

Opinion filed March 9, 2017



In The

Eleventh Court of Appeals

No. 11-17-00045-CV

IN RE LEON FLETCHER, JR.

Original Mandamus Proceeding

MEMORANDUM OPINION

Relator, Leon Fletcher, Jr., has filed in this court an original mandamus proceeding seeking to compel the judge of the 259th District Court of Jones County, the Honorable Brooks Hagler, to vacate his order of November 22, 2016. In that order, Judge Hagler denied Relator's motion to dismiss the underlying proceeding—trial court cause no. 023702—a parental termination case filed by the Department of Family and Protective Services, a real party in interest. Judge Hagler ruled that dismissal was not required by Section 263.401 of the Texas Family Code because he had issued a continuance order pursuant to Section 161.2011, which operated to stay the proceedings. TEX. FAM. CODE ANN. § 161.2011 (West 2014), § 263.401

(West Supp. 2016). We disagree and conditionally grant in part Relator's petition for writ of mandamus.

We note that the Department concedes that Relator's petition for writ of mandamus has merit as to the suit filed by the Department. The Department agrees that the statutory deadline under Section 263.401(a) passed, that no order extending the deadline was entered under Section 263.401(b), and that the trial court abused its discretion when it denied Relator's motion to dismiss the Department's suit.

Section 263.401(a) provides that a parental termination suit filed by the Department shall be dismissed unless trial on the merits has commenced by the Monday following one year from the date of the temporary order appointing the Department as managing conservator. Pursuant to Section 263.401(b), one 180-day extension may be granted. "If the court grants an extension . . . but does not commence the trial on the merits before the dismissal date, the court shall dismiss the suit. The court may not grant an additional extension that extends the suit beyond the required date for dismissal under Subsection (b)" *Id.* § 263.401(c). Under Section 161.2011, a parent whose rights are subject to termination in a pending suit "and against whom criminal charges are filed that directly relate to the grounds for which termination is sought" may request a continuance of the final trial in the termination proceeding until the criminal charges are resolved. *Id.* § 161.2011(a). "*Notwithstanding any continuance granted, the court shall conduct status and permanency hearings with respect to the child as required by Chapter 263 and shall comply with the dismissal date under Section 263.401.*" *Id.* (emphasis added).

In the underlying proceeding, the Department filed a petition seeking to terminate Relator's parental rights. The Department was appointed temporary managing conservator on October 23, 2015. The judge set the original dismissal date at October 24, 2016. Approximately a month before the trial was set to commence, Relator requested a continuance pursuant to Section 161.2011(a). The

trial court granted the continuance, but its order did not comply with any of the provisions of Section 263.401(b) and did not extend the mandatory dismissal deadline. On October 28, 2016, Relator filed a motion for contempt and for dismissal, which Relator amended on November 7, 2016. The trial court denied Relator's amended motion on November 22, 2016. According to the parties, trial is currently set for March 27, 2017.

The statutory dismissal deadline is mandatory, and mandamus is appropriate if a trial court denies a timely motion to dismiss filed pursuant to Section 263.401. *See In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 643–45 (Tex. 2009) (orig. proceeding); *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609 (Tex. 2006) (orig. proceeding); *In re Elliott*, No. 11-13-00323-CV, 2013 WL 6583957, at *2 (Tex. App.—Eastland Dec. 13, 2013, orig. proceeding) (mem. op.). The trial court in this case abused its discretion when it denied Relator's motion to dismiss the suit filed by the Department. We note that a dismissal under Section 263.401 is without prejudice and does not prohibit the Department from filing another petition to terminate parental rights. *In re M.N.G.*, 147 S.W.3d 521, 528 (Tex. App.—Fort Worth 2004, pet. denied).

We note also that the children's mother has filed pleadings in the trial court in which she requests relief against Relator and also requests that the trial court terminate Relator's parental rights. Section 263.401 specifically applies to termination suits "filed by the department." FAM. § 263.401(a). The dismissal of the Department's suit does not affect the mother's affirmative claims for relief. *See In re D.D.M.*, 116 S.W.3d 224, 231–32 (Tex. App.—Tyler 2003, no pet.) (holding that trial court retained jurisdiction over intervenor's claims for affirmative relief even though dismissal of Department's suit was required by Section 263.401). We hold that the mother's claims against Relator in this cause shall not be affected by this opinion or by the dismissal of the Department pursuant to Section 263.401.

We conditionally grant in part Relator's petition for writ of mandamus. The Honorable Judge Brooks Hagler is directed to vacate his order of November 22, 2016, and to dismiss the Department's suit without prejudice as required by Section 263.401 of the Family Code. This mandamus does not affect the affirmative request for relief brought by the children's mother and filed in the trial court in this cause against Relator. A writ of mandamus will issue only if Judge Hagler fails to act by March 20, 2017.

PER CURIAM

March 9, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.