Vacate and Render and Opinion Filed May 23, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01450-CV

IN THE INTEREST OF I.S., A CHILD

On Appeal from the 304th Judicial District Court
Dallas County, Texas
Trial Court Cause No. JD-15-114-W

MEMORANDUM OPINION

Before Chief Justice Wright, and Justices Lang-Miers and Stoddart
Opinion by Chief Justice Wright

Appellant (Aunt) appeals the trial court's order denying her bill of review seeking to set aside the termination of her sister's (Mother) parental rights. In four issues, Aunt generally contends the trial court erred by: (1) denying her bill of review because both her and Mother's due process rights were violated; (2) denying her bill of review because Mother did not receive effective assistance of counsel; and (3) granting Dallas County Child Protective Services' motion to quash discovery requests. The State maintains Aunt is barred from bringing her bill of review because she lacks standing and because section 161.211 of the Texas Family Code does not allow for Aunt's challenge to the termination judgment.[1] We agree that section 161.211 bars this bill of review and order the case dismissed for want of jurisdiction.

[1] To the extent Aunt maintains we should not consider these arguments, we disagree. Jurisdiction may be raised for the first time on appeal and may not be waived by the parties. *Univ. of Houston v. Barth*, 313 S.W.3d 817, 818 (Tex. 2010) (per curiam).

Background

In June 2012, CPS received a referral alleging Mother left her three-month-old son, I.S., at a laundromat for four hours. A friend of Mother took I.S. to his godmother, Shareka Moore. Moore, in turn, took I.S. to the hospital for treatment of a diaper rash and a rash on his neck. The hospital contacted CPS, which filed an emergency petition for removal of I.S. and sought termination of the parental rights of Mother, W.A., the alleged biological father, and any "unknown biological father."

In March 2013, the trial court conducted a bench trial to determine whether to terminate the parental rights of Mother, W.A., and any unknown possible biological father. Mother and W.A. were not present, but they were represented by counsel. After considering the evidence presented at trial, the trial court terminated the parental rights of Mother, W.A., and any possible biological father. Several months later, O.S., a potential biological father of I.S., and Aunt, filing "individually and as the duly appointed attorney in fact" for Mother, filed a bill of review. Aunt relied, in part, on a durable power of attorney executed by Mother on April 15, 2014. In the bill of review, O.S. and Aunt alleged that (1) neither O.S. nor Mother were served in the termination suit, (2) CPS failed to exercise due diligence in its search to locate Aunt, and (3) Mother received ineffective assistance of counsel.

Following an evidentiary hearing, the trial court signed an order denying the bill of review. Upon Aunt's request, the trial court issued findings of facts and conclusions of law. The court found, among other things, that Mother was personally served on July 10, 2012, and Aunt was not a party to the underlying termination proceeding. The trial court concluded, among other things, there was "no defect in the underlying proceeding regarding due process." This appeal by Aunt followed.

Standard of Review

A bill of review is an independent equitable action brought to set aside a judgment in the same court in an earlier suit when the judgment in the earlier suit is final, not reviewable on appeal, and does not appear to be void on the face of the record. *Vickery v. Vickery*, 999 S.W.2d 342, 367 (Tex. 1999); *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979). Because the administration of justice requires that judgments be afforded some finality, courts do not look on bills of review with favor, and the grounds on which they are granted are narrow and restricted. *See Vickery*, 999 S.W.2d at 367; *Bakali v. Bakali*, 830 S.W.2d 251, 255 (Tex. App.—Dallas 1992, no writ). We review the granting or denial of a bill of review under an abuse of discretion standard. *Ramsey v. Davis*, 261 S.W.3d 811, 815 (Tex. App.—Dallas 2008, no pet.).

Discussion

According to Aunt, she filed the bill of review in this case to (1) inquire into the scope and extent of CPS's statutory duty to locate I.S.'s family members for placement, and (2) determine whether Mother was afforded due process at the termination proceeding. On appeal, Aunt brings four issues generally complaining that (1) she was not afforded due process because CPS failed to notify her about the termination proceeding pursuant to section 262.1095 of the family code; (2) Mother's due process rights were violated at the termination proceeding because Mother was not present at the proceeding; (3) Mother did not receive the effective assistance of counsel at the termination proceeding; and (4) the trial court erred by denying certain discovery in the bill of review proceeding. We begin our discussion with Aunt's claims on behalf of Mother, and then turn to Aunt's claim that her individual due process rights were violated.

Section 161.211

Section 161.211 of the Texas Family Code provides that the validity of an order terminating the parental rights of a person who was personally served is not subject to either a

direct or collateral attack filed more than six months after the termination order has been signed. *See* TEX. FAM. CODE ANN. § 161.211 (West 2014). The six-month deadline in section 161.211 is a bar to or preclusion of a challenge to a termination order rather than a statute of limitations affirmative defense that is waived if not pleaded or presented to a trial court. *In re E.R.*, 335 S.W.3d 816, 821 (Tex. App.—Dallas 2011), *rev'd on other grounds*, 385 S.W.3d 552 (Tex. 2012). Thus, if a person who is constitutionally entitled to notice of the termination proceeding receives proper notice, the trial court lacks jurisdiction to entertain any challenges, direct or collateral, after six months from the time the termination order is signed. *See id*. at 821–22.

