IN THE SUPREME COURT OF TEXAS

NO. 08-0524

IN RE DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 12, 2008

JUSTICE HECHT, joined by JUSTICE BRISTER, dissenting.

When K.W.'s daughters were ages 3 and 2, the district court issued an emergency order removing them from her and giving custody to the Department of Family and Protective Services. Within a year, following a two-day bench trial, the district court found by clear and convincing evidence that K.W. had endangered her daughters, that she had been convicted or placed on community supervision for indecency with a child, that she had failed to comply with a court-ordered service plan to obtain the return of her children, and that termination of her rights in her daughters was in their best interest.[1] K.W. moved for a new trial. The court granted her motion and set a trial date three months away. When that date came, K.W. agreed to a postponement, and the court set another trial date four months away. Before that date arrived, K.W. moved to have the case dismissed and her children returned to her because of the delays caused by granting her motion for new trial and the agreed postponement. Not surprisingly, the court denied her motion.

The girls are now 6 and 5 and have been in foster care for two-and-a-half years. Today the Court orders them returned to their mother. There is no evidence that her situation has changed. No

[1] TEX. FAM. CODE § 161.001 (1) (E), (L) (iv), (O), (2). It appears from allegations in the record submitted to this Court that K.W. was 18 and the alleged father was 13 when the elder of their two children was conceived.

consideration is given to the children's best interests. As far as we know, they are going back to the same living conditions that necessitated emergency intervention two-and-a-half years ago. K.W. recovers her daughters, not because they are now safe with her, but because of delays in these termination proceedings that she herself requested or agreed to. The Court explains that K.W. is simply taking advantage of "protections designed to assure prompt processing of both children and parents through the system".[2] The Court's notion of "prompt processing" is an odd one. If K.W. wanted prompt processing of her children and herself through the system, she could have gone to trial in December 2007, April 2008, or June 2008 instead of trying to force dismissal of the case so that it can be refiled and the parties can start over, further delaying a final resolution. The Court blames this startling result on the trial court for not following statutory procedures to continue the case, and on the Legislature for setting deadlines the way it did. But the result is unnecessary, in my view, for two reasons. I respectfully dissent.

I

The question that really matters is the one the Court refuses to answer: after a suit by the Department to terminate parental rights is dismissed due to a failure to meet the deadlines in section 263.401 of the Family Code, can the Department simply refile the same suit, retain custody of the child, and continue on as before, essentially unaffected?[3] If the answer is yes, and dismissal does not affect the Department's ability to proceed, then all the consternation over whether this case should have been dismissed has been a waste of time — not just our time, the Department's time, and a young mother's time, but more than eighteen months out of the lives of two little girls whose futures are at stake here. If the Department can proceed after dismissal the same as before, then a determination whether dismissal was required is largely irrelevant. And if the answer is no, the

[2] *Ante* at ___.

[3] *Ante* at ___ ("As to the issue of whether the Department can refile the same suit, retain custody of the children, and continue as before to seek termination of K.W.'s parental rights, the question simply is not before us").

Department cannot refile and retain custody, or can do so only with substantially new grounds for termination, then surely we should say so now rather than leaving the parties and trial court to continue in further proceedings the Department has no authority to pursue.

The four courts of appeals that have addressed the question have all concluded that a dismissal under section 263.401 is without prejudice and therefore does not bar the Department from filing another petition seeking termination on the same legal grounds.[4] One court has indicated that the petition in the later action must allege facts not alleged in the prior case,[5] but the author of the Court's decision today disagreed.[6] All four courts agree that the Department cannot retain custody of a child after the dismissal of a termination action without alleging a new factual basis,[7] but the

