TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00487-CV

F. R. and J. R., Appellants

v.

Texas Department of Family and Protective Services, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 274TH JUDICIAL DISTRICT
NO. 13-2094, HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

M E M O R A N D U M   O P I N I O N

Appellants F.R. ("Felix") and J.R. ("Jane") appeal from the trial court's order terminating their parental rights regarding two children, J.R. ("Tiffany") and J.R. ("Erin").[1] Appellants challenge the order claiming trial-court procedural errors, ineffective assistance of trial counsel, legal and factual insufficiency of the evidence, and denial of due process. For the reasons that follow, we will affirm the trial court's order.

BACKGROUND

Felix and Jane are Tiffany and Erin's biological parents. Neither parent reports having any other children. Since birth, Tiffany has had an intellectual and developmental disability that her parents refer to as "autism." According to Jane, Tiffany exhibited delayed speech and motor

[1] To preserve the parties' privacy and for convenience, we refer to the parties and their children by fictitious names. *See* Tex. Fam. Code § 109.002(d); Tex. R. App. P. 9.8.

skills in infancy and did not begin walking until she was two-and-a-half years old. Tiffany began acting violently when agitated when she was a young child by hitting, scratching, and biting her parents, other caregivers, and Erin. The parties refer to these episodes as tantrums. The violent behavior, both directed outwardly and at times self-injurious, has continued throughout Tiffany's childhood.

In September 2013, the Texas Department of Family and Protective Services received four intakes alleging abuse and neglect of Tiffany and Erin by Felix and Jane. At that time, Tiffany was ten years old and Erin was four. The first intake, dated September 6, 2013, reported that Tiffany was observed with scratches and sores on her legs and buttocks after disrobing during a tantrum at school. The second intake, made the same day, reported that with increasing frequency no adult was present at the residence when Tiffany was dropped off by the school bus. It also noted concerns related to proper management of Tiffany's medication. The third intake was dated September 12, 2013, and reported that Felix became enraged at a school-bus driver who refused to exit the bus to aid Felix during one of Tiffany's tantrums. It also reported that Felix had subsequently called the school and made statements to the effect that "his life and his family's lives was going up in flames," which school staff understood to be a threat to blow up his home with his wife and children inside. The same day, the Department received the fourth intake, which reported that law enforcement had responded to two incidents that afternoon in which Tiffany was biting and kicking her father, who was restraining Tiffany. The intake reported that Jane video-recorded the second incident instead of helping Felix and Tiffany.

The Department conducted an investigation that led to it filing its Original Petition for Protection of Children, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship. The paternal grandmother, R.K. ("Rita"), intervened in the suit. Tiffany and Erin were removed from their parents' home on September 26, 2013, pursuant to an order for protection of child in an emergency and writ of attachment. When the Department attempted to effectuate the order, it learned that Tiffany had been admitted to Austin State Hospital. Erin was collected from the home of an unknown individual, where Felix and Jane had left her, and placed in foster care. An adversary hearing was conducted on October 29 and 31, 2013, and the children's placements were continued, as was the Department's conservatorship. The court also ordered the parents to complete a Family Plan of Service that included psychological and psychiatric evaluations. In accordance with the Family Code in effect at the time, the order also set a dismissal date of September 29, 2014. *See* Tex. Fam. Code § 263.401(a).[2]

Following a four-day bench trial, on August 21, 2014, an associate judge terminated the parental rights of Felix and Jane and appointed the Department as the children's permanent managing conservator. Felix and Jane timely requested a de novo trial on August 22, 2014, and filed an amended request on August 26, 2014. The Department also requested a de novo trial regarding attorney's fees and child support.

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[2] Various parts of the Family Code have been amended since the Department filed suit in 2013. *See* Act of May 31, 2017, 85th Leg. R.S., ch. 317, § 28, 2017 Tex. Gen. Laws 713; Act of May 28, 2017, 85th Leg. R.S., ch. 319, § 13, 2017 Tex. Sess. Law Serv. 615. Unless otherwise specified, all references in this opinion are to the version of the statute in effect when the Department filed suit.

