

Order Vacated and Memorandum Opinion filed August 16, 2022.



**In The
Fourteenth Court of Appeals**

NO. 14-22-00115-CV

**IN THE INTEREST OF J.D.A.S. A/K/A J.S., K.V.S. A/K/A K.S., J.N.S.
A/K/A J.S., P.K.J. A/K/A P.J., CHILDREN**

**On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2018-05930J**

MEMORANDUM OPINION

Appellants C.E.S. (Mother) and J.J. (Father) appeal the trial court's final decree terminating their parental rights and appointing the Department of Family and Protective Services as sole managing conservator of the children John, Kyle, Jane, and Piper (Children).¹ The trial court terminated Mother's parental rights under Sections 161.001(b)(1)(D), (E), and (O) of the Family Code and concluded that termination was in the best interest of the Children. *See* Tex. Fam. Code §§

¹ Pursuant to Texas Rule of Appellate Procedure 9.8, we use fictitious names to identify the minors and other individuals involved in this case.

161.001(b)(1)(D), (E), & (O); 161.001(b)(2). The trial court terminated Father's parental rights under Sections 161.001(b)(1)(D), (E), and (O) of the Family Code and concluded that termination was in the best interest of Piper.² *See* Tex. Fam. Code §§ 161.001(b)(1)(D), (E), & (O); 161.001(b)(2). Mother and Father challenge the trial court's final decree, arguing the trial court lacked jurisdiction to render the final order in this case.³ Concluding the trial court lost jurisdiction under Family Code Section 263.401, we vacate the trial court's final order and dismiss the underlying case. *See* Tex. R. App. P. 43.2(e).

JURISDICTION

In a suit filed by the Department seeking termination of parental rights, a trial court generally loses jurisdiction over the case on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the Department as temporary managing conservator. *See* Tex. Fam. Code § 263.401(a). Unless the trial court has commenced trial on the merits, the case is automatically dismissed on that date. *Id.* § 263.401(a). However, if the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the Department and that continuing the appointment of the Department as temporary managing conservator is in the child's best interest, the trial court may set a new automatic dismissal date that is no more than 180 days after the original dismissal date. *Id.* § 263.401(b).

This case was filed on December 18, 2018, and the Department was appointed temporary managing conservator of the Children on January 30, 2019.

² C.E.S. is the mother of the four children, but J.J. is the father of only Piper. John, Kyle, and Jane's father, R.S., died in 2015.

³ Mother raises an additional issue regarding factual sufficiency which we do not reach because of our disposition of the first issue, that the trial court lacked jurisdiction to render the final decree. *See* Tex. R. App. P. 47.1.

The original dismissal date was February 3, 2020. *See* Tex. Fam. Code § 263.401 (providing the trial court loses jurisdiction over a parental termination case unless the court has commenced trial on the merits on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator).

On January 15, 2020, the trial court conducted a hearing wherein the parties indicated their agreement to continue the trial because of Mother and Father's progress in therapy. The parties presented an agreed motion to request an extension of the original dismissal date and continuance of the trial. The parties all requested the 180-day extension under the statute. At the hearing, the trial court also appointed a separate attorney ad litem for Piper because of a "conflict of interest" between the three other children and Piper. The trial court announced that the motion for continuance and motion for extension of the dismissal date were both granted but that the trial court would go forward on the permanency hearing. The trial court then heard testimony of a caseworker regarding the placement of the Children. The caseworker testified that Mother's visitation of John, Kyle, and Jane should be stopped due to the behavior issues of those children after the visits.⁴ The trial court suspended visitation between Mother and John, Kyle, and Jane. The trial court provided a new trial date of May 13, 2020.

On the same day the trial court rendered an order finding that extraordinary circumstances existed and that it was in the best interest of the Children to remain in the temporary managing conservatorship of the Department. The trial court set a new dismissal date of August 1, 2020. The trial court also rendered a

⁴ John, Kyle, and Jane were placed with a relative, their paternal grandfather. Piper was placed into foster care.

permanency hearing order before final order setting trial for May 13, 2020, on placement for the Children.