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[4] *In re Bishop*, 8 S.W.3d 412, 420 (Tex. App.–Waco 1999, orig. proceeding) ("In addition, we observe that the dismissal mandated by section 263.401 does not constitute a decision on the merits of the suit. Therefore, such a dismissal is without prejudice to the rights of DPRS to assert the same grounds in a subsequently filed suit."); *In re Ruiz*, 16 S.W.3d 921, 927 (Tex. App.–Waco 2000, orig. proceeding) ("We have already determined that a dismissal under section 263.401(a) is without prejudice, so DPRS would be able to re-file the case asserting the same grounds *for termination* as originally alleged." (citing *Bishop*)); *In re T.M.*, 33 S.W.3d 341, 347 (Tex. App.–Amarillo 2000, orig. proceeding) ("[A]uthority holds that a dismissal under section 263.401 does not constitute an adjudication on the merits. So too does it conclude that the DPRS may refile the case and assert the same grounds for termination as originally alleged." (citing *Ruiz*, citations omitted)); *In re M.N.G.*, 147 S.W.3d 521, 528 (Tex. App.–Fort Worth 2004, pet. denied) ("A dismissal under section 263.401(a) is without prejudice so that DFPS may refile the case asserting the same grounds for termination as originally alleged." (citing *Ruiz*)); *In re K.Y.*, ___ S.W.3d ___, ___ (Tex. App.–Houston [14th Dist.] 2008, no pet. h.) ("Once a suit is dismissed without prejudice, DFPS may refile the suit asserting the same grounds for termination originally alleged." (citing *M.N.G.* and *Ruiz*)).

[5] *In re L.J.S.*, 96 S.W.3d 692, 694 (Tex. App.–Amarillo 2003, pet. denied) ("[A]uthority clearly allows [the Department] to reinitiate the proceeding if new facts are alleged justifying relief on the same grounds averred in the first action.").

[6] *Id.* at 695-696 (Johnson, C.J., concurring) ("The Legislature has set out detailed standards and procedures for suits involving protection of children and families. . . . If the collective will of the Legislature had been to preclude the TDPRS from dismissing and then re-filing suit . . . , it could have easily so provided. . . . Section 263.401 does not require trial courts to determine that a subsequent suit is based on 'new facts' of some timing and character, or to otherwise dismiss the suit. Regardless of whether new facts were pled and regardless of the nature of any new facts pled, the plain language of Section 263.401 neither precluded TDPRS from filing the second suit seeking to terminate the [parents'] relationship with [their child], nor mandated dismissal of the second suit.").

[7] *In re Ruiz*, 16 S.W.3d at 927 ("[W]e conclude that DPRS cannot again remove R.R. from her home or keep her in foster care absent new facts which support removal under chapter 262 of the Family Code. . . . To support a subsequent removal, DPRS must rely on facts warranting removal which have occurred after the adversary hearing [on the first temporary orders]. To hold otherwise would render section 263.401(a) meaningless because DPRS would be permitted to maintain custody of a child in its care indefinitely merely by annually re-filing suit. This is clearly contrary to the purpose of the statute."); *In re T.M.*, 33 S.W.3d at 347 ("However, the right to rely upon the same grounds for termination does not permit the entity to use the same facts as the basis for removing the child from her parents or maintaining her in a foster home pending resolution of the suit. New facts justifying the temporary relief must be propounded." (citations omitted)); *In re M.N.G.*, 147 S.W.3d at 528 ("DFPS cannot keep a child in foster care absent

only reason the courts have ever given is purely practical: otherwise the Department could retain custody indefinitely simply by dismissing and refiling the same action over and over. One court has indicated that the public policy behind the statute would be violated if the Department could repeatedly refile termination proceedings without moving toward a final adjudication.[8] Undermining these concerns, courts have taken a very permissive view of what would constitute "new" facts.[9]

I agree with the courts of appeals that the dismissal required by section 263.401 is without prejudice. Subsection (a), as originally enacted in 1997, provided that "the court shall dismiss" a termination suit unless, within a year after issuing temporary orders, a final order is rendered.[10] A

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new facts supporting removal from the home."); *In re K.Y.*, ___ S.W.3d at ___ ("However, DFPS cannot maintain temporary custody of the children without alleging new facts to support the termination.").

