

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000523-ME

JAMIE MARCUM

APPELLANT

v. APPEAL FROM GREENUP FAMILY COURT  
HONORABLE JEFFREY L. PRESTON, JUDGE  
ACTION NO. 06-CI-00393

GLENN MARCUM

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: NICKELL AND WINE, JUDGES; HARRIS,<sup>1</sup> SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Jamie Marcum appeals from a Greenup Family Court order, entered on February 16, 2009 (the February 16 order), which granted Glenn Marcum's Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the custody provisions of the parties' marriage dissolution decree

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

(decree) entered on October 15, 2008. The decree awarded the parties joint custody of their children with Jamie<sup>2</sup> designated as the primary residential custodian. The February 16 order awarded sole custody to Glenn, with restricted visitation awarded to Jamie. Jamie also appeals from an order entered on March 4, 2009, denying her motion to alter, amend, or vacate the February 16 order. After reviewing the record and briefs, we conclude that *Gullion v. Gullion*, 163 S.W.3d 888 (Ky. 2005), requires us to vacate the February 16 order and remand this case to the Greenup Family Court “with directions to limit its consideration of [Glenn’s] CR 59.05 motion to facts that existed at the trial.” *Id.* at 894.

Glenn and Jamie were married in 1998. Their marriage produced four children. Initially, Glenn filed for dissolution of the marriage on June 30, 2006, after Jamie, Jamie’s male paramour, and the children moved to Alabama. Three months later, Jamie moved back to Kentucky and reconciled with Glenn. On May 1, 2007, the trial court entered a notice to dismiss for lack of prosecution. Shortly thereafter, on June 15, 2007, Glenn filed an amended petition for dissolution after Jamie took the children and moved to Illinois with her cousin, Sara. Several months later Jamie moved the children back to Alabama. The decree of dissolution was entered October 15, 2008, following a trial (characterized by the trial court as a “final hearing”) held on September 30.

In the decree of dissolution and custody order, the trial court clearly stated concerns about the parenting skills of both parties. The court found that

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<sup>2</sup> We refer to the parties by their given names for the sake of clarity and without intending any disrespect.

Glenn had not seen the children or provided financial support since June 2007. On the other hand, the court found that Jamie failed to provide the children with a stable environment and engaged in a romantic relationship with her cousin Sara. Based upon Jamie's testimony, however, the trial court found that the children had been in Alabama for a year and were doing well in school. The trial court awarded Jamie and Glenn joint custody with Jamie designated as the primary residential custodian. Glenn was ordered to pay child support in the amount of \$152.00 per month.

Twelve days after the original decree of dissolution and custody order was entered, on October 27, 2008, Glenn filed a CR 59.05 motion to alter, vacate or amend the custody order. The motion claimed that Jamie lied to the court about the children's living conditions and school progress. The facts alleged were obtained through a telephone conversation between Glenn's sister and one of the children that occurred after the original custody hearing. The motion also requested that the trial court order the Alabama school system to provide the children's academic records for review. A hearing on the motion was held on February 2, 2008.

During the hearing, Jamie testified that she moved back to Illinois after her mobile home was repossessed in Alabama. Glenn argued that Jamie had knowingly misled the trial court when she testified that she and the children continued to reside in Alabama, considering that Jamie moved the children to Illinois the day after the hearing. Glenn also claimed that Jamie lied to the trial

court about the children's standard of living and well-being based upon his son's claims that the children slept on the floor and did not want to live with their mother. Jamie counter-argued that the child who spoke to Glenn's sister is mentally disabled and is confused easily.

After hearing arguments from both parties, the trial court entered an order granting Glenn's CR 59.05 motion on February 16, 2009, amending the previous order and awarding custody to Glenn. The trial court found that Jamie misled or lied to the court during the September 30, 2008, trial concerning living arrangements, living conditions, and the children's performance in school. The trial court specifically noted that at the February 2, 2009, hearing Jamie testified that she had moved the children from Alabama to Illinois on the very next day following the September 30, 2008, trial, and that when Jamie testified at the trial she "gave no indication whatsoever that she would be moving to Illinois the next day." The court also found that Jamie failed to be an active participant in her children's education. The trial court specifically stated that it utilized the factors found in KRS 403.270 in determining what is in the best interest of the children in making its decision. Although Glenn had been an absentee father since the separation, the court found that he could better provide a stable home environment for the children since he lived with his family and had a stable job. The court granted awarded Glenn custody of the children and awarded Jamie visitation rights. This appeal follows.

One of Jamie's arguments on appeal is that the trial court erred in granting Glenn's CR 59.05 motion because it based its decision on facts that were not in existence at the time of the September 30, 2008 trial. Because we are bound to follow the law as enunciated by the Kentucky Supreme Court in the *Gullion* case, *see* Rules of the Supreme Court (SCR) 1.030(8)(a), we agree with this argument and do not reach any other issues.

It is abundantly clear that the evidence adduced before the trial court at the hearing on Glenn's CR 59.05 motion included evidence of events which occurred subsequent to the September 30, 2008 trial. It is just as clear that the trial court's February 16 order was based in part on that evidence. *Gullion* expressly states:

Although a trial court may grant a CR 59.05 motion if the movant presents newly discovered evidence that was not available at the time of trial, "newly discovered evidence" must be of facts existing at the time of trial. . . . [I]t is improper for a trial court to rely upon evidence of events that occurred subsequent to the trial in ruling on a CR 59.05 motion. . . . [T]he trial court committed reversible error when, in changing custody, it relied in part on facts that occurred subsequent to the custody trial.

*Gullion*, 163 S.W.3d at 894.

In the present case the trial court has done precisely what *Gullion* prohibits. We have our marching orders.

Accordingly, the orders entered in the Greenup Family Court on February 16, 2009, and March 4, 2009, are vacated and this case is remanded to the

Greenup Family Court with directions to limit its consideration of Appellee's CR 59.05 motion to facts that existed at the time of the September 30, 2008 "final hearing."

ALL CONCUR.

BRIEF FOR APPELLANT:

Audelia J. Francis  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Richard A. Hughes  
Ashland, Kentucky