Here, the record shows Mother was personally served on July 10, 2012. Assuming without deciding that the power of attorney on which Aunt relies entitles her to bring claims regarding Mother's due process rights, section 161.211 required her attack to have been brought no later than October 15, 2013—six months after the April 15, 2013 termination decree. Aunt did not file the bill of review until almost two years after the termination order was signed. Because any claims on Mother's behalf were barred by section 161.211, the trial court lacked jurisdiction to consider those claims. We overrule Aunt's second and third issues.

Section 262.1095

Aunt next contends her own due process rights were violated because CPS failed to provide her the information required under section 262.1095(b). According to Aunt, her statutory right to receive information about I.S.'s removal and options available for her to participate in his care, pursuant to section 262.1095(a)–(b), equates to a constitutional right to notice. It follows that if she was constitutionally entitled to notice of the underlying termination proceeding, section 161.211 of the family code would not preclude any claims she had standing to bring. *See E.R.*, 385 S.W.3d at 566 (section 161.211 does not foreclose attack by party deprived of constitutionally adequate notice). Whether section 262.1095 confers a constitutional

right to notice, as alleged by Aunt, of the termination suit to a relative within the third-degree of consanguinity[2] of the child is an issue of first impression for this Court.

Section 262.1095(a)(1)(A) of the family code provides that CPS must provide certain information to each adult that it can locate and identify that is related to the child within the third- degree of consanguinity. TEX. FAM. CODE ANN. § 262.1095(a)(1)(A) (West Supp. 2015). In particular, CPS must provide a statement that the child has been removed from his home and is in the temporary managing conservatorship of the department, an explanation of the options available to the individual to participate in the case and placement of the child and support of the child's family, a statement that some of the options available to them may be lost if the individual does not respond in a timely manner, and the date, time, and location of the "status hearing," if applicable. *See id.* § 262.1095(b)(1)–(4). CPS must use due diligence to locate and identify all individuals related to the child within the third degree of consanguinity. *See id.* § 262.1095(d). CPS can seek information from each parent, relative, alleged father of the child, and the child—if the child is an appropriate age. *Id.* The failure of a parent to complete the child placement resources form does not relieve CPS of the duty to seek information. *Id.* § 262.1095(e).

The United States Supreme Court has long recognized a fundamental liberty interest in parent–child relationships. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In arguing she has a liberty interest with respect to her relationship with I.S., Aunt relies on the fact that the United States Supreme Court has extended this relationship interest to traditional relatives, including aunts and uncles. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504–05 (1977). Further,

[2] Section 573.023(c)(3) identifies the relatives who are within three degrees of consanguinity. Included within the definition is an "aunt who is a sister of a parent of the individual." TEX. GOV'T CODE Ann. § 573.023(c)(3) (West 2012).

Aunt argues that the constitutional analysis in *In re A.M.*, 312 S.W.3d 76, 79 (Tex. App.—San Antonio 2010, pet. denied), should guide our analysis in this case.

Courts have extended the liberty interest of parent–child relationships to traditional relatives—including uncles, aunts, cousins, and grandparents under certain circumstances. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504–505 (1977); *In re A.M.*, 312 S.W.3d 76, 86 (Tex. App.—San Antonio 2010, pet. denied). In *Moore*, the Court considered whether an ordinance that limited occupancy of a dwelling unit to members of a single family was a violation of the Due Process Clause. *Moore*, 431 U.S. at 495–96. Inez Moore lived in her East Cleveland home with her son and two grandsons. *Id.* at 496. The two grandsons were first cousins rather than brothers. *Id.* This arrangement of family members living in one house violated a city ordinance that only recognized a "family" as a few categories of related individuals. *Id.* The Supreme Court recognized that the "tradition of . . . aunts . . . and especially grandparents sharing a household along with parents and children has roots . . . equally deserving of constitutional recognition" because millions of Americans have profited from such an environment. *Id.* at 504–05. The Court concluded that the ordinance deprived Moore of her liberty in violation of the Due Process Clause. *Id.* at 494. *Moore* is distinguishable from this case because the "broader family" had already been established in *Moore*: Moore was already living with her son and her two grandsons; thus, her substantive due process rights were violated. *Id.* at 496, 505. In contrast, there is no evidence in this record that Aunt established a "broader family" relationship with I.S. Having determined that *Moore* does not support Aunt's argument, we now turn to *A.M.*