The requested de novo trial did not occur until May 2017, approximately two years and ten months later. The chronology of events during the interim time period is as follows[3]:

- August 26, 2014 — Counsel for Felix and Jane moved to withdraw as counsel for Jane because a conflict of interest had arisen.
- September 4, 2014 — Motion for withdrawal of Jane's counsel was granted.
- September 8, 2014 — Substitute counsel for Felix and Jane appeared. Felix and Jane requested the de novo trial be tried before a jury but failed to submit the required jury fee.
- January 27, 2015 — The Department moved to dismiss for want of prosecution, alleging that Felix and Jane had not set their request for de novo trial by jury for hearing and had failed to appear at a hearing on January 26, 2015, that was set by the Department, despite confirmed receipt of notice of the hearing.
- January 29, 2015 — Felix and Jane filed a second request for jury trial with proof of payment of the jury fee and responded to the Department's motion to dismiss, explaining that a last-minute scheduling conflict had arisen and counsel had inadvertently failed to notify parties to this cause and the court. Although a motion to set the de novo trial for hearing on April 27, 2015, was attached as an exhibit to the response, the record does not show that it was filed.
- March 25, 2015 — The parties filed a Rule 11 Agreement continuing the trial to August 10, 2015.
- June 23, 2015 — One of two attorneys of record for Felix and Jane moved to withdraw as counsel for Felix, citing an inability to effectively communicate with Felix in a manner consistent with good attorney–client communications.
- July 8, 2015 — An amended motion for withdrawal of counsel was filed, requesting that both attorneys of record be withdrawn as counsel for both Felix and Jane, again citing inability to effectively communicate.

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[3] Throughout this time, the Department and the court-appointed special advocate submitted regular permanency reports to the court, and the court entered a number of permanency hearing orders. Because they are not pertinent to issues raised by the appellants, these are not included in the chronology.

- August 3, 2015 — A second substitute attorney appeared on behalf of Felix and Jane.
- September 14, 2015 — An agreed order on motion for substitution of counsel was filed, having been signed on September 9, 2015.
- April 1, 2016 — The Department filed a notice of mediation setting for April 11, 2016.
- April 12, 2016 — The parties filed a limited mediated settlement agreement to set the matter for final jury trial on August 29, 2016, explaining that the attorney ad litem had requested a continuance due to a scheduling conflict with another case attempting to meet its statutory deadline.
- July 27, 2016 — The Department filed a motion for preferential setting, noting that the de novo trial had been pending for approximately 2 years at that point and that the parties were originally set for a jury trial on July 30, 2015, but that the "setting [had] been continued and reset multiple times since that time at the request of different parties."
- July 28, 2016 — Counsel for intervenor paternal grandmother Rita moved to withdraw per Rita's request.
- August 19, 2016 — The Department filed its Motion in Limine.
- August 23, 2016 — Rita's counsel's motion to withdraw was granted.
- October 17, 2016 — Felix and Jane filed their Motion in Limine.
- October 25, 2016 — The Department moved for preferential setting with the same notations made in its July 27, 2016 motion for preferential setting.
- March 3, 2017 — An Order of Assignment by the Presiding Judge was entered, citing a "Pre-Trial" that had been held on February 21, 2017, and assigning Judge Don Burgess to preside over the trial on the merits set for May 22, 2017. The Order had been signed February 21, 2017. The Department also filed a Motion to Set the jury trial on May 22, 2017.
- March 14, 2017 — The Department filed its First Amended Petition.
- May 15, 2017 — The Department filed its First Amended Motion in Limine.
- May 22, 2017 — Felix and Jane filed a Motion for Continuance because Felix had been involved in a serious car accident on May 18, 2017.

The de novo jury trial commenced on May 22, 2017, and proceeded for eight days. The jury heard evidence about the family's history with the Department resulting from domestic

violence and neglect, Felix's and Jane's efforts to accomplish the goals on their family-service plans, and the children's placements and progress made since the Department removed them. The family's caseworker also testified about the Department's post-termination plans for the children. The Department planned for Tiffany to stay in a long-term residential-treatment center where the Department believed her needs could be met. It hoped she might later be adopted. The Department planned for Erin to be adopted by the foster parents whom she had been placed with since June 2016.

