

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION**

**MARISA N. PAVAN and TARRAH D. PAVAN,
individually, and as parents, next friends, and
guardians of T.R.P., a minor child**

**LEIGH D. W. JACOBS and JANA S. JACOBS,
individually, and as parents, next friends, and
guardians of F.D.J., a minor child**

**COURTNEY M. KASSEL and KELLY L. SCOTT,
individually, and as parents, next friends, and
guardians of A.G.S., a minor child**

PLAINTIFFS

VS.

Case No. 60CV-15-3153

**NATHANIEL SMITH, MD, MPH,
Director of the Arkansas Department of Health,
in his official capacity, and his successors in office**

DEFENDANT

MOTION FOR STAY

COMES NOW Nathaniel Smith, MD, MPH, Director of the Arkansas Department of Health (“ADH”), in his official capacity, and his successors in office, by and through undersigned counsel,¹ and for his Motion for Stay, states as follows:

1. At the hearing held on November 23, 2015, the Court announced from the bench its intention to grant an injunction requiring ADH to amend the birth certificates of the child Plaintiffs in this case. The Court did not announce a ruling on the constitutional claims

¹ ADH is represented herein by the Office of the Arkansas Attorney General pursuant to Ark. Code Ann. § 25-16-702(a), which requires the Attorney General to serve as counsel for state agencies and entities when requested. *See id.* (“The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.”).

presented in this case, nor did the Court announce a ruling regarding additional injunctive relief requested by the Plaintiffs. The Court told the parties that the Court will enter a written order effectuating its ruling, and disposing of the remaining claims in the case, on a future date. The Court has not entered a written order as of the date and time of this filing.

2. ADH hereby notifies the Court and the Plaintiffs that ADH intends to appeal the Court's anticipated ruling regarding the birth certificates of the child Plaintiffs in this case. ADH will also appeal any additional adverse rulings contained in the Court's forthcoming written order. ADH cannot file a notice of appeal at this time because the Court has not entered a final, appealable order.

3. ADH respectfully requests that the Court grant a stay of its forthcoming written order, concomitantly with the written order. This Court has the discretion to grant a stay of its own order. *See* Ark. R. Civ. P. 62(c) (“When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court from which the appeal is taken, in its discretion, may suspend . . . an injunction during the pendency of the appeal[.]”). “When an appeal is taken by the State of Arkansas or an officer or agent thereof and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.” Ark. R. Civ. P. 62(e). ADH will appeal the Court's order, assuming the Court grants relief to the Plaintiffs. A stay is warranted, and no bond is required.

4. As this Court (Second Division) has recognized in the past,² a stay is warranted under the circumstances of this case.

² *See* Final Order and Judgment, May 10, 2010, *Sheila Cole, et al v. Dep't of Human Services et al*, Pulaski County Circuit Court No. CV 2008-14284 (declaring Arkansas Initiated Act 1 of 2008 unconstitutional and providing that “enforcement of this judgment is stayed without bond pending appeal in accordance with Rule 62 of the Arkansas Rules of Civil Procedure.”).

5. Respectfully, ADH submits that although the Court has announced from the bench its intention to order ADH to amend the child Plaintiffs' birth certificates, the Court's order is not entered and is therefore not effective until reduced to writing and properly filed in the record of this case. Entry of orders is governed by Rule 58 of the Arkansas Rules of Civil Procedure, which states:

[U]pon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel . . .

Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2.

Id. (emphasis added). Administrative Order No. 2 of the Administrative Orders of the Arkansas Supreme Court, in turn, provides:

(b) (1) The clerk shall keep a judgment record book in which shall be kept a correct copy of every final judgment or appealable order . . . and any other order which the court may direct to be kept.

(2) The clerk shall denote the date and time that a judgment, decree or order is filed by stamping or otherwise marking it with the date and time and the word "filed." A judgment, decree or order is entered when so stamped or marked by the clerk, irrespective of when it is recorded in the judgment record book.

(4) At any time that the clerk's office is not open for business, and upon an express finding of extraordinary circumstances set forth in the order, any judge may make any order effective immediately by signing it, noting the time and date thereon, and marking or stamping it "filed in open court." Any such order shall be filed with the clerk on the next day on which the clerk's office is open, and this filing date shall control all appeal-related deadlines

pursuant to Rule 4 of the Arkansas Rules of Appellate Procedure – Civil.

