

No. 09-0531

TO THE SUPREME COURT OF TEXAS

IN RE J.H.G.

*FROM THE COURT OF APPEALS FOR THE
FIFTH JUDICIAL DISTRICT AT DALLAS*

05-08-00875-CV

TDFPS'S BRIEF ON THE MERITS

*APPEAL FROM THE 417TH JUDICIAL DISTRICT COURT
THE HONORABLE CYNTHIA WHELESS, JUDGE PRESIDING*

JOHN R. ROACH
Criminal District Attorney
Collin County, Texas

JOHN R. ROLATER, JR.
Assistant Criminal District Attorney
Chief of the Appellate Division

ANDREA L. WESTERFELD
Assistant Criminal District Attorney
2100 Bloomdale Road, Suite 20004
McKinney, Texas 75071
State Bar No. 24042143
(972) 548-4323
FAX (972) 548-4324

MALCOLM MIRANDA
Assistant Criminal District Attorney

ORAL ARGUMENT IS REQUESTED.

IDENTIFICATION OF PARTIES

Pursuant to Rule of Appellate Procedure 38.1, a complete list of the names of all interested parties is provided below.

Parties:

**TEXAS DEPARTMENT OF FAMILY
& PROTECTIVE SERVICES (“TDFPS”)**
(Appellee/Petitioner)

Counsel:

JOHN R. ROACH
Collin County Criminal District Attorney
2100 Bloomdale Road, Suite 20004
McKinney, Texas 75071

JOHN R. ROLATER, JR.
Assistant Criminal District Attorney
Chief of the Appellate Division

ANDREA L. WESTERFELD (Appeal)
Assistant Criminal District Attorney

MALCOLM MIRANDA (Trial)
Assistant Criminal District Attorney

A.H.G.¹
(Appellant/Respondent-Mother)

MICHAEL DIAZ (Trial)
1515 Heritage Drive, Suite 202
McKinney, Texas 75069

J. MATTHEW GOELLER (Appeal)
400 Chisholm Place, Suite 400
Plano, Texas 75075

J.H.G.
(Child)

DANETTE ALVARADO
(Attorney Ad Litem)
207 E. Davis Street, Suite A
McKinney, Texas 75069

Judge:

The Hon. Cynthia Wheless

Court:

417th Judicial District Court
Collin County, Texas

¹ Pursuant to Texas Rule of Appellate Procedure 9.8, requiring parties to use pseudonyms to preserve the privacy of the child, TDFPS will refer to the child as “Jose” and Respondent-Mother as “Mother” or by their initials only.

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Section 263.401 of the Family Code requires the trial court to dismiss a termination case if it has not been tried or properly extended within one year after the suit commenced. The Family Code provides that this requirement may be waived if the parent does not file a proper motion in the trial court. But the Dallas Court of Appeals held that this requirement nonetheless cannot be waived on appeal because it is jurisdictional in nature. The plain language of the statute, this Court’s 2009 ruling, and numerous lower courts of appeals establish that the dismissal deadline is merely procedural in nature and thus waivable, whether at the trial level or on appeal. The holding of the Dallas Court of Appeals is thus contrary to binding authority and should be reversed.

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STATEMENT OF THE CASE

Nature of the Case: This is an accelerated appeal from an involuntary termination of parental rights.

Trial Court: The trial judge was the Honorable Cynthia Wheless of the 417th Judicial District Court of Collin County, Texas. The case was styled *In re B.B.H.G.*,² cause number 417-51250-07.

Trial Court's Disposition: Following a jury trial, the trial court terminated the parental rights of A.H.G. ("Mother") regarding her son "Jose."

Court of Appeals: The parties in the Court of Appeals were Mother/Appellant, now Respondent, and TDFPS/Appellee, now Petitioner. The case was appealed to the Fifth District Court of Appeals in Dallas and heard before Justices O'Neill, Bridges, and FitzGerald.

Court of Appeals' Disposition: In an opinion written by Justice O'Neill, the Court of Appeals reversed the trial court's judgment, holding the trial court improperly extended the case without a written order and thus lacked jurisdiction beyond the one-year dismissal deadline. *See In re J.H.G.*, No. 05-08-00875-CV, 2009 WL 1335156, at *1 (Tex. App.—Dallas May 14, 2009).

² The case was originally filed with the child's name listed as "Baby Boy." The case was restyled on appeal as *In re J.H.G.*, cause number 05-08-00875-CV.

STATEMENT OF JURISDICTION

Pursuant to Article 5, § 3 of the Texas Constitution and Texas Government Code § 22.001, this Court has jurisdiction for the following reasons:

1. The case involves the construction or validity of a statute necessary to the determination of the case, in that the court of appeals reversed and dismissed the case on a point of law not raised in the statement of points, as required under § 263.405 of the Family Code.
2. The court of appeals decided a material question of law differently from prior decisions of this Court and other courts of appeals, in that it held the dismissal deadline of § 263.401 of the Family Code is a jurisdictional rather than a procedural requirement.

ISSUE PRESENTED

The failure to dismiss a termination case after the statutory deadline is a procedural error that can be waived by the parent's failure to file a motion to dismiss. Did the court of appeals err in concluding this was nonetheless a jurisdictional complaint that could not be waived on appeal?

No. 09-0531

TO THE SUPREME COURT OF TEXAS

IN RE J.H.G.

TDFPS'S BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

Comes now, the Texas Department of Family and Protective Services, by and through its Criminal District Attorney John R. Roach, and submits its brief in support of its Petition for Review of the decision of the Fifth District Court of Appeals, which erroneously reversed the trial court's judgment terminating Mother's parental rights. The court of appeals held that the one-year dismissal deadline in parental termination cases is a jurisdictional requirement, contrary to the plain language of Section 263.401 of the Family Code and the holdings of this Court and numerous lower courts of appeals.

STATEMENT OF FACTS

The court of appeals' opinion correctly stated the nature of the case. In addition to the facts presented in its Petition for Review, the State presents the following facts relevant to the instant issue:

TDFPS filed its original suit affecting the parent-child relationship and received temporary orders of possession on March 19, 2007. The original dismissal date was thus March 24, 2008. