correcting rule that allows the trial court broad discretion’ where an inadvertent error has caused a party to miss a filing deadline for an appellate action.” (Appellant’s brief, p. 7, quoting *Kurtsinger*, 90 S.W.3d at 456). Her argument fails for two reasons.

First, *Kurtsinger* is factually distinguishable. In *Kurtsinger*, the trial court acknowledged that after a timely CR 59.05 motion was denied, “notice of entry of the order was sent to Appellees *but not to Appellants.*” *Kurtsinger*, 90 S.W.3d at 455 (emphasis supplied). The CR 60.02(a) motion in *Kurtsinger* was granted because the trial judge admitted “that his office had made a mistake by not including the Appellants . . . on the distribution list” and granted relief “upon a finding that Appellants ‘acted with due diligence and acted promptly.’” *Id.*

In C.S.’s case, the record shows notice of entry of the order was sent to C.S.’s original counsel.³ More significantly, that counsel’s affidavit indicates he became aware of entry of the order terminating parental rights during “the first week of December, 2009” and therefore in time to file a notice of appeal from the order terminating C.S.’s parental rights.⁴ Unlike the court in *Kurtsinger*, neither the family court nor the clerk committed a similar mistake in this case.

³ C.S.’s counsel representing her before the family court is not the same counsel who has represented her on appeal.

⁴ The affidavit stated that upon learning of the entry of the order, he “immediately contacted [counsel] who prosecuted the case” who was, at that moment, “attending the Kentucky Law Update and then the Model Court Seminar (held on December 3, 4, 2009)[.]” December 4, 2009 was a Friday, twenty-eight days after entry of the Order Terminating Parental Rights. That means the deadline for filing a notice of appeal would have been Monday, December 7, 2009.

Second, as *Kurtsinger* notes, the family court's discretion to grant or deny relief under CR 60.02 is broad. We cannot say that this broad discretion was abused here.

For the foregoing reason, the Jefferson Family Court's order denying C.S.'s motion to reconsider is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT C.S.,
MOTHER:

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NO BRIEF FOR APPELLANT
M.R., FATHER.

BRIEF FOR APPELLEE
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