On July 21, 2020, the trial court held a “Special Status Hearing” to hear evidence on Piper’s motion to suspend visitation of Mother and Father. Piper’s counselor testified regarding Piper’s behavioral issues following visitations with Mother and Father. The trial court stopped the hearing due to time constraints and recessed the hearing until July 30. The Department informed the trial court that the dismissal date was approaching:

[Department]: And so, we’re going to have to file an extension of the dismissal date.

The Court: Okay.

[Department]: Did you want us to just be prepared to present that on the 30th?

The Court: Yeah, absolutely, and we’ll extend it at that point.

The trial court recessed the hearing until July 30, 2020. As certified by the trial court’s court reporter, no such hearing occurred. The trial court did not make any docket notes extending the dismissal date or any findings regarding extending the dismissal date.

On August 4, 2020, three days after the statutory dismissal date, the trial court rendered an order extending the dismissal date under the Texas Supreme Court’s Eighteenth Emergency Order Regarding the COVID-19 State of Disaster, Miscellaneous Docket # 20-9080, 609 S.W.3d 122 (Mem) (Tex. 2020), and pursuant to the trial court’s “Standing Order” in effect at the time.⁵ In the August 4

⁵ The trial court’s Standing Order is not part of the record on appeal but was attached to the Department’s brief. We may take judicial notice of the Standing Order. *See C.C. v. Tex. Dep’t of Fam. & Protective Svcs.*, No. 03-21-00587-CV, 2022 WL 1121428, at *3 n.3 (Tex. App.—Austin April 15, 2022, no pet. h.).

Order, the trial court extended the dismissal deadline to January 28, 2021 and set final hearing and trial for August 27, 2020.

Trial took six days over the course of 11 months in 2021, beginning on January 26, 2021 and concluding on November 18, 2021. At the January 26, 2021 trial setting, the Department offered exhibits into evidence, Mother and Father made various objections to the exhibits, and the trial court took the objections under advisement for a later ruling. The trial court then stopped trial to conduct a statutory hearing on the placement of the Children. After hearing testimony from a caseworker regarding placement, the trial court approved the placement and visitation plan. The trial court further preferentially set the case for trial on March 23, 2021.

After the last trial hearing in November, the trial court took the case under advisement. On February 1, 2022, the trial court signed a final order terminating Mother's parental rights to the children and Father's parental rights to Piper. The final order recites that "On January 15, 2020, . . . came on to be heard before this Court Petitioner's Suit to Affect The Parent-Child Relationship and to Terminate The Parent-Child Relationship." Mother and Father appeal the final order.

ANALYSIS

Mother and Father challenge the trial court's order of termination asserting that the trial court lacked jurisdiction to render the order because the case was automatically dismissed under the statute on August 1, 2020. The Department argues that the trial court's Standing Order operated to prevent the trial court from losing jurisdiction over this case on August 1, 2020.

A. The Case was Not Statutorily Dismissed on August 1, 2020

The Department argues that despite the extension order being three days late, the trial court did not lose jurisdiction on August 1, 2020, because of the trial court's "Standing Order" issued pursuant to the Texas Supreme Court's First Emergency Order Regarding COVID-19 State of Disaster, 596 S.W.3d 265 (Tex. 2020).

The Standing Order acknowledges that due to the "state of disaster . . . the Court is incapable of commencing trial by the dismissal deadline" and orders that any "pending TDFPS matter already retained under Section 263.401 of the Texas Family Code and on an extended dismissal date **REMAINS RETAINED ON THE COURT'S DOCKET** and shall not be automatically dismissed. The Court **ORDERS** that all cases already on an extended dismissal date shall be retained for up to 180 days passed [sic] the extended dismissal date" The Department further argues that the Texas Supreme Court's First and Third Emergency Orders Regarding COVID-19 State of Disaster allowed for the automatic extension of the statutory deadlines under Section 263.401 of the Texas Family Code as provided in the Standing Order.

