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 JOHNSON delivered the opinion of the Court in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE WILLETT joined.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE BRISTER joined.

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE HECHT, JUSTICE O'NEILL and JUSTICE MEDINA joined.

The Department of Family and Protective Services brought this parental-rights termination case and was appointed temporary managing conservator of two children. The trial court ordered the mother's parental rights terminated before the one-year dismissal date prescribed by the Family Code, but then, after the dismissal date, granted the mother's motion for new trial. The trial court neither rendered another final order nor entered an extension order, and the mother moved to dismiss the case more than nineteen months after the Department was first appointed temporary managing conservator. Her motion to dismiss was denied. We hold that the Family Code required the case to be dismissed and the trial court abused its discretion by failing to do so.

I. Background

The Department of Family and Protective Services filed suit to terminate K.W.'s parental rights to two children. On July 18, 2006, the trial court entered an order appointing the Department managing conservator of the children. In accordance with the Family Code in effect at the time, the order also set a dismissal date of July 23, 2007. *See* TEX. FAM. CODE § 263.401(a).[1] A bench trial took place on June 28, 2007 and July 10, 2007. On July 10, 2007, the judge orally ordered K.W.'s parental rights terminated. In August 2007, K.W. filed a motion for new trial. On August 21, 2007, the court entered a written order of termination, but on August 28, 2007, it granted K.W.'s motion for new trial. The court did not enter an order extending the time for which the case was to be retained on its docket. *Id.* § 263.401(b).[2]

The case was set for trial on December 4, 2007, but the trial was continued by agreement because the attorneys were in trial elsewhere and reset for April 22, 2008. On March 6, 2008, almost eight months after the one-year dismissal date, K.W. filed a motion to dismiss. The court denied the motion.

K.W. petitioned the court of appeals for mandamus directing the trial court to dismiss the case. The court of appeals held that the granting of a new trial had the legal effect of vacating both the July 10, 2007 and the August 21, 2007 orders of termination and returning the case to the docket as though there had been no previous trial or hearing. 265 S.W.3d 545, 550. It also held that

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[1] *See* Act of May 28, 1997, 75th Leg., R.S., ch. 600, 1997 Tex. Gen. Laws 2108, 2112 (amended 2007). Various parts of the Family Code have been amended since the Department filed suit in 2006. Unless otherwise specified, all references in this opinion are to the version of the statute in effect when the Department filed suit.

[2] *See* Act of May 29, 2005, 79th Leg., R.S., ch. 268, 2005 Tex. Gen. Laws 621, 636 (amended 2007).

because the effect of granting the new trial was to return the case to the docket, K.W.'s motion to dismiss was timely. *Id.* at 553; *see* TEX. FAM. CODE § 263.402(b).[3] The court of appeals granted mandamus relief directing the trial court to dismiss the case.

One justice in the court of appeals dissented to the denial of en banc review and argued that the time limits specified in the Family Code are jurisdictional. 265 S.W.3d at 557-58 (Keyes, J., dissenting). The dissenting justice would have denied relief on the basis that the trial court lost jurisdiction to take any action when the one-year dismissal date passed and an extension order had not been entered. *Id.*

The Department asserts that the court of appeals abused its discretion and seeks a writ of mandamus ordering the court of appeals to vacate its directive to the trial court.

II. Jurisdiction

If the dismissal dates set by the Family Code are jurisdictional, then the trial court had jurisdiction only to dismiss the case once the dates had passed, and its orders beyond those dates are void. Thus, we first address whether the trial court retained jurisdiction over the case after the time limits set by the Family Code had passed.

Family Code section 263.401, in relevant part, provided that when the Department files a suit to terminate the parent-child relationship and is appointed conservator of the children, as was the case here, then

> (a) 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

[3] Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395, 2396-97 (amended 2007).