The trial court ordered termination of both parents' parental rights based on the jury's finding by clear and convincing evidence that termination was in the children's best interest and that Felix and Jane had committed the following statutory grounds for termination: (1) they knowingly placed or allowed the children to remain in conditions or surroundings that endanger the children's physical or emotional well-being; (2) they engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangers the children's physical or emotional well-being; and (3) they failed to comply with provisions of a court order that specifically established actions necessary for them to obtain return of the children. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), (O), (2). Felix and Jane timely perfected appeal of the order of termination to this Court.

ANALYSIS

Felix and Jane challenge the termination order in seven issues. First, they assert that the trial court erred by not complying with Section 263.401 of the Texas Family Code, which requires a court to dismiss a suit in which the Department seeks termination of parental rights if the trial on the merits has not commenced within one year after the initial temporary order was entered. Second, they assert the trial court abused its discretion by not holding a de novo hearing within

30 days of the filing of their request for de novo hearing, as required by Family Code Section 201.015(f). Felix and Jane assert in their third issue that the trial court erred by allowing the Department to amend its pleadings and by proceeding to trial on the amended pleadings. In their fourth and fifth issues, Felix and Jane claim they suffered ineffective assistance of counsel because their trial counsel failed to object to the Department's amended petition and to the admission of a videotape that was not properly authenticated. Sixth, Felix and Jane argue that the evidence is insufficient to prove termination of parental rights is in the best interest of the children. Lastly, in their seventh issue, Felix and Jane assert that they were denied their Fourteenth Amendment rights to due process of law, claiming that the cumulative errors of the court, trial counsel, and the Department deprived them of the opportunity to be heard at a reasonable time and place.

Family Code Section 263.401's one-year deadline

In their first issue, Felix and Jane contend that the trial court erred in failing to dismiss the termination suit under Family Code Section 263.401. That section states that the trial court shall dismiss a suit in which the Department requests termination of a parent–child relationship if the court has not commenced the trial on the merits or granted an extension by 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). Here, it is uncontested that the court entered a temporary order appointing the department temporary managing conservator on September 26, 2013, and the trial on the merits before the associate judge commenced on August 19, 2014, less than one year later. However, Felix and Jane base their argument on the version of the statute in effect before June 15, 2007, which required the court to render a final order

within the same time frame. On that basis, they contend that the August 21, 2014 order signed by the associate judge is not a final order for purposes of Section 263.401 because the associate judge's report was challenged and the referring court never accepted the associate judge's report. They argue this despite citing Section 201.013, which establishes that a proposed order of the associate judge is in full force and effect and enforceable as an order of the referring court pending a de novo hearing. *Id.* § 201.013(a). They further acknowledge that this Court held in 2006 that an associate judge's report finding that parental rights should be terminated constitutes an enforceable order of the district court for purposes of Section 201.013(a) while an appeal is pending in the district court. *Garza v. Texas Dep't of Family & Protective Servs.*, 212 S.W.3d 373, 377 (Tex. App.—Austin 2006, no pet.) (citing Tex. Fam. Code § 201.013(a) (West 2005)). Because the law applicable to this case does not require a conventional final order to be rendered within one year, and because even if it did, the record shows that the associate judge's order was final and had been entered within one year, we conclude the trial court did not fail to comply with Section 263.401.

Felix and Jane additionally argue that this case is unique and therefore not bound by precedent, urging this Court to reverse on the basis that the trial court erred by failing to comply with the spirit of Section 263.401. Specifically, they point to the facts that: (1) the Department amended its petition and proceeded to a jury trial on the amended petition; and (2) the case took three years, seven months, and twenty-six days from the day the children were removed until the day the final jury trial was held. Felix and Jane contend that "the extreme delay in finality and the fact that the Department was allowed to amend their pleadings more than two years after the August 21, 2014 order make any result other than a determination that § 263.401 was violated as unconscionable."

In response, the Department argues that Felix and Jane failed to preserve their complaint regarding the trial court's failure to dismiss the case under Section 263.401 and have waived this issue on appeal. On the record before us, we agree.[4]

Family Code Section 263.402 specifically addresses waiver of the right to object in the context of a parental-rights termination case on the basis asserted by Felix and Jane:

> A party to a suit under this chapter who fails to make a timely motion to dismiss the suit under this subchapter waives the right to object to the court's failure to dismiss the suit. A motion to dismiss under this subsection is timely if the motion is made before the trial on the merits commences.