[8] *In re L.J.S.*, 96 S.W.3d at 693-694 ("Assuming *arguendo* that the TDPRS may be free to non-suit and reinitiate proceedings, they cannot do so in a manner that violates statute or public policy. The public policy here involved is encapsulated in § 263.401(a) of the Texas Family Code. That statute exists to facilitate permanence and stability in the lives of children subjected to TDPRS involvement by limiting the time within which the TDPRS can prosecute actions to terminate parental rights or have it designated conservator. And, that time is 12 months with, generally, no more than an extension of 180 days. Now, to allow the statutory time period to be exceeded through legal maneuvering of the TDPRS or any other party would undoubtedly run afoul of the public policy underlying the provision." (citations omitted)).

[9] *See, e..g.*, *In re K.Y.*, ___ S.W.3d at ___ ("DFPS argues that it did allege new facts because the second petition alleged that appellant was incarcerated on charges of murdering A.F. while the third petition alleged that appellant had been convicted of the murder and requested termination on an additional ground based on this conviction. . . . We agree with DFPS that these new facts and the additional ground for termination based on these facts were sufficient to allow DFPS to refile and maintain temporary custody of the children."); *In re M.N.G.*, 147 S.W.3d at 528-529 (affidavit attached to the second termination petition differed from prior affidavit only by providing more details of mother's employment and residence and alleging that her rights to three other children had been terminated, whereas the prior affidavit alleged that those rights were only in the process of being terminated); *In re L.J.S.*, 96 S.W.3d at 694 (noting that new facts could include facts which "involved a continuation of the conduct precipitating the first suit"); *but see In re Ruiz,* 16 S.W.3d at 927 ("To support a subsequent removal, DPRS must rely on facts warranting removal which have occurred after the adversary hearing").

[10] Section 263.401 was originally enacted in 1997 by three separate, nearly identical bills: Act of May 28, 1997, 75th Leg., R.S., ch. 600, § 17, 1997 Tex. Gen. Laws 2108, 2112-2114 (this bill did not include section 263.402(d), found in the other two bills, and now at section 263.403(d)); Act of May 28, 1997, 75th Leg., R.S., ch. 603, § 12, 1997 Tex. Gen. Laws 2119, 2123-2124 (this bill did not include section 263.404, found in chapter 600, and now at section 263.406); and Act of May 31, 1997, 75th Leg., R.S., ch. 1022, § 90, 1997 Tex. Gen. Laws 3733, 3768-3770. Subsection (a) provided:

> Unless the court has rendered a final order or granted an extension under Subsection (b), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child.

2007 amendment changed the condition to commencement of trial.[11] Subsection (b) permits a 180-day extension on specified conditions that have varied over the years.[12] The 1997 version of

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[11] Act of May 27, 2007, 80th Leg., R.S., ch. 866, §§ 2-5, 2007 Tex. Gen. Laws 1837, 1837-1838. Subsection (a) was amended to read:

> Unless the court has commenced the trial on the merits or granted an extension under Subsection (b), on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court shall dismiss the suit affecting the parent-child relationship filed by the department that requests termination of the parent-child relationship or requests that the department be named conservator of the child.

[12] As originally enacted in 1997, subsection (b) read:

> On or before the time described by Subsection (a) for the dismissal of the suit, the court may extend the court's jurisdiction of the suit for a period stated in the extension order, but not longer than 180 days after the time described by Subsection (a), if the court has continuing jurisdiction of the suit and the appointment of the department as temporary managing conservator is in the best interest of the child. If the court grants an extension, the extension order must also:
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> (1) schedule the new date for dismissal of the suit; and
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> (2) make further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit.

See supra note 7. In 2001, the subsection was amended to read:

> The court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a), if the court finds that continuing the appointment of the department as temporary managing conservator is in the best interest of the child. If the court retains the suit on the court's docket, the court shall render an order in which the court:
>
> (1) schedules the new date for dismissal of the suit not later than the 180th day after the time described by Subsection (a);
>
> (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and
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> (3) sets a final hearing on a date that allows the court to render a final order before the required date for dismissal of the suit under this subsection.

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 8, 2001 Tex. Gen. Laws 2395, 2396. In 2005, the first sentence of the paragraph was amended to read:

> The court may not retain the suit on the court's docket after the time described by Subsection (a) unless 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 best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a).

