TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-22-00099-CV

A. N., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE 453RD DISTRICT COURT OF HAYS COUNTY
NO. 20-0971, THE HONORABLE MELISSA MCCLENAHAN, JUDGE PRESIDING

CONCURRING OPINION

I respectfully concur only in the Court's judgment because the majority misapplies the Supreme Court of Texas emergency order at issue. To begin with, the extension here under the Forty-Seventh Emergency Order from February 1 to March 1 was proper even though the extension order was signed on the then-dismissal date of February 1 because such orders may be signed on the dismissal date even though by statute the trial otherwise must start "before" the dismissal date. *See In re G.X.H.*, 627 S.W.3d 288, 300–01 (Tex. 2021) (applying Tex. Fam. Code § 263.401(b)). There is thus no need for the majority to have concluded that "the plain language of the Fortieth Emergency Order did not require the district court to start trial on the merits before February 1, 2022 or lose jurisdiction." *See ante* at 6.

This conclusion is error. The majority reaches it by observing that nothing in the Fortieth Emergency Order "requires courts to comply with Section 263.401's procedural requirements, such as beginning trial before the dismissal date, when granting a second extension."

See ante at 4–5. Not so. The Fortieth Emergency Order says that in these kinds of suits, "all deadlines and procedures must not be modified or suspended, unless permitted by statute, except the dismissal date may be extended as follows." *Fortieth Emergency Ord. Regarding the COVID-19 State of Disaster*, 629 S.W.3d 911, 912 (Tex. 2021). In other words, statutory deadlines and procedures are not changed by the emergency order and cannot be changed by courts unless the relevant statutes themselves already allow it. Only the "dismissal date" may be picked up and moved to a later date. This means that when the trial court picked up the dismissal date from November 13, 2021, and moved it to February 1, 2022, everything else that Family Code chapter 263 says about what the "dismissal date" means otherwise stayed in place. The trial thus had to start before February 1 or some other authority—namely here, the Forty-Seventh Emergency Order—had to permit further extension.

The majority's case-law support for its conclusion is *R.C.C. v. Texas Department of Family and Protective Services*, but that case involved a materially different emergency order. *See* No. 03-21-00687-CV, 2022 WL 2231306 (Tex. App.—Austin June 22, 2022, no pet.) (mem. op.). The relevant emergency-order provision there allowed extensions "[s]ubject only to *constitutional* limitations." *See id.* at *6–7 (emphasis added) (quoting *Eighteenth Emergency Ord. Regarding the COVID-19 State of Disaster*, 609 S.W.3d 122, 122–23 (Tex. 2020)). That language obviously differs from the language here that "all deadlines and procedures must not be modified or suspended, unless permitted *by statute*, except the dismissal date may be extended." *See Fortieth Emergency Ord.*, 629 S.W.3d at 912 (emphasis added). Thus, here, the statutory requirement that the trial start before the dismissal date cannot have been stripped from the February 1 dismissal date, contrary to the majority's conclusion. Indeed, the Fortieth Emergency

Order's use of the statutory term "dismissal date," *see* Tex. Fam. Code § 263.401(a), (c), becomes meaningless if it is divorced from the statute's try-or-dismiss requirement.

I respectfully concur only in the judgment.

Chari L. Kelly, Justice

Before Chief Justice Byrne, Justices Kelly and Smith

Filed: August 23, 2022