Tex. Fam. Code § 263.402(b). The Texas Supreme Court has affirmed that the version of Section 263.401 applicable to this case did not make the deadlines it set out jurisdictional, that is, the trial court does not lose jurisdiction when the identified time periods lapse.[5] *In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 642 (Tex. 2009). No change automatically occurs in a case when the deadline passes. In addition, to be timely a motion to dismiss must be filed before the Department introduces its evidence, other than rebuttal evidence. Tex. Fam. Code § 263.402(b); *In re Texas Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 613 (Tex. 2006). Here, Felix and

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[4] As discussed herein, even if the issue had not been waived, Felix and Jane would not prevail on the merits because the trial before the associate judge commenced within one year, as required by Section 263.401. *See* Tex. Fam. Code § 263.401.

[5] The legislature has recently changed Sections 263.401 and .402 to make the deadlines jurisdictional but explicitly applied the amended statute only to suits filed after September 1, 2017. *See* Act of May 28, 2017, 85th Leg., R.S., ch. 317, § 28, 2017 Tex. Sess. Laws Serv. 615; Act of May 31, 2017, 85th Leg., R.S., ch. 319, § 13, 2017 Tex. Gen. Laws 713; *cf. In re J.B.W.*, 99 S.W.3d 218, 222-23 (Tex. App.—Fort Worth 2003, pet. denied) (retroactively applying amendment conferring jurisdiction on a court in which litigation is pending based on legislature's express intent and analysis that amendment did not affect parties' substantive rights).

Jane did not file a timely motion to dismiss under Section 263.402 and have therefore waived their right to object to the trial court's failure to dismiss the suit. *See* Tex. Fam. Code § 263.402(b); *see also* Tex. R. App. P. 33.1. Accordingly, we overrule Felix and Jane's first issue.

Family Code Section 201.015(f)'s 30-day deadline

In their second issue, Felix and Jane argue that the trial court abused its discretion by failing to hold the de novo hearing within thirty days after they requested it, thereby violating Family Code Section 201.015(f). Noting that the de novo trial in this case commenced 1,003 days after the request was filed, Felix and Jane argue that the error and resulting harm are evident on the face of the record. Namely, they claim that they were harmed because they were separated from their children for over one thousand days and were denied visitation and Department-provided services during that time. In addition, they assert that by the time a jury heard evidence, the showing that the parents had not had any contact with their children for more than two-and-a-half years greatly prejudiced the jury against the parents. They argue that if the hearing had been timely held, in compliance with Section 201.015(f), the testimony would have shown a very different picture of the parents. The Department responds that this argument fails because the parents never sought to compel the trial court to set the hearing within the statutorily mandated thirty days.

Family Code Section 201.015 provides that, following a trial before an associate judge, any party may request a de novo hearing before the referring court within three working days after notice of the associate judge's report is received. Tex. Fam. Code § 201.015(a). Then, "[t]he referring court, after notice to the parties, shall hold a de novo hearing not later than the 30th day after the date on which the initial request for a de novo hearing was filed with the clerk of the

referring court." *Id*. § 201.015(f). As indicated by use of the word "shall," this provision is mandatory, but "failure to comply with the 30-day requirement of section 201.012(f) does not deprive the trial court of jurisdiction." *In re L.R.*, 324 S.W.3d 885, 888 (Tex. App.—Austin 2010, orig. proceeding) (citing *Harrell v. Harrell*, 986 S.W.2d 629, 631 (Tex. App.—El Paso 1998, no pet.)). In other words, "the referring court is not statutorily precluded from conducting the de novo hearing outside the thirty day window." *Id.* at 889 (quoting *Harrell*, 986 S.W.2d at 631). Instead, Section 201.015(f) affords the parties the right to compel the trial court to hear the case promptly. *See id.* Where no party seeks to compel the trial court to set the hearing within the 30-day window set by the statute, the trial court does not abuse its discretion by setting the de novo hearing outside that window. *See id*.

Here, the record shows that Felix and Jane did not seek to compel the court to hold the de novo hearing within the thirty-day window. In fact, Felix and Jane were responsible for setting the de novo hearing on the court's docket under Hays County Local Rules, Rule 1, but they did not do so for six months following their request. *See* 274th (Tex.) Cty. Ct. Loc. R. 1 (Comal, Hays, and Caldwell Counties). In addition, Felix and Jane either initiated or agreed to every delay evident in the record before this Court. Indeed, the parents sought to delay the trial even further by requesting a continuance of the trial on the day it was set to commence. On these facts, we cannot say the trial court abused its discretion in failing to hold the de novo hearing within thirty days of the parents' request, pursuant to Section 201.015(f).