Act of May 29, 2005, 79th Leg., R.S., ch. 268, § 1.40, 2005 Tex. Gen. Laws 621, 636. In 2007, the phrase "Unless the court has commenced the trial on the merits," was added to the beginning of the first sentence, and subsection (1) and (3) were changed to the current version, which now provides:

subsection (b) spoke in terms of "extend[ing] the court's jurisdiction",[13] but since the 2001 amendments the provision has referred instead to "retain[ing] the suit on the court's docket".[14] The dismissal contemplated by these provisions is clearly for want of prosecution without reference to the merits of the case. Such a dismissal is without prejudice to claims not adjudicated.[15]

A dismissal with prejudice is an adjudication of the parties' rights;[16] a dismissal without prejudice is not.[17] A dismissal under section 263.401 does not involve a decision on the merits of

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> Unless the court has commenced the trial on the merits, the court may not retain the suit on the court's docket after the time described by Subsection (a) unless 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 best interest of the child. If the court makes those findings, the court may retain the suit on the court's docket for a period not to exceed 180 days after the time described by Subsection (a). If the court retains the suit on the court's docket, the court shall render an order in which the court:
>
> (1) schedules the new date on which the suit will be dismissed if the trial on the merits has not commenced, which date must be not later than the 180th day after the time described by Subsection (a);
>
> (2) makes further temporary orders for the safety and welfare of the child as necessary to avoid further delay in resolving the suit; and
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> (3) sets the trial on the merits on a date not later than the date specified under Subdivision (1).

Act of May 27, 2007, 80th Leg., R.S., ch. 866, § 2, 2007 Tex. Gen. Laws 1837, 1837-1838.

[13] *See supra* note 12.

[14] *See supra* note 12.

[15] *Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 656 (Tex. 1998) (per curiam) ("[T]he trial court's dismissal of the plaintiffs' case for want of prosecution following the rendition of the partial summary judgment resulted in a dismissal with prejudice of those issues already adjudicated in the partial summary judgment and a dismissal without prejudice of those issues not covered in the partial summary judgment."); *Gracey v. West*, 422 S.W.2d 913, 917 (Tex. 1968) ("The judgment of dismissal of the cause for want of prosecution is not a judgment on the merits of the cause.").

[16] *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991) (per curiam) ("[I]t is well established that a dismissal with prejudice functions as a final determination on the merits."); *accord Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999) (per curiam).

[17] *Crofts v. Court of Civil Appeals for Eighth Supreme Judicial Dist.*, 362 S.W.2d 101, 104 (Tex. 1962) ("It is elementary that a dismissal is in no way an adjudication of the rights of parties; it merely places the parties in the position that they were in before the court's jurisdiction was invoked just as if the suit had never been brought. ").

the case, but dismissal with prejudice can be ordered as a sanction.[18] Section 263.401 does not contemplate dismissal as a sanction because it can occur without any fault of the Department, as in this case, or without any fault at all, as when the press of the trial court's business simply does not allow compliance. Ordinarily, "'there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'"[19] But having given the Department the authority to sue to terminate parental rights, the Legislature could certainly restrict that authority and prohibit the Department absolutely from prosecuting an action with respect to a child after a certain period of time. There is no indication that the Legislature has done so in section 263.401. The Legislature has made crystal clear that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."[20] To require dismissal of a termination suit after a period of time without a determination that it is in the child's best interest means either that the child's best interest is sometimes irrelevant, or that delay past a certain time, for whatever reason, is never in the child's best interest. Neither is possible.

Thus, a dismissal under section 263.401 must be without prejudice. A dismissal without prejudice presents no bar to refiling the same action.[21] The courts of appeals are therefore correct

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[18] *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.351(b)(2) ("If, as to a defendant physician or health care provider, an expert report has not been served within the period specified . . . , the court . . . shall . . . enter an order that . . . dismisses the claim . . . with prejudice . . . ."); *Villafani v. Trejo*, 251 S.W.3d 466, 468 (Tex. 2008) ("If the plaintiff fails to provide an adequate expert report or to voluntarily nonsuit the claim, the statute allows a defendant to move for sanctions against the plaintiff, including: . . . (3) dismissal of the case with prejudice."); TEX. R. CIV. P. 13 (providing that a court may sanction pleading abuse with any appropriate sanction permitted by Rule 215); TEX. R. CIV. P. 215.2(b) (providing that a court may sanction certain discovery abuse by dismissing the action with prejudice).

