In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-07-405 CV

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IN THE INTEREST OF M.A.C.

On Appeal from the 260th District Court
Orange County, Texas
Trial Cause No. D-060576-D

MEMORANDUM OPINION

This is an accelerated appeal of an involuntary termination of parental rights. Nicole Ariel Carriker raises two issues challenging the trial court's termination order; Mark Anthony Carriker raises one issue.

The Texas Department of Family and Protective Services ("Department") contends that we may not consider appellants' issues because they were not presented to the trial court as required by section 263.405(i) of the Texas Family Code in either a statement of points or a motion for new trial. TEX. FAM. CODE ANN. § 263.405(i) (Vernon Supp. 2007). In the alternative, the Department argues that the issues set forth in appellants' notices of appeal, if considered as substitutes for the required statement of points, are statutorily insufficient

to preserve the issues they now assert on appeal. We agree with the Department that if we consider appellants' notices of appeal as substitutes for the statements of points, the allegations contained within the notices of appeal are insufficient to preserve any error. Therefore, we affirm the trial court's judgment.

Background

The Department filed its original petition against Nicole and Mark in June of 2006. After a jury found that appellants' parental rights should be terminated, the trial court signed its termination order on July 27, 2007.

On August 9, 2007, less than fifteen days from the trial court's order, Nicole and Mark filed separate notices of appeal. The trial court conducted a hearing on August 23, 2007, as required by section 263.405(d) of the Family Code. After stating in its order that appellants' notices of appeal with statements of points of appeal were timely filed, the court determined that both Nicole and Mark were partially indigent and that their "appellate points [were] not frivolous."

On appeal, both Nicole and Mark challenge the factual and legal sufficiency of the evidence introduced at trial justifying the trial court's termination of their parental rights. Nicole additionally complains the trial court erred by denying her motion for continuance.

Analysis

Family Code section 263.405 governs an appeal of a final order related to a child under Department care. *See* TEX. FAM. CODE ANN. § 263.405 (Vernon Supp. 2007).[1] The version of the statute in effect at the time of the Department's filing of its original petition stated that:

> [n]ot later than the 15th day after the date a final order is signed by the trial judge, a party intending to appeal the order must file with the trial court a statement of the point or points on which the party intends to appeal. The statement may be combined with a motion for a new trial.

Act of June 15, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395, 2397-98, *amended by* Act of June 16, 2007, 80th Leg., R.S., ch. 526, § 2, 2007 Tex. Gen. Laws 929.[2] Further, the Family Code specifically addresses appellate review and provides that an 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. For purposes of this subsection, a claim that a judicial decision is contrary to the evidence or that

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[1]Unless otherwise noted, we cite to the current version of the statute because the changes in the Family Code that have occurred since the Department filed suit against Nicole and Mark do not impact whether they preserved their issues for review.

[2]*See* Act of June 16, 2007, 80th Leg., R.S., ch. 526, § 6, 2007 Tex. Gen. Laws 929, 929-30. ("The changes in law made [to this subsection] apply only to a suit affecting the parent-child relationship filed on or after the effective date of this Act[, June 16, 2007]. A suit affecting the parent-child relationship filed before the effective date of this Act is governed by the law in effect on the date the suit was filed, and the former law is continued in effect for that purpose.").

> the evidence is factually or legally insufficient is not sufficiently specific to preserve an issue for appeal.

TEX. FAM. CODE ANN. § 263.405(i).

Neither Nicole nor Mark filed statements of the points for appeal or motions for new trial. While the Texas Rules of Civil Procedure allow some pleadings to be filed together in one instrument, Nicole and Mark cite no authority that has considered whether a statement of points filed as part of a notice of appeal is sufficient. *See generally* TEX. R. CIV. P. 86, 120a. Based on the language of the version of the Family Code applicable here, it appears the legislature contemplated that a party would file a separate statement of points of appeal or combine a statement of points with a motion for new trial. Act of June 15, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395, 2397-98 (amended 2007); *see also* TEX. FAM. CODE ANN. § 263.405(i). Nevertheless, for reasons explained below, we need not reach the issue of whether it is possible to preserve issues for appellate review through notices of appeal that attempt to combine sufficiently specific and adequate points for appeal.