The Department's amended petition

Felix and Jane assert that the trial court abused its discretion by allowing the Department to make substantive changes to their pleadings after the final order was rendered by the associate judge[6] and before the de novo trial was held. They cite no authority prohibiting such amendment. In response, the Department first argues that Felix and Jane did not object to the amended pleading or move to strike it before the trial court, and so the issue on appeal has been waived. The Department further asserts that it was allowed to amend its pleadings at any time, so long as the amendment did not operate as surprise or prejudice to the other party. The Department asserts that because its amended petition did not assert any new causes of action, sought the same relief its original petition did, and provided sufficient notice, the amendment did not operate as surprise or prejudice to Felix and Jane.

First, we agree that because no objection to the amended petition was raised to the trial court, Felix and Jane have waived this issue on appeal. *See* Tex. R. App. P. 33.1. Nonetheless, we will address the merits of the issue because they are relevant to appellants' ineffective-assistance-of-counsel arguments. "A party who files a notice of appeal to the referring court in compliance with the Family Code is entitled to a de novo hearing before that court." *Attorney Gen. of Tex. v. Orr*, 989 S.W.2d 464, 467 (Tex. App.—Austin 1999, no pet.) (citing Tex. Fam. Code § 201.015(f)). "Judicial review by trial de novo is not a traditional appeal, but a new and independent action characterized by all the attributes of an original civil action." *Id.* (citing

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[6] Consistent with their first issue, Felix and Jane maintain that no final order was rendered at that time but offer this alternative argument in the event that we find that the associate judge's report did constitute a final order.

Key W. Life Ins. Co. v. State Bd. of Ins., 350 S.W.2d 839, 846 (Tex. 1961)). That includes allowing amendments to pleadings. *FKM P'ship, Ltd. v. Board of Regents of Univ. of Hous. Sys.*, 255 S.W.3d 619, 626 (Tex. 2008); *see* Tex. R. Civ. P. 63. A party may amend its pleadings without leave at any time prior to seven days before the trial. Tex. R. Civ. P. 63. Even within the week before trial, a party may amend its pleadings with leave of the court, which must be granted unless "there is a showing that such filing will operate as a surprise to the opposite party." *Id*. Felix and Jane cite no authority, and we find none, indicating that this rule is different for de novo trials. *See In re M.R.*, No. 11-13-00029-CV, 2013 WL 3878584, at *2 (Tex. App.—Eastland July 25, 2013, no pet.) (mem. op.) (concluding that trial court did not err in allowing Department to proceed on first amended petition rather than second, as announced at de novo hearing, because amendment did not operate as surprise).

Here, the Department amended its petition sixty-nine days prior to trial. No leave was required. Tex. R. Civ. P. 63. Under these circumstances, "a trial court has no discretion to refuse an amendment unless: 1) the opposing party presents evidence of surprise or prejudice; or 2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment." *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990) (internal citations omitted). "An amendment that is prejudicial on its face has three defining characteristics: (1) it asserts a new substantive matter that reshapes the nature of trial itself; (2) the opposing party could not have anticipated the new matter in light of the development of the case up to the time the amendment was requested; and (3) the amendment would detrimentally affect the opposing party's presentation of its case." *Halmos v. Bombardier Aerospace*

Corp., 314 S.W.3d 606, 623 (Tex. App.—Dallas 2010, no pet.); *see also Thomas v. Graham Mortg. Corp.*, 408 S.W.3d 581, 593 (Tex. App.—Austin 2013, pet. denied). The Department's amendments did not add any causes of action or stray from the issues identified in the parties' requests for de novo trial. *See* Tex. Fam. Code § 201.015(c). The amended pleading removed one ground for termination of Felix's parental rights and an issue related to the paternity of the children, corrected what appears to be a typographical error misnaming the respondent mother,[7] and makes other adjustments to account for changes in the factual circumstances between the time when the original petition was filed and the time approaching trial, nearly three years later. Felix and Jane made no showing of surprise or prejudice. Accordingly, the trial court was required to allow the Department to amend its pleading and did not abuse its discretion by doing so. We overrule Felix and Jane's third issue.