> 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.
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> (b) 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).
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> . . . .
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> (c) 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).[4]

In construing these statutory provisions, our objective is to determine and give effect to the Legislature's intent. *State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *see also* TEX. GOV'T CODE § 312.005; *Am. Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95 (Tex. 2000). We look first to the plain and common meaning of the statute's words. *Gonzalez*, 82 S.W.3d at 327. We determine legislative intent from the statute as a whole and not from isolated portions of it. *Id.*

Construing the relevant provisions according to the foregoing principles, we conclude that the trial court did not lose jurisdiction when the dismissal dates passed. Both subsections 263.401(a) and (b) provide time limits for which the trial court may retain the case on its docket, and for which

[4] Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395, 2396 (amended 2007).

it would clearly have jurisdiction. But, although subsection 263.401(a) provides for what is called the "one-year dismissal date" and subsection 263.401(b) provides for a 180-day extension of that one-year dismissal date (if the trial court finds that certain circumstances exist), nothing in the language of section 263.401 indicates that these deadlines are jurisdictional. The statute merely states that the trial court "shall dismiss the suit" and "may not retain the suit on the court's docket" when the deadlines expire. TEX. FAM. CODE § 263.401(a), (b).

On the other hand, section 263.402 provides that a party may waive its right to dismissal if the party "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." *Id.* § 263.402. Subject-matter jurisdiction, however, cannot be waived. *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (per curiam) (citing *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004)). Thus, if the Legislature intended for the deadlines to be jurisdictional, it would not have expressly permitted them to be waived.[5]

Additionally, treating the statutory deadlines as jurisdictional could result in collateral attacks upon some termination orders well after completion of the termination proceedings and even after adoption of the children by other parties. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex.

[5] The applicable language of the statute does not make the dismissal dates jurisdictional and we need not look further than the language itself. Nevertheless, we note that before the Legislature amended the statute in 2001, subsection 263.401(b) contained language specifically referencing jurisdiction. Act of May 31, 1997, 75th Leg., R.S., ch. 1022, 1997 Tex. Gen. Laws 3733, 3769. The 2001 amendments deleted the reference to jurisdiction and substituted language providing that a trial court could take actions that allow it to "retain the suit on the court's docket for a period not to exceed 180 days." Act of May 22, 2001, 77th Leg., R.S., ch. 1090, 2001 Tex. Gen. Laws 2395, 2396. At the same time, the Legislature amended section 263.402 to provide that a party may waive its right to dismissal if the party "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." *Id.* at 2396-97.

2000) ("[A] judgment will never be considered final if the court lacked subject-matter jurisdiction."). Construing the dismissal dates as jurisdictional would not be reasonable in light of the Legislature's rationale in promulgating them to begin with: prompt and final resolution of parental-rights termination cases. *See* TEX. GOV'T CODE § 311.021(3) (providing that it is to be presumed the Legislature intends just and reasonable results when it enacts statutes); *In re B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003). We hold that the dismissal dates are not jurisdictional.

III. Failure to Dismiss

A. Standard of Review

We review a trial court's interpretation of the law de novo. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). A trial court has no discretion in determining what the law is or properly applying the law. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 612 (Tex. 2006). If the trial court fails to properly interpret the law or applies the law incorrectly, it abuses its discretion. *Id.*

Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). A court of appeals improperly issues mandamus if the trial court did not abuse its discretion or if the record fails to demonstrate the lack of an adequate remedy on appeal. *Id.*

B. Discussion

The Legislature has granted the Department authority to take possession of children and file suit to seek the termination of parental rights, as it did in this case. *See* TEX. FAM. CODE §§ 161.001, 262.001(a). However, the Legislature has prescribed with particularity how certain aspects of such