[19] *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958)).

[20] TEX. FAM. CODE § 153.002.

[21] *See Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980) ("[A] litigant may refile an action that has been dismissed for want of prosecution, since the merits of such an action remain undecided.").

that the Department, after dismissal of a termination action under section 263.401, can file a new action asserting the same legal grounds. But they are incorrect in holding that the Department must allege new facts. Without prejudice is without prejudice. The pragmatic concern that the Department "would be permitted to maintain custody of a child in its care indefinitely merely by annually re-filing suit"[22] is unfounded. If the Department acts without sufficient grounds, merely to prolong custody of a child without a final adjudication, the trial court has ample authority to impose sanctions.[23] Section 263.401 does not suggest that the Department should be prohibited from refiling suit to protect a child.

The ostensible purpose of section 263.401 is to expedite termination cases. Threatening the Department with dismissal may not be the best means to that end. It makes no sense to punish children by returning them to dangerous circumstances because the Department or the court did not move swiftly enough to protect them. A better way might have been to set deadlines enforceable by mandamus along with procedures to monitor the status of termination cases throughout the State and ensure compliance. The Court shrugs: "it is not for courts to decide if legislative enactments are wise or if particular provisions of statutes could be better-worded to reach what courts or litigants might believe to be better or more equitable results."[24] Perhaps, but we are required to presume that the Legislature intended "a just and reasonable result" in favor of the public interest over any private

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[22] *In re Ruiz*, 16 S.W.3d 921, 927 (Tex. App.–Waco 2000, orig. proceeding).

[23] *See* TEX. R. CIV. P. 13 ("Attorneys or parties who shall . . . make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215, upon the person who signed it, a represented party, or both."); TEX. CIV. PRAC. & REM. CODE § 10.001 ("The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry: (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . ."); *id.* § 10.004(a) ("A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.").

[24] *Ante* at ___.

interest.[25] And we should consider the consequences.[26] We are obliged to adopt a reasonable construction of a statute that avoids results as unreasonable as returning children to unsafe environments.

Whether the threat of dismissal adequately serves the Legislature's purpose of expediting termination cases, judicial wrangling over whether dismissal should or should not occur does not. The trial court last set this case for trial on June 4, 2008. Had judgment been rendered at that time, the case could be close to being final on appeal. Even though this Court and the court of appeals have expedited consideration of K.W.'s petition for mandamus, if the Department is permitted to proceed anyway, months have been lost unnecessarily. Despite the energy expended in this case, adjudication remains distant. The Court states: "The Family Code evidences a clear intent by the Legislature to prevent cases from lingering on court dockets for extended periods beyond specified timeframes by agreement *or otherwise*."[27] Then the Court proceeds to adopt a construction in this case that requires that a final resolution of the issues be delayed interminably.

I would hold that even if this suit is dismissed, the Department can refile the same action as long as there are factual and legal grounds to do so.[28] I would leave it to the ample mechanisms already in place for assuring prompt resolution of cases to require that the Department move expeditiously.

II

That said, I do not believe that section 263.401 requires dismissal.

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[25] TEX. GOV'T CODE § 311.021 ("In enacting a statute, it is presumed that: . . . (3) a just and reasonable result is intended; . . . and (5) public interest is favored over any private interest.").

[26] *Id*. § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: . . . (5) consequences of a particular construction . . . .").

[27] *Ante* at ___ (emphasis in original).

[28] It may be, of course, that the situation has changed in the two-and-one-half years since the case began.

The trial court rendered a final order before the one-year deadline prescribed by subsection (a). K.W. timely filed a motion for new trial,[29] and the trial court held a timely hearing.[30] While the Family Code prescribes deadlines for filing and hearing a motion for new trial, it says nothing specific about deadlines after a motion for new trial is granted. The statutory provisions cannot reasonably be construed to allow a party to file a motion for new trial but deny the court a reasonable opportunity to grant the motion and retry the case.