Ineffective assistance of counsel

In their fourth and fifth issues, Felix and Jane allege that their trial counsel provided ineffective assistance. Felix and Jane argue that their trial counsel performed deficiently by failing to object to the Department's amended petition and failing to object to the admission of a videotape on authentication grounds and that their parental rights would not have been terminated otherwise.

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[7] Though the original petition asked for the termination of the parental rights of a person not a party to this case in paragraph 14, it accurately identified Jane as the mother to be served in paragraph 4, and Jane was served and accepted service. Such a misnomer is generally allowed to be corrected so long as the mistake is not misleading. *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009); *Chilkewitz v. Hyson*, 22 S.W.3d 825, 828 (Tex. 1999). While Felix and Jane argue that they do not understand why another person was named in the original petition, they do not claim that they were led to believe that the Department was seeking to terminate the parental rights of someone other than Jane.

The Department responds that because objecting to the Department's First Amended Pleading would have been meritless, trial counsel's performance with respect to that issue cannot be said to be deficient. In addition, it claims that because the videotape at issue was properly self-authenticated with a business-records affidavit and witness testimony, trial counsel's failure to object was not erroneous.

Parents have a right to effective assistance of counsel in a proceeding to terminate parental rights. *See In re B.G.*, 317 S.W.3d 250, 253-54 (Tex. 2010). The Texas Supreme Court has adopted the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), for claims of ineffective assistance of counsel in parental-termination cases. *In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003). Under *Strickland*, to establish an ineffective-assistance claim, Felix and Jane must show two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. We give "great deference to counsel's performance, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, including the possibility that counsel's actions are strategic." *In re M.S.*, 115 S.W.3d at 545.

As explained above, the trial court had no discretion to disallow the Department from amending its petition absent a showing of surprise or prejudice. The amended pleading was filed more than two months before trial and did not change the substance of the Department's allegations

except to narrow and clarify issues. Nothing in the record indicates that an attempt to show prejudice or surprise would have been successful. "[T]rial counsel is under no obligation to do what would amount to a futile act." *Holland v. State*, 761 S.W.2d 307, 318-19 (Tex. Crim. App. 1988). Therefore, we cannot conclude that trial counsel's failure to object to the Department's first amended petition amounted to deficient performance. Accordingly, we overrule Felix and Jane's fourth issue.

A similar analysis applies to the claim that trial counsel's failure to object to admission of video footage was deficient. On the first day of trial, the Department presented video footage that appeared to show Tiffany's school bus on the morning of September 12, 2013. The footage first shows the bus waiting, then a child walks past the bus doors. Shortly thereafter, the driver opens the bus's doors at which time screaming is heard from off-screen. Felix approaches the school bus and begins to yell at the driver for not exiting the bus to help and for "calling CPS on" him. Tiffany reappears and attempts to board the bus three times, but Felix physically stops her each time while continuing to yell at the driver. Then the video shows Tiffany beginning to scream and proceeding to fall to the ground in a tantrum. Felix responds by yelling and pleading with Tiffany to get on the bus, at one point threatening to drag her if he has to. Jane appears during this time, asks Tiffany what is wrong with her, and threatens to send Tiffany "back to the hospital." Felix then reminds Tiffany of when she cried because "they put [him] in the police car" and handcuffed him, and he tells her to get on the bus so "they won't do that again." Eventually Tiffany stands up and gets on the bus and the driver takes her to school, with Tiffany rocking herself much of the drive.

The Department offered the video through witness John Fuerst, Executive Director of Special Programs for Hays Consolidated Independent School District (HCISD). Fuerst testified

that the exhibit offered by the Department was the video from the bus that he had viewed on September 13, 2013. He testified that the Transportation Department typically prepares such videos and that the exhibit was marked as "Bus 93 Kyle Elementary School, September 12, 2013, morning, A.M. and P.M. route." The video was accompanied byan affidavit for business records that was signed by Mr. Bonavita, who Fuerst testified was the Director of Student Services for HCISD. The video and affidavit were admitted without objection.