Id. Rue 4(d) of the Arkansas Rules of Appellate Procedure – Civil, in turn, provides that “[a] judgment or order is entered within the meaning of this rule when it is filed in accordance with Administrative Order No. 2(b).” *Id.*

In *McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 243 S.W.3d 278 (2006), plaintiffs challenged the constitutionality of the Arkansas Check-Cashers Act. The trial court “announce[d] from the bench that the Act was constitutional” but it was “apparent from the record that no such ruling [could] be found in the written order.” 268 Ark. at 66. On appeal, the Arkansas Supreme Court explained that “[a]s a threshold issue, this court must determine whether the trial court in fact ruled on McGhee’s constitutional challenge.” *Id.* The Supreme Court held that the trial court’s announcement of its ruling from the bench was not an effective order because it was never reduced to writing and filed:

Pursuant to Administrative Order 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed. *Judkins v. Hoover*, 351 Ark. 552, 95 S.W.3d 768 (2003), *rev'd on other grounds, West v. Williams*, 355 Ark. 148, 133 S.W.3d 388 (2003). **This rule eliminates or reduces disputes between litigants over what a trial court’s oral decision in open court entailed.** *See Price v. Price*, 341 Ark. 311, 16 S.W.3d 248 (2000). **If a trial court’s ruling from the bench is not reduced to writing and filed of record, it is free to alter its decision upon further consideration of the matter.** *See Morrell v. Morrell*, 48 Ark.App. 54, 889 S.W.2d 772 (1994). **Simply put, the written order controls.** Accordingly, the Board and AFSA are correct that this court is limited to a review of whether the trial court properly declined to address the merits of the constitutional challenge[.]

Id. at 67 (emphasis added). *See also Ehler v. Post-Prison Transfer Bd.*, 2015 Ark. 139, *2, 2015 WL 1567122 (April 2, 2015) (“[U]ntil an order denying petitioner’s indigent status is filed of record in the circuit court, there is no effective order from which petitioner may appeal[.]”);

Jefferson County Election Comm'n v. Hollingsworth, 2014 Ark. 431, *7, 445 S.W.3d 504 (“This court has made clear that an oral order announced from the bench does not become effective until reduced to writing and filed in accordance with the requirements of Arkansas Supreme Court Administrative Order No. 2(b)(2).”); *Oliver v. Phillips*, 375 Ark. 287, 293, 290 S.W.3d 11 (2008) (“Pursuant to Administrative Order 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed.”); *Nat’l Home Centers, Inc. v. Coleman*, 370 Ark. 119, 120, 257 S.W.3d 862 (2007) (same). The Court’s announcement from the bench of its decision regarding the child Plaintiffs’ birth certificates is not effective until it is reduced to writing and filed.

6. Pursuant to Ark. R. Civ. P. 58, Administrative Order No. 2, Ark. R. App. P. 4(d), and controlling case law applying these rules, *supra*, the Court’s injunction announced from the bench at the November 23 hearing is not entered and not effective until the Court sets forth the order in a written document and enters the written order by properly filing it with the clerk.

7. ADH has no intention of disobeying an order entered by this Court. ADH also does not wish to take any action that may be undone or overruled on appeal if ADH is successful in its appeal. Additionally, ADH does not wish to create the appearance that ADH has waived any potential argument on appeal through voluntary action contrary to ADH’s position, and in advance of the entry of an order under the rules discussed above.

8. Because ADH will appeal the Court’s final order upon entry of the order, ADH requests that when the Court enters the order, the Court include a stay of its order pending ADH’s appeal pursuant to Ark. R. Civ. P. 62.

WHEREFORE, the Director of the Arkansas Department of Health prays that the Court grant his Motion for Stay, and for all other just and appropriate relief.

Respectfully Submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

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Attorneys for the Defendant

CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, certify that on this 24th day of November, 2015, I electronically filed the foregoing with the Circuit Court Clerk using the Arkansas Judiciary's eFlex electronic filing system, which shall provide electronic notification to the following:

Cheryl K. Maples
Attorney for the Plaintiffs
ckmaples@aol.com

/s/ Colin R. Jorgensen