While the court's order granting a new trial set aside the final order, it did not erase the fact that a final order was rendered within the time prescribed by subsection (a). Subsection (b) allowed the court to retain the case on its docket for 180 days if it found that continuing the Department's conservatorship of K.W.'s children was necessitated by extraordinary circumstances and was in the children's best interest. While the court did not make those findings on the record, subsection (b) does not impose that requirement, and the findings are certainly implied in the court's rulings, as they would be in other cases.[31] Subsection (b) does require an additional order setting a new dismissal deadline within 180 days, a trial date enough in advance for a final ruling by the deadline, and any further orders necessary. The court issued no additional order but did set a new trial date well within the 180 days. It issued no further temporary orders, but there is no indication that any were necessary. In any event, K.W. never objected that an additional order did not issue. I would hold that the court properly retained the case under that subsection (b).

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[29] TEX. FAM. CODE § 263.405(b) (requiring that a motion for new trial be filed within 15 days of the date a final order is signed).

[30] *Id.* § 263.405(d) (requiring a hearing within 30 days of the date a final order is signed).

[31] *E.g. In re Lynd Co.*, 195 S.W.3d 682, 686 (Tex. 2006) (holding that absent a trial court's express finding that a party received late notice of the judgment, a finding should be implied by the court's granting of a motion for new trial); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003) ("When neither party requests findings of fact and conclusions of law, it is implied that the trial court made all fact findings necessary to support its judgment."); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) ("When a trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to support the judgment and supported by the evidence are implied."); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (holding that findings should be implied in favor of an order modifying child support).

The new trial was postponed until after the 180-day deadline. Section 263.401(c) prohibited this extension.[32] K.W. did not object to the delay; she requested it. Under section 263.402(b), she waived the right to object because she did not move for a final order before the extended deadline and did not move to dismiss before the Department rested its case-in-chief at the first trial.[33] K.W. contends that she was entitled to move for dismissal until the Department rested at the second trial, but she cannot be permitted to agree to postpone the trial and then object that it was not conducted sooner.

This construction of the statutory provisions does not force a parent to choose between moving for a new trial and insisting on expedited proceedings. Having obtained a new trial, K.W. was entitled to insist that it occur within 180 days, and the trial court complied with a setting well within that period. But K.W. did not move for a final order within the period; to the contrary, she requested a postponement. At that point, she could no longer object to the delay.

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[32] The version of section 263.401(c) applicable to this case provided:

> If the court grants an extension but does not render a final order or dismiss the suit on or before the required date for dismissal under Subsection (b), 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).

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 8, 2001 Tex. Gen. Laws 2395, 2396.

[33] The version of § 263.402(b) applicable in this case provided:

> A party to a suit under this chapter who fails to make a timely motion to dismiss the suit or to make a motion requesting the court to render a final order before the deadline for dismissal 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 department has introduced all of the department's evidence, other than rebuttal evidence, at the trial on the merits.

Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 9, 2001 Tex. Gen. Laws 2395, 2396-2398. I agree with the Court that the deadlines in section 263.401 are not jurisdictional. The fact that they can be waived under section 263.402(b) seems to prove that.

The Court states: "The members of this Court recognize the significance of this proceeding to the lives of the children involved — anyone would."[34] Then it releases to K.W., who was found in emergency proceedings and after trial on the merits to have been an unfit parent, two small children who have been in foster care for over two years, though the Court acknowledges that it has no idea what the present circumstances are or what the risks may be. The Court seems to take comfort in the possibility the Department will refile termination proceedings,[35] actions that will no doubt extend by years a final resolution of this case. Recognizing the significance of this case to the children, and trying to avoid harm, appear to be different things.

I would direct the court of appeals to vacate its judgment and allow the trial court to proceed. Because the Court does not do so, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: January 9, 2009

[34] *Ante* at ___.

[35] *Ante* at ___ ("At oral argument, counsel for K.W. stated his opinion that the Department could refile the case and expected it to do so. Counsel for the Department did not dispute that argument.").