Felix and Jane argue that no predicate was laid with regard to the recording equipment, the operator, or whether the contents of the video accurately reflected the events it purported to depict. They claim that there was no testimony from any person who was actually present at the time the video was recorded, and no testimony as to what equipment the video was recorded on, whether the recording system was working properly, whether the video had been altered, and whether it was the original or a duplicate. They further assert that business records are insufficient to prove the authenticity of a video. Because trial counsel failed to object to admission of the video footage on these grounds, Felix and Jane contend that counsel's performance was unreasonably deficient under the *Strickland* test. The Department responds that because the footage was properly self-authenticated with a business-records affidavit and further authenticated by Fuerst, any objection would have been futile, so trial counsel did not erroneously fail to object.

Consistent with the concept that counsel is not required to take an action that would be futile, *see Holland*, 761 S.W.2d at 318-19, the failure to object to a lack of foundation is not ineffective assistance unless the record shows that the State would not have been able to lay proper foundation. *Darnell v. State*, No. 14-11-00437-CR, 2012 WL 626318 , at *3-5 (Tex. App.—Houston

[14th Dist.] Feb. 28, 2012, no pet.) (mem. op., not designated for publication). Here, the record does not demonstrate that if trial counsel had objected, he would have successfully defeated admission of the video footage. Assuming without deciding a business record affidavit would have been insufficient, there is no indication that the Department would not have provided adequate foundation in another way, for instance by asking Felix if the video accurately represented what it was purported to depict. *See Medellin v. Texas Dep't of Family & Protective Servs.*, No. 03-11-00558-CV, 2012 WL 4466511, at *6 (Tex. App.—Austin Sept. 26, 2012, pet. denied) (mem. op.) (citing *Darnell*, 2012 WL 626318, at *3). In fact, Felix testified extensively about the footage during the de novo trial, and at no time did he suggest that the footage was not an accurate depiction. Therefore, Felix and Jane have failed to affirmatively demonstrate in the record that, had their counsel objected, the video would have been excluded. *See id.* Accordingly, we cannot find that the parents' trial counsel performed deficiently by failing to object to the admission of the video footage. *See id.* Accordingly, we overrule the parents' fifth issue.

Sufficiency of the evidence

In their sixth issue, Felix and Jane contend that the evidence was legally and factually insufficient to support termination of their parental rights. "Texas Rule of Civil Procedure 324 requires a motion for new trial to preserve '[a] complaint of factual sufficiency of the evidence to support a jury finding.'" *In re M.S.* 115 S.W.3d at 547 (citing *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991)). In a jury trial, a legal-sufficiency issue must be preserved by filing one of the following in the trial court: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the question to the jury; (4) a

motion to disregard the jury's answer to a vital fact question; or (5) a motion for new trial. *See In re J.P.B.*, 180 S.W.3d 570, 574 (Tex. 2005); *T .O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220-21 (Tex. 1992). A review of the record reveals that the parents' preserved neither a legal-sufficiency nor a factual-sufficiency complaint for appellate review.[8] Therefore, those complaints are waived.

Due process

In their final issue, the parents argue that they were denied their Fourteenth Amendment rights to due process of law to be heard at a reasonable time and place. Specifically, they argue that the cumulative errors of the trial court (by not holding the de novo trial timely as mandated by statute and admitting the video footage without proper authentication), trial counsel (by failing to object to admission of the video footage), and the Department (by denying the parents visitation or notice of interim permanency hearings while the de novo trial was pending) deprived the parents of their constitutionally protected rights to make decisions concerning the care, custody, and control of their children without due course of law.[9] The errors, they claim, probably prevented

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[8] The Texas Supreme Court has previously held that we may review factual sufficiency in a parental-termination case despite failure to preserve the issue if the parents' counsel unjustifiably failed to preserve error. However, Felix and Jane have not alleged that their counsel unjustifiably failed to preserve error. *See In re J.P.B.*, 180 S.W.3d 570, 574 (Tex. 2005) (concluding that where no allegation of unjustified failure to preserve error was raised, "[i]t is reasonable to presume that her counsel's decision not to raise a "no evidence" point was based either on litigation strategy or on her counsel's belief that, in his professional opinion, the evidence was legally sufficient and preservation of error was not warranted").