suits must be conducted. The statute is clear that the suits must be dismissed on the first Monday after the first anniversary of the date the Department was appointed temporary managing conservator of the children, absent the rendering of a final order or the granting of an extension. *Id.* § 263.401(a); *see In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 612 ("Subsection 263.401(a) of the Texas Family Code requires a trial court to dismiss a SAPCR filed by the Department if a final order has not been rendered" by the deadline.). The court cannot just enter an extension order, though. In order for the suit to remain on the court's docket beyond the one-year dismissal date, the court must make specific findings to support the extension order: "the court *may not* retain the suit on the court's docket" after the one-year dismissal date unless the court makes specific findings as set out in the statute. TEX. FAM. CODE § 263.401(b) (emphasis added). Even if a trial court enters an extension order, the suit may be retained on the court's docket for a maximum of 180 days after the one-year dismissal date, and the trial court must make specific provision in the order setting (1) the new dismissal date for not later than the 180-day limit, and (2) the trial on the merits for a date that complies with the 180-day limit. *Id.* § 263.401(b)(1), (3). A trial court may not grant a second extension to retain the suit on the court's docket beyond the 180-day limit. *Id.* § 263.401(c). Parties may not extend the deadlines set by the court "by agreement or otherwise." *Id.* § 263.402(a).[6]

[6] As the statute is clear by its terms, we do not consult extrinsic sources to construe it. We do note, however, that the statute's clear aim to help children awaiting adoption by requiring the Department to expedite termination proceedings is fleshed out in the House and Senate bill analyses. The House Bill Analysis states

> [The bill] would make the Texas adoption system more decisive, efficient and accountable. Statistics for fiscal years 1991-1995 show that children spent an average of 40.8 months in the state system before being adopted. For children, such a delay seems like a lifetime and can be extremely detrimental to healthy emotional development . . . . [The bill] would help provide [a stable]

At the time K.W. moved for dismissal of the suit in March 2008, the one-year dismissal date had passed as well as had the 180-day period for the trial court to retain the suit on its docket had it made the required findings for extending the date and entered an extension order, both of which it had not done. The trial court could have retained the suit if K.W. waived her right to dismissal by failing to make (1) a timely motion to dismiss, or (2) a motion requesting the court to render a final order before the deadline for dismissal. *Id.* § 263.402(b). The two motions are alternative methods of obtaining a dismissal. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 613. We agree with the court of appeals that K.W. did not waive her right to dismissal by failing to request that the trial court render a final order before the one-year dismissal date of July 23, 2008 because the trial court *did* render such an order on July 10. It would make no sense to hold that K.W. waived her right to dismissal when the trial court did exactly what she would have been required to request that it do to avoid waiver. Moreover, when the trial court granted a new trial, the one-year dismissal date had passed and another dismissal date had not been set. At that point, K.W. did not have an opportunity to request that the court enter a final order before a dismissal date. Because there was no final order in place as of the time K.W. filed her March 2008 motion to dismiss, her motion was timely when it was filed before the Department had introduced all its evidence, other than rebuttal

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> environment more quickly to children in foster care by expediting the adoption process.
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> The bill would do this by establishing a 12-month deadline for resolving each child's case. This would prevent children from remaining in the state's care for long periods of time or being moved through a long string of foster homes.

House Comm. on Juvenile Justice and Family Issues, Bill Analysis, Tex. S.B. 34, 75th Leg., R.S. (1997). The Senate Bill Analysis states that subsections 263.401(a) and (b) "require" the trial court to dismiss the suit if the Department fails to obtain a final order within the one-year deadline or 180-day extension, if granted. Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 34, 75th Leg., R.S. (1997).

evidence, at the pending trial on the merits. TEX. FAM. CODE § 263.402(b). Thus, under the clear provisions of the Family Code, the trial court had no discretion to deny K.W.'s motion to dismiss the Department's suit and abused its discretion in doing so. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 612-13.

The Department argues that the trial court rendered a "final order" on July 10, 2007 before the one-year dismissal date and the rendition of that order allowed the court to retain the case on its docket. We agree that the trial court rendered a final order on July 10 when it orally pronounced the termination of K.W.'s parental rights. *See* TEX. FAM. CODE § 101.026 (defining "render" to include an oral pronouncement in the presence of the court reporter); *Id.* § 263.401(d)[7] (providing that for the purposes of section 263.401, an order terminating the parent-child relationship and appointing the Department as managing conservator of the children is a final order). However, we disagree that the July 10, 2007 order survived the granting of a new trial.