In *A.M.*, the San Antonio Court of Appeals considered whether section 102.006 of the family code was unconstitutional by violating the liberty interest in "family integrity and

association" without due process of law.[3] *A.M.*, 312 S.W.3d at 85. The children in that case resided with their maternal aunt for almost two years before CPS removed them following allegations of abuse. *Id.* at 79. However, the allegations were later found to be unsubstantiated. *Id.* The parents' rights to the children were later terminated, and the aunt filed a petition to adopt the children. *Id.* CPS argued that the aunt lacked standing when she untimely filed her petition, despite CPS's encouragement of the aunt to proceed with her family plan and allowing unsupervised visitation after the statutory deadline to file her adoption petition had passed. *Id.* at 84. When considering the constitutionality of section 102.006, the court did not explicitly find that the aunt had a liberty interest, but assumed she had some interest in order to complete the constitutional analysis. When concluding that the aunt failed to show that the statute was unconstitutional, the court reasoned that CPS was not required to give the aunt notice of the ninety-day deadline. Like *Moore, A.M.* is distinguishable from this case. *A.M.* involved children that resided with their maternal aunt for approximately two years before CPS removed them. *Id.* at 79. Further, CPS encouraged the aunt to meet with the children, and even allowed unsupervised overnight visitations. *Id.* Thus, a "broader family" relationship existed between the aunt and the children. These factual scenarios do not exist in our case.

Here, there is no evidence in the record that Aunt had any contact or established any relationship with I.S. Just as an unwed father does not automatically have full constitutional parental rights by virtue of a mere biological relationship, neither does a maternal aunt who has not established a relationship with the child. *See Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *In re C.M.D.*, 287 S.W.3d 510, 516 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Although Aunt was entitled to statutory notice under section 262.1095 regarding I.S.'s removal and a

[3] Section 102.006 puts certain limitations on standing to file original suits affecting the parent–child relationship after all living parents' rights have been terminated. TEX. FAM. CODE ANN. § 102.006 (West 2014).

status hearing, she was not entitled to service in the underlying termination suit. *See* TEX. FAM. CODE ANN. § 102.009 (West 2014). Because there is no evidence Aunt established the "broader family" relationship that *Moore* and *A.M.* reference, we conclude that Aunt did not possess a then-existing interest or right that was prejudiced by the termination order. Thus, Aunt lacked a constitutional right to notice of the termination suit.

Our analysis is similar to the analysis of an appellate court in Colorado. *See People in Interest of C.E.*, 923 P.2d 383 (Colo. App. 1996). In *C.E.*, a maternal aunt sought to intervene in the dependency or neglect proceeding to terminate her sister's parental rights. *Id.* at 384. The Adams County Department of Social Services notified the maternal aunt of the proceeding and asked if she would be interested in assuming temporary custody of the child, but the aunt declined for personal reasons. *Id.* More than three months after the mother's parental rights were terminated, the aunt contacted the department indicating a desire to assume custody of, and to be considered as a potential adoptive parent for, the child. *Id.* The department refused her request as untimely. *Id.* The applicable Colorado statute required that an aunt's request for the custody of a child whose legal relationship with his parents is subject to termination must be filed before the termination hearing begins. *Id.* The Colorado statute expressly did not require that the relatives of the child be notified of the pending termination hearing. *Id.* The maternal aunt in *C.E.*, like Aunt in our case, argued that she had a "protected liberty interest in the society and custody of her nephew commensurate with that of a natural parent . . . ." *Id.* at 385. The court concluded that the failure of the Adams County Department of Social Services to notify the maternal aunt of the termination hearing did not constitute a procedural due process violation—reasoning that a maternal aunt who had not established an existing extended family custodial relationship was not entitled to the same protections as the Supreme Court recognized for extended family members in *Moore*. *Id.* at 386. Unlike *Moore* and *A.M.*, *C.E.* is analogous to

the case before us. Just as the Colorado statute did not require the department to notify an aunt of the termination hearing, section 262.1095(b) required CPS to notify Aunt of a Chapter 263 "status hearing," rather than the termination hearing. *See* TEX. FAM. CODE ANN. § 262.1095(b)(1)–(4).

Because Aunt lacked a constitutional right to notice of the underlying termination and was not statutorily entitled to service, her claims were subject to the six-month deadline of section 161.211. Aunt's claims were time-barred when she filed the bill of review almost two years after the termination order was signed. We overrule Aunt's first and fourth issues.

Having determined the claims raised by Aunt are barred by section 161.211, we vacate the trial court's order denying Aunt's bill of review and render judgment dismissing Aunt's bill of review.

/Carolyn Wright/
CAROLYN WRIGHT
CHIEF JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF I.S., A CHILD

No. 05-15-01450-CV

On Appeal from the 304th Judicial District Court, Dallas County, Texas
Trial Court Cause No. JD-15-114-W.
Opinion delivered by Chief Justice Wright.
Justices Lang-Miers and Stoddart participating.

In accordance with this Court's opinion of this date, we **VACATE** the trial court's order denying bill of review and **RENDER** judgment that appellant's bill of review is dismissed.

Judgment entered May 23, 2016.