The Texas Supreme Court's First Emergency Order Regarding the COVID-19 State of Disaster ordered that without a participant's consent and "[s]ubject only to constitutional limitations" all courts in Texas may in any case "[m]odify or suspend any and all deadlines and procedures . . . for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted." In the Third Emergency Order, the supreme court clarified that the First Emergency Order "specifically" applied to the deadlines in Section 263.401, "which may or must be modified or suspended." In the Eighteenth Order, the order in place and in effect at the time the initial extension order expired, the supreme court did not

renew the paragraphs quoted above and instead provided additional restrictions on the trial court's ability to modify or extend the applicable deadlines:

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal . . . without a participant's consent:

a. ***except as provided in paragraph (b)***, modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020;

b. in all proceedings under Subtitle E, Title 5 of the Family Code:

(i) extend the initial dismissal date as calculated under Section 263.401(a) only as provided by Section 263.401(b) or (b-1);

(ii) for any case previously retained on the court's docket pursuant to Section 263.401(b) or (b-1), or for any case whose dismissal date was previously modified under an Emergency Order of this Court related to COVID-19, extend the dismissal for an additional period not to exceed 180 days from the date of this Order;

Eighteenth Emergency Order Regarding COVID-19 State of Disaster, 609 S.W.3d 122, 122–23 (Tex. 2020) (emphasis added). The Eighteenth Emergency Order was issued on June 29, 2020, was “effective immediately and expire[d] August 31, 2020.” *Id.* at 125. Thus, the trial court was authorized by the Eighteenth Emergency Order to extend the dismissal for “an additional period not to exceed 180 days from the date of this Order” or until December 26, 2020.

Thus, applying both the Standing Order and the Eighteenth Emergency Order, the case was not automatically dismissed on August 1, 2020 when the prior extension order expired. Instead, the Standing Order operated to further extend the dismissal date. *See C.C.*, 2022 WL 1121428 at *3–4 (acknowledging standing order, in conjunction with the supreme court's emergency order in place at the time, authorized and extended dismissal date); *see also In re J.-R.A.M.*, No. 10-20-

00221-CV, 2020 WL 7866877, at *3 (Tex. App.—Waco Dec. 30, 2020, pet. denied) (mem. op.) (“While the [later] emergency orders do expressly require compliance with Section 263.401(a) regarding initial extension, they do not expressly require compliance with an extension granted after the initial extension.”).

B. The Case was Statutorily Dismissed on December 26, 2020

Barring some further order from the trial court or commencement of trial prior to December 26, 2020, the case would be automatically dismissed on that date. *See In re G.X.H.*, 627 S.W.3d 288, 301 (Tex. 2021) (trial court’s error in setting a new dismissal date beyond the 180-day maximum does not have any jurisdictional consequence where the trial commenced within the 180-day maximum); *see also E.N. v. Tex. Dep’t of Fam. & Protective Servs.*, No. 03-21-00014-CV, 2021 WL 2460625, at *5 (Tex. App.—Austin June 17, 2021, no pet.) (mem. op.) (explaining that successive emergency COVID-19 orders “would theoretically have allowed the district court to extend the case indefinitely by granting an extension under each successive order” so long as “the Supreme Court would continue to authorize additional extensions.”). The Emergency Orders gave the trial court discretion to extend the dismissal date, but such extensions were not automatic. *See In re J.L.J.*, 645 S.W.3d 294, 298 (Tex. App.—Houston [14th Dist.] 2022, pet. filed); *In re J.S.*, No. 05-21-00898-CV, 2022 WL 620709, at *4 n.2 (Tex. App.—Dallas Mar. 3, 2022, pet. denied).

Although the final order rendered by the trial court indicates that the trial commenced on January 15, 2020, Mother and Father argue that the trial did not actually commence on that date. While there is a presumption that recitals contained in a judgment are true, the presumption is rebutted when there is a conflict between the judgment and record. *MJR Fin., Inc. v. Marshall*, 840 S.W.2d

5, 9 (Tex. App.—Dallas 1992, no writ.). The record supports,⁶ and the parties agree, that trial commenced on January 26, 2021, and not on January 15, 2020.