When a trial court grants a motion for new trial, the case is reinstated on the trial court's docket as though no trial had occurred, and the slate is essentially wiped clean as to orders such as an oral pronouncement of judgment and written judgment based on the trial. *See In re Baylor Med. Ctr. at Garland*, ___ S.W.3d___, ___ (Tex. 2008). Therefore, both the written and oral orders terminating K.W.'s parental rights were vacated by the order granting a new trial. We agree with the Department that the order granting a new trial could be "ungranted" or set aside. *See id.* But if

[7] *See* Act of May 28, 1997, 75th Leg., R.S., ch. 600, 1997 Tex. Gen. Laws 2108, 2112 (amended 2007).

the trial court did so, the original oral order and written judgment terminating K.W.'s rights would not be reinstated; the trial court would have to enter a new judgment. *See id.*

The Department also argues that an interpretation such as the one we make is unreasonable and unworkable because it would be rare or nearly impossible for a trial court to conduct a new trial and render a final order within the one-year statutory deadline if the trial court granted a new trial or an appellate court concluded a new trial was warranted. However, as for a trial court granting a new trial, there are two answers to the Department's argument. First, under the statute, the court may retain the case on its docket for up to an additional 180 days in order to conduct a new trial. TEX. FAM. CODE § 263.401(b). Second, the time limits are set by the Legislature, and it is not for courts to decide if legislative enactments are wise or if particular provisions of statutes could be more effectively worded to reach what courts or litigants might believe to be better or more equitable results. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003) ("Our role . . . is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent."). As for an appellate court granting a new trial, section 263.401 requires dismissal only if the trial court has not rendered a final order by the prescribed or permitted dismissal dates. A predicate for appeal is the existence of a final order. *See* TEX. FAM. CODE § 263.405 (allowing an appeal of a "final order"). Further, the statutory deadlines mandate only the trial court's rendition of a final order, not deadlines after appellate review of such an order. The Legislature addressed appellate deadlines in section 263.405, and nothing in that provision creates deadlines after a final order has been appealed. *See id.*

The foregoing interpretation accords with our prior decisions as to the effect of new trial orders and respects the statutory construct. The Legislature set time limits with the intent to expedite resolution of cases of this type. *See In re B.L.D.*, 113 S.W.3d at 353. If rendering a timely order and then granting a new trial would suffice to allow the trial court to retain the case on its docket indefinitely despite motions to dismiss, the time limitations specified by the Legislature would effectively be nullified. We decline to adopt such a construction.

C. Mandamus Relief

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of interlocutory review. *In re McAllen Med. Ctr., Inc.*, ___ S.W.3d ___, ___ (Tex. 2008). In cases involving child custody, "[j]ustice demands a speedy resolution," and we have acknowledged that appeal is "frequently inadequate to protect the rights of parents and children." *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 613. Here, because the children would remain in the Department's custody despite its retaining them in violation of a statutory provision and it is unknown when the trial court would issue a final order subject to appeal, K.W. has no adequate remedy by appeal.

D. The Dissents

The dissenting Justices would avoid requiring dismissal of the case by holding that because K.W. requested a new trial and later agreed with the Department to a trial setting beyond 180 days from the one-year dismissal date (even though the trial court had not made findings required for it to retain the suit on its docket for the 180 days or entered an order with a new dismissal date), she either waived or is estopped from asserting the trial court erred by denying her motion to dismiss.

The Department does not raise either of these theories in support of its position, and even if it did, they are not applicable here.