[9] Felix and Jane also complain of this Court's denial of their motion to supplement the appellate record with transcripts from the adversary hearing held on October 29 and 31, 2013, and the periodic status and permanency hearings held after their parental rights were terminated by the

the parents from properly presenting their case and caused the rendition of the improper judgment. As a remedy, the parents ask this Court to reverse the judgment of termination and remand the case to the trial court for a new trial.

First, the actions of which the parents complain were not errors. As discussed above, because the trial court was not prompted by any party to take action regarding statutory deadlines, and it was not mandated to address the matters *sua sponte*, it did not err. Likewise, Felix and Jane have not shown that the court erred in admitting the video footage because no objection was raised. As also discussed above, the record does not show that if trial counsel had objected, the video footage would have been excluded, so we cannot say that trial counsel erroneously failed to object to its admission. Finally, the parents complain that the Department's erred by not allowing them to see the children between the trial before the associate judge and the de novo jury trial nearly three years later, and that they were not given notice of legal proceedings that occurred during the interim. As discussed supra, on the lengthy record before us, this was also not error. On August 22, 2014, the associate judge entered an order terminating Felix and Jane's parental rights. That order remained through the pendency of the de novo hearing. Tex. Fam. Code § 201.315 ("Pending a de novo hearing before the referring court, a proposed order or judgment of the associate judge is in full force and effect and is enforceable as an order or judgment of the referring court, except for an order providing for the appointment of a receiver."). Accordingly, while the de novo hearing was pending, Felix and Jane did not have parental rights and were not entitled to visitation or notice of additional legal proceedings concerning Tiffany and Erin. Tex. Fam. Code § 161.206(b) (providing that

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associate judge. We denied the motion to supplement because we determined that the requested transcripts were not necessary for the resolution of this appeal and the appellate record was complete.

termination order divests parent and child of all legal rights and duties with respect to each other, with inapplicable exception); *Durham v. Barrow*, 600 S.W.2d 756, 760 (Tex. 1980) (divestiture of rights under termination order includes right to notice of subsequent adoption). Therefore, the Department's failure to provide notice to the parents of legal proceedings that occurred while the de novo hearing was pending was also not error.

Felix and Jane assert an argument centered on the due process analysis set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). That case sets out three elements to be evaluated in deciding what due process requires: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. *Id.* at 326. Courts must weigh these factors to determine whether the fundamental requirements of due process have been met by affording an opportunity to be heard at a meaningful time and in a meaningful manner under the circumstances of the case. *In re D.W.*, 498 S.W.3d 100, 112 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

However, we refrain from engaging such an analysis here, when the parents failed to use the process available to them. The delay between the associate judge's order and the de novo hearing was excessive, as was the pendency of the case as a whole. As discussed above, the parents had the right to compel the court to rectify this issue, and the record shows that at no point did they attempt to exercise that right. The statutory deadlines protect against delay, but they were not utilized to effectuate their purpose. The deadlines are "designed to be enforced by the complainant against the trial court, and not vice versa, simply because with limited exceptions the complainant is statutorily obligated to comply with the order of the associate judge pending the de novo

proceeding." *Harrell*, 986 S.W.2d at 631 (citing Tex. Fam. Code § 201.013(a)). Moreover, many of the instances of delay in the record were either initiated or agreed to by the parents. Indeed, the parents sought a continuance at the time the de novo trial finally began, urging further delay. "[A] due process claim cannot be substantiated by a party's failure to utilize the processes in place nor can the process be deemed inadequate . . . if the party did not avail himself of the available remedies." *Hendrickson v. Action Realty*, No. 13-14-00510-CV, 2015 WL 3799424, at *2 (Tex. App.—Corpus Christi June 18, 2015, no pet.) (mem. op.) (citing *McGlothin v. Kliebert*, 672 S.W.2d 231, 231 (Tex. 1984)); *see Alphonso Crutch Life Support Ctr. v. Williams*, No. 03-13-00789-CV, 2015 WL 7950713, at *7 (Tex. App.—Austin Nov. 30, 2015, pet. denied) (mem. op.). Accordingly, we conclude that the parents were not deprived of their right to due process, and we overrule their seventh issue.

CONCLUSION

Having overruled Felix and Jane's issues on appeal, we affirm the trial court's order of termination.

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Cindy Olson Bourland, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: December 15, 2017