Thus, while not dismissed automatically on August 1, 2020, because (1) the Eighteenth Emergency Order limited the 180-day extension, (2) trial did not commence before December 26, 2020, and (3) there was no further extension order in this case, the case was automatically dismissed on December 26, 2020. *See* Tex. Fam. Code § 263.401(c) (“If the court grants an extension under Subsection (b) . . . but does not commence the trial on the merits before the dismissal date, then court’s jurisdiction over the suit is terminated and the suit is automatically dismissed without a court order.”); *see also In re J.R.*, 622 S.W.3d 602, 606 (Tex. App.—Fort Worth 2021, no pet.).

The Department argues that the Standing Order automatically extended the August 1, 2020 extended dismissal date to January 28, 2021, in March 2020 by its terms and without the need for a further order from the trial court. The Department further argues that because at the time the Standing Order was rendered the trial court was permitted to extend the dismissal date in such a manner, this case was not automatically dismissed in December 2020. We disagree because the trial court’s August 4 Order was rendered “pursuant to” the Eighteenth Emergency Order and the Standing Order thus limiting itself to the extension permitted

⁶ At the January 15, 2020 hearing, the parties all agreed that it was not in the children’s best interest to go forward with the trial setting and requested a statutory extension of 180-days. *See* Tex. Fam. Code § 263.401(b). The Department stated that “we’re present for a case that’s set for a final hearing, but we have an agreed motion on file . . . so we just feel like we need more time to sift through all these issues, figure out why the recommendation was changed, figure out . . . where we want to go from here.” The trial court granted the extension orally at the hearing and reduced its ruling to a written order that same day. The trial court also orally granted the continuance and reduced such ruling to a written order the same day.

therein.⁷ While later supreme court orders allowed the trial court to further extend the dismissal deadline, there are no further orders in the record and such extensions were not automatic. *See In re J.L.J.*, 645 S.W.3d at 298.

The Department argues that even if there was no trial court order reinstating jurisdiction, Section 263.401 of the Family Code did not operate to invalidate the current judgment, because the Department filed pleadings after August 1, 2020, that requested affirmative relief to invoke the jurisdiction of the court to act.” The Department argues that such “petitions” were filed on December 14, 2020 (prior to automatic dismissal) and then March 2021 (after dismissal and the purported trial began). However, the Department fails to recognize the requirements of petitions seeking to terminate the parent-child relationship. *See* Tex. Fam. Code § 161.101(a). Further, applying the Department’s argument would effectively nullify the statutory dismissal of any case that missed the deadline by allowing the Department to continue cases far beyond the automatic dismissal if the Department continued to file “pleadings” in the original case and further extend such dismissal because such pleadings should be construed liberally to be petitions. An automatic dismissal under the statute is without prejudice to re-filing, but the appropriate steps to re-filing must be taken.

Finally the Department argues that because the trial court was permitted to modify or suspend procedures, that the trial court “intended to amend any procedure that would preclude the court from exercising jurisdiction over the Department pleadings subject to Section 263.401 of the Family Code,” and that it “must be inferred that the trial court amended the applicable procedures so it could treat the Department’s permanency report as a petition during the Covid pandemic

⁷ We need not decide whether the trial court would have been permitted to extend the dismissal date in March 2020 to January 2021 despite a later emergency order limiting the trial court’s ability to extend such deadlines.

disaster in order to avoid the dismissal effect of Section 263.401.” However, the Standing Order does not broadly amend the procedures in such a way to support the Department’s interpretation and we decline to apply such a broad interpretation that is unsupported by the language of the Standing Order.

We sustain appellants’ first issue.

CONCLUSION

Pursuant to the Standing Order and the Eighteenth Emergency Order, the statutory deadline for this case was December 26, 2020. Because trial did not commence before December 26, 2020, and no further extension orders were rendered by the trial court prior to that date, Section 263.401 operated to deprive the trial court of jurisdiction to render the final termination order. The case, therefore, terminated by operation of law before the trial court rendered the termination order. *See* Tex. Fam. Code § 263.401. We vacate the termination order and dismiss the underlying case. *See* Tex. R. App. P. 43.2(e).

/s/ Ken Wise
Justice

Panel consists of Chief Justice Christopher and Justices Wise and Jewell.