NO. 12-09-00092-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF E.M.,	***§***	***APPEAL FROM THE 321ST***
C.M., N.M. AND J.M.F., JR.,	***§***	***JUDICIAL DISTRICT COURT***
CHILDREN	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

R.F.[1] appeals the termination of her parental rights. In five issues, R.F. challenges the order of termination. We affirm.

BACKGROUND

R.F. is the mother of four children, E.M., born February 4, 1989;[2] C.M., born March 22, 1992; N.M., born March 22, 1992; and J.M.F., Jr., born January 6, 2005. J.M.[3] is the father of the three older children and J.M.F., Sr. is the father of J.M.F., Jr. This case began on May 19, 2005 and after numerous hearings, orders, and petitions, an agreed order was filed on August 16, 2007. The trial court ordered that the Department of Family and Protective Services (the "Department") be appointed permanent managing conservator of C.M. and N.M. and that the children remain in their current foster care placement. The foster parents were appointed joint sole managing conservators of J.M.F., Jr. and the Department was dismissed as a party as to this

[1] Pursuant to rule 9.8 of the Texas Rules of Appellate Procedure, we must, in our opinion, use an alias to refer to the minors's parents. TEX. R. APP. P. 9.8(b)(2).

[2] The oldest child, E.M., reached the age of eighteen and was no longer enrolled in an accredited secondary school in a program leading toward a high school diploma before the agreed order was filed (August 16, 2007). Therefore, E.M. was no longer subject to the jurisdiction of the district court, and the parent-child relationship between R.F. and E.M. was not terminated.

[3] J.M. is not a party to this appeal.

child. R.F. and the fathers of the three children were appointed joint possessory conservators. However, on October 15, 2007, the foster parents and the Department filed a joint amended petition to modify the parent-child relationship regarding all three children. Later, the Department and the foster parents filed a third amended joint petition to modify and to terminate the parent-child relationship between C.M., N.M., J.M.F., Jr. and R.F., and between J.M.F., Jr. and J.M.F., Sr. After a jury trial, the trial court found by clear and convincing evidence that R.F. engaged in acts or conduct that satisfied one or more of the statutory grounds for termination and that termination was in the best interest of the children. On March 9, 2009, the trial court ordered that the parent-child relationship between C.M., N.M. and J.M.F., Jr. and R.F. be terminated. Likewise, the trial court found by clear and convincing evidence that J.M.F., Sr. engaged in acts or conduct that satisfied one or more of the statutory grounds for termination and that termination was in the best interest of the child. The trial court ordered that the parent-child relationship between J.M.F., Jr. and J.M.F., Sr. be terminated.[4] On March 16, 2009, R.F. filed a motion for appointment of appellate counsel and a notice of appeal. On March 27, 2009, the trial court filed an order appointing R.F.'s trial counsel to represent R.F. on appeal.

SECTION 263.405

In her first issue, R.F. contends that the trial court's order of termination is void because J.M. was an indispensable party and was not properly served. In her second and third issues, she argues that the evidence is factually insufficient to terminate her parental rights to C.M. and N.M. In her fifth issue, R.F. contends that the trial court abused its discretion by appointing the Department as possessory conservator of C.M. and N.M. The Department disagrees, arguing that R.F. failed to comply with the requirements of section 263.405 of the Texas Family Code, which precludes this court from considering certain issues on appeal.

Because termination of R.F.'s parental rights to C.M. and N.M. was instituted by the Department, section 263.405 of the Texas Family Code governs this appeal. Section 263.405 provides as follows:

> (b) Not later than the 15th day after the date a final order is signed by the trial judge, a party who intends to request a new trial or appeal the order must file with the trial court:

[4] J.M.F., Sr. is not a party to this appeal.

> (1) a request for a new trial; or
> (2) if an appeal is sought, a statement of the point or points on which the party intends to appeal.
>
> . . . .
>
> (d) The trial court shall hold a hearing not later than the 30th day after the date the final order is signed to determine whether:
>
> (1) a new trial should be granted;
> (2) a party's claim of indigence, if any, should be sustained; and
> (3) the appeal is frivolous as provided by Section 13.003(b), Civil Practice and Remedies Code.
>
> . . . .
>
> (i)The appellate court may not consider any issue that was not specifically presented to the trial court in a timely filed statement of the points on which the party intends to appeal or in a statement combined with a motion for new trial.

TEX. FAM. CODE ANN. § 263.405(b), (d), (i) (Vernon 2008).

Here, R.F. did not file a statement of points as required by section 263.405(b). Further, she does not assert in her brief that she was deprived of effective assistance of counsel or that this statute is unconstitutional as applied to her. *See* ***In re P.P.M.I.***, No. 04-10-00096-CV, __ S.W.3d __, 2010 WL 1609246, at *1 (Tex. App.–San Antonio Apr. 21, 2010, no pet. h.) (stating that both an ineffective assistance of counsel claim and an assertion that the statute is unconstitutional as applied to the party could be raised even if the party did not include these issues in a statement of points). However, in her reply brief, R.F. contends that she was precluded from complying with the requirements of section 263.405(b) because of the delay by the trial court in appointing appellate counsel.

Within seven days of the order of termination, R.F. filed a motion to appoint appellate counsel that included an *in forma pauperis* declaration, and a notice of appeal. The trial court did not file its order appointing appellate counsel for her until March 27, 2009, eighteen days after the order of termination and three days after the deadline to file a statement of points. Nevertheless, R.F. could have filed a motion for an extension of time for filing her statement of points. *See* TEX. R. CIV. P. 5; ***In re M.N.***, 262 S.W.3d 799, 803 (Tex. 2008). But she did not do so. The filing of a statement of points is a procedural prerequisite to our considering issues R.F. has raised on appeal regarding termination of her parental rights to C.M. and N.M. Accordingly, we may not consider R.F.'s first, second, third, and fifth issues.

RULE 324(b)

In her fourth issue, R.F. argues that the evidence is factually insufficient to terminate her parental rights to J.M.F., Jr. The Department disagrees, contending that R.F. waived any error regarding factual insufficiency because she did not file a motion for new trial. A point in a motion for new trial is a prerequisite to a complaint of factual insufficiency of the evidence to support a jury finding. TEX. R. CIV. P. 324(b)(2). Here, the jury found that the parent-child relationship between R.F. and J.M.F., Jr. should be terminated. R.F. did not file a motion for new trial. Because she did not do so, she has failed to preserve her factual sufficiency complaint regarding termination of her parental rights to J.M.F., Jr. Accordingly, R.F.'s fifth issue is overruled.

REPLY BRIEF

In her reply brief, R.F. contends that section 263.405 of the Texas Family Code is unconstitutional and that application of this section would deny her due process. She did not raise this constitutional issue in her first brief. The Department's brief addressed section 263.405, arguing that this court was precluded from addressing certain issues because R.F. failed to file a statement of points. An appellant may file a reply brief addressing any matter in the appellee's brief. TEX. R. APP. P. 38.3. However, a reply brief is not intended to allow R.F. to raise new issues. *See* ***id.***; ***Lopez v. Montemayor***, 131 S.W.3d 54, 61 (Tex. App.–San Antonio 2003, pet. denied). Therefore, these arguments are not properly before this court. *See* ***Lopez***, 131 S.W.3d at 61.

DISPOSITION

The judgment of the trial court is ***affirmed***.

BRIAN HOYLE
Justice

Opinion delivered June 30, 2010.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

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