The invited error doctrine applies to situations where a party requests the court to make a specific ruling, then complains of that ruling on appeal. *See Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005) ("[A] party cannot complain on appeal that the trial court took a specific action that the complaining party requested, a doctrine commonly referred to as 'the invited error' doctrine."); *see also Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984); *Patton v. Dallas Gas Co.*, 192 S.W. 1060, 1062-63 (Tex. 1917). The only request K.W. made to the trial court in regard to dismissal was that the suit be dismissed. She does not assert error in regard to what she asked the trial court to do and it *did* do—grant her a new trial at a time the trial court was statutorily authorized to grant a new trial and enter an extension order setting a new dismissal date. She asserts error in regard to what she asked the trial court to do and it *did not* do—dismiss the Department's suit at a point in time beyond any statutorily authorized dismissal date. It was not incumbent on K.W. to advise the trial court of all the ramifications of its granting her motion for new trial. She was entitled to have the trial court consider the motion on its merits, and so far as the record before us shows, that is what the trial court did. The Department makes no claim that K.W. somehow tried to ambush the trial court, or that she had any motive in pursuing a new trial or in agreeing to a continuance of the December 4, 2007 trial date other than protecting her parental and familial rights. The record before us does not show that K.W. was the party who requested continuance of the December trial date; the docket sheet shows only that the court granted the continuance because the attorneys were in trial

elsewhere. To the extent the dissents assert or imply that K.W. instigated continuance of the December trial date, the mandamus record does not support that position. K.W.'s actions do not come within the invited error rule.

As to estoppel, K.W. takes no position that differs from the one she took in the trial court. For a party to be estopped from asserting a position in an appellate court based on actions it took in the trial court, the party must have "unequivocally taken a position in the trial court that is clearly adverse to its position on appeal." *Tittizer*, 171 S.W.3d at 862; *see also Diamond Shamrock Ref. Co., L.P. v. Hall*, 168 S.W.3d 164, 170 (Tex. 2005); *Scoggins v. Curtiss & Taylor*, 219 S.W.2d 451, 454 (Tex. 1949). In the trial court, K.W. moved for a new trial and does not complain about the granting of that motion. In fact, none of the parties claim the trial court erred in granting a new trial. As noted above, K.W.'s complaint pertains to the trial court's refusal to dismiss the case long after it had granted the new trial but had not entered a final order. Nothing in the record before us or the briefs shows that she made any type of representation regarding her right to have the proceedings dismissed other than moving for dismissal. Certainly there is no indication she made a representation to the effect that the case would not be subject to statutory dismissal provisions if her motion for new trial were to be granted, or that she would not move for dismissal if the trial court and Department did not comply with statutory timeframes.

Further, the Family Code specifies that "the parties to a suit under this chapter may not extend the deadlines set by the court under this subchapter *by agreement or otherwise*." TEX. FAM. CODE § 263.402(a) (emphasis added). Although K.W.'s motion for new trial might be construed as impliedly waiving her right to complain that the Department failed to comply with the one-year

dismissal date, it had nothing to do with the extended dismissal date the trial court was permitted to, but did not, set. The parties agreed to a continuance from the December 2007 trial date and that caused the case to be on the court's docket longer than the statutorily permitted 180-day extension period. The trial court was not authorized to extend the time for dismissal again. *Id.* § 263.401(c) ("The court may not grant an additional extension that extends the suit beyond the [180-day] required date for dismissal under Subsection (b)."). However, the agreed continuance which the trial court granted did not extend the dismissal deadline because the trial court never set a dismissal date beyond the one-year dismissal date; and even if it had, the statute specifically precludes parties from extending deadlines by agreement.

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*. *Id.* § 263.402(a). The dissenting Justices would rely on the parties' agreed continuance to effectively negate the statutes' deadlines. That would offend the Family Code by (1) impermissibly extending the statutory deadlines, and (2) doing so by agreement of the parties.

The legal problem here is not one K.W. created, and she should not forfeit protections designed to assure prompt processing of both children and parents through the system because she sought to protect her rights via a procedural vehicle provided for by rule and by statute. *See* TEX. R. CIV. P. 320; TEX. FAM. CODE § 263.405. Motions for new trial are not only allowed, but in some instances are required to preserve error. *See* TEX. R. CIV. P. 324(b); TEX. R. APP. P. 33.1. Here, the result was the granting of a new trial—exactly what motions for new trial are designed to allow. The trial court did not set out its reasons for granting a new trial, but the judge apparently concluded that

there was cause to grant the motion and retry the case.[8] And the statute allowed time for retrial if the trial court had proceeded according to the statute. It was up to the Department or the children's attorney, if the children's attorney believed it was in their best interests, to oppose K.W.'s motion for new trial or move for an extension order. The trial court could have addressed the issues of timeliness of trial settings and extension orders on its own, but did not do so. *See In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (noting that where a parental termination statute gives the trial court authority to grant a deadline extension, the trial court should adhere to the statute's instruction). Or, the trial court could have denied the parties' agreed motion for continuance as to the December trial date. The one person who did *not* have a legal burden to tell the trial court the means by which to terminate her parental rights and who should not be penalized by the doctrines of invited error or estoppel for not doing so, is K.W.

The dissents charge that our holding, in effect, makes the deadlines non-waivable. That is wrong. We hold only that the statute specifies the requirements for a party to waive the deadlines, K.W. did not waive them as the statute provides she could, and this record does not show that K.W. otherwise waived them.[9] TEX. FAM. CODE § 263.402(b).

The dissents also accuse the Court of giving no thought to the best interests of the children. That also is wrong. The members of this Court recognize the significance of this proceeding to the lives of the children involved—anyone would. But as noted above, it is the Legislature, not the

[8] The motion for new trial is not before us, but K.W.'s brief states that her motion was based on insufficiency of the evidence. The Department does not challenge that assertion.

[9] The question of whether the statutory waiver provisions are the exclusive means by which K.W. could have waived the deadlines is not before us and we express no opinion on it.

judiciary, that has enacted the Family Code and given the Department the right to intrude into family relationships. And it is the Legislature that has placed limits and restrictions on how the Department can conduct its intrusions. As appellate judges, we cannot ignore or misconstrue statutory language on the basis that in a particular case we as individuals might disagree with the outcome dictated by the policy choices made and embodied in legislation. *See McIntyre*, 109 S.W.3d at 748; *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985) (noting that courts must be willing to take statutes as they find them, giving true and fair effect to all provisions of the statutes). By our holding, we adhere to the Legislature's policy decisions as reflected in the statute, not to our own individual senses of how this case should turn out based on a mandamus record that does not even contain a statement of facts from the trial.

The dissents further decry the Court's decision to deny relief to the Department because there is no evidence that K.W.'s situation has changed and that as far as this Court knows, the children are going back to the same living conditions that necessitated emergency intervention to begin with. Justice Hecht also would answer the question of whether the Department can refile the same suit, retain custody of the children, and continue its quest to terminate K.W.'s parental rights. Both positions are unwarranted.

As to the first charge, this is a mandamus proceeding. The record before us does not contain any discovery or a statement of facts from the trial. Evaluation of (1) whether the mother's situation has changed, and (2) the living conditions into which the children will go if they are returned to the mother are manifestly factual determinations based on weighing and assessing the evidence. Not only do we not have a record on which to fairly make those types of decisions, even if we did, it is

not this Court's business to be making factual determinations in mandamus proceedings. *See In re Meador*, 968 S.W.2d 346, 354 (Tex. 1998). Further, the argument assumes the children will be returned to the mother with no further action by the Department and no further review by the trial court. These assumptions are not based on anything in the record before us. 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.

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. We recognize that courts of appeals have not been unanimous in their decisions on the matter and the issue is important. But that does not justify our addressing it when it has not been preserved, briefed, or presented as an issue, and when no relief has been requested based on its resolution. *See In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 70 (Tex. 2005).

IV. Conclusion

At the time the trial court denied K.W.'s timely motion to dismiss, the case had been pending for a longer time than that allowed by statute. We agree with the court of appeals that the trial court clearly abused its discretion by not granting K.W.'s motion to dismiss and that a remedy by appeal is not adequate under these circumstances. We deny the Department's request for relief.

Phil Johnson
Justice

OPINION DELIVERED: January 9, 2009