

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2007-CA-000054-ME

H.M.E., BY AND THROUGH HER  
DULY APPOINTED GUARDIAN AD  
LITEM, WILLIAM D. ELKINS

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE JR., JUDGE  
ACTION NO. 06-AD-00003

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH AND FAMILY  
SERVICES/JERRY LOVITT; AND  
S.K.

APPELLEES

### OPINION AND ORDER DISMISSING AND REMANDING

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BEFORE: LAMBERT AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: H.M.E., a minor, by and through her duly appointed *guardian ad litem*, William D. Elkins, brings this appeal from Findings of Fact, Conclusions of Law and Order of Judgment Dismissing the Involuntary Termination of Respondent's [S.K.'s]

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Parental Rights entered in the Estill Circuit Court on December 5, 2006. We dismiss and remand.

On March 7, 2006, the Cabinet for Health and Family Services (Cabinet) filed a Petition for Involuntary Termination of Parental Rights seeking to terminate the parental rights of H.M.E.'s father, S.K. Following an evidentiary hearing, the court entered its Findings of Fact, Conclusions of Law and Order of Judgment (judgment) on December 5, 2006. Therein, the court dismissed the Cabinet's petition for involuntary termination and awarded sole custody of H.M.E. to her biological father, S.K.

On December 8, 2006, the Cabinet timely filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.05 to alter, amend, or vacate the judgment. While the CR 59.05 motion was pending, H.M.E.'s *guardian ad litem* filed a notice of appeal initiating this appeal on January 4, 2007. Thereafter, by order entered January 29, 2007, the court denied the Cabinet's CR 59.05 motion. No appeal was taken from that order, and the earlier appeal has now proceeded to this Court.

It is well-established that a timely filed motion pursuant to CR 59.05 postpones finality of an order and that a ruling on such motion is required to achieve finality. *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005)(citing *Kurtsinger v. Bd. of Trs. Of Kentucky Ret. Sys.*, 90 S.W.3d 454 (Ky. 2002)). Simply put, "a CR 59.05 motion stays finality until the motion is ruled upon." *Gullion*, 163 S.W.3d at 891.

In the case *sub judice*, a judgment was entered on December 5, 2006, and the Cabinet timely filed a CR 59.05 motion to vacate that judgment. As such, it is clear that the filing of the postjudgment motion under CR 59.05 suspended the "finality"

of the court's December 5, 2006, judgment. See *Johnson v. Com.*, 17 S.W.3d 109 (Ky. 2000). However, while the CR 59.05 motion was pending, H.M.E.'s *guardian ad litem* filed a notice of appeal initiating the instant appeal. Thus, this appeal is premature as it was filed while a timely CR 59.05 motion was pending before the circuit court. See *id.*

Additionally, while this appeal was pending, the circuit court denied the CR 59.05 motion by order entered January 29, 2007. In *Johnson*, the Kentucky Supreme Court stated:

As a general rule, except with respect to issues of custody and child support in a domestic relations case, the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending.

*Id.* at 113. The case now before us involved the denial of the termination of parental rights. Consequently, the circuit court's January 29, 2007, order was rendered without jurisdiction and is a nullity.<sup>2</sup> See *id.*

Now therefore be it ORDERED that Appeal No. 2007-CA-000054-ME is DISMISSED as premature and this cause is REMANDED to the Estill Circuit Court to properly rule upon the pending CR 59.05 motion.

ALL CONCUR.

ENTERED: April 25, 2008

/s/ Jeff S. Taylor  
JUDGE, COURT OF APPEALS

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<sup>2</sup> The dismissal of this appeal in no way reflects upon the merits of the case. Unfortunately, S.K. filed a motion to dismiss the appeal earlier on other grounds that was denied by a motion panel of this Court. The reasons for which this appeal is now being dismissed were not raised before the motion panel. The Court of Appeals is bound by and must follow applicable precedents established by the Kentucky Supreme Court. Rules of the Supreme Court 1:030(8)(a). Regrettably, for H.M.E., we hold that *Johnson v. Commonwealth*, 17 S.W.3d 109 (Ky. 2000) is controlling, and we are duty bound to follow its ruling.

BRIEF FOR APPELLANT:

William D. Elkins  
Winchester, Kentucky

BRIEF FOR APPELLEE, S.K.:

Chad B. Hammonds  
Richmond, Kentucky