Under some circumstances, although we need not decide if it does so here, Rule 71 of the Texas Rules of Civil Procedure allows a trial court, if justice so requires, to treat a pleading mistakenly designated as the proper designated pleading. Although it is not clear under what rule the trial court acted here, it appears that at the hearing the trial court treated appellants' notices of appeal as a combined pleading containing a statements of points.

Nicole's notice of appeal, however, did not complain about the trial court's denial of her motion for continuance. Thus, this issue was not raised in any post-trial pleading that

would have given the trial court notice that Nicole intended to appeal based on the trial court's denial of her request for a continuance. As a result, Nicole's issue complaining of the trial court's error in denying her motion to continue was not preserved for our review.

Further, appellants' respective notices of appeal, without pointing to any specific evidentiary deficiencies, assert generally that the evidence was factually and legally insufficient to support the trial court's judgment. In identical notices of appeal, Nicole and Mark stated that "the evidence did not prove by clear and convincing evidence that [Nicole's and Mark's] rights should be terminated."

General complaints about evidentiary sufficiency do not comply with section 263.405(i)'s requirement requiring sufficiency points to be specific. *See* TEX. FAM. CODE ANN. § 263.405(i). "'The plain language of the statute indicates the Legislature intended to bar our consideration of global, nonspecific claims of evidentiary insufficiency in a statement of points.'" *In re S.K.A.*, 236 S.W.3d 875, 899 (Tex. App.–Texarkana 2007, pet. filed) (citing *In re N.L.G.*, No. 06-06-00066-CV, 2006 Tex. App. LEXIS 10623, at *9 (Tex. App.–Texarkana Dec. 14, 2006, pet. denied) (mem. op.). "The provision requires more than a statement that the trial court's decision is based on legally or factually insufficient evidence." *In re J.W.H.*, 222 S.W.3d 661, 662 (Tex. App.–Waco 2007, no pet.).

Other courts evaluating the specifics required of statements of points for appeal have similarly concluded that general points complaining about insufficiency of evidence fail to alert the trial court to specific erroneous findings that, thereby, allow the trial court an

opportunity to correct those findings. *See* TEX. FAM. CODE ANN. § 263.405(i); *see also In re J.W.H.*, 222 S.W.3d at 662 (holding that appellant's statement that the State "did not meet the burden of proof at trial required for the termination" of appellant's parental rights insufficient to satisfy statute); *Cisneros v. Tex. Dep't of Family & Protective Servs.*, No. 13-06-321-CV, 2006 Tex. App. LEXIS 11121, *2-*3 (Tex. App.–Corpus Christi Dec. 29, 2006, no pet.) (holding that statement of points claiming "that the evidence was insufficient to terminate the parental rights" and the motion for new trial asserting "there was insufficient evidence to terminate" appellant's parental rights were not sufficiently specific to preserve appellate issues); *In re N.L.G.*, 2006 Tex. App. LEXIS 10623, *9-*10 (holding that appellant's statement that "[t]here is insufficient evidence in the record of this case to support the jury's finding in the affirmative as to termination of the parent/child relationship" did not include sufficient specificity); *In re A.C.A.*, No. 13-05-610-CV, 2006 Tex. App. LEXIS 3759, *2-*3 (Tex. App.–Corpus Christi May 4, 2006, no pet.) (mem. op.) (holding that statement in motion for new trial that claimed "the evidence was factually and legally insufficient to support the Judgment" was insufficient to preserve the issue for appeal). We conclude that the general complaints about the evidence contained in appellants' notices of appeal, even if considered as statements of points, are not "sufficiently specific to preserve" issues for appellate review. *See* TEX. FAM. CODE ANN. § 263.405(i).

We find that the issues raised by Nicole and Mark in their appellate briefs were not preserved for appeal. *See* TEX. FAM. CODE ANN. § 263.405(i); *see also* TEX. R. APP. P. 33.1. As a result, we overrule appellants' issues and affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on June 12, 2008
Opinion Delivered July 17, 2008
Before McKeithen, C.J., Gaultney and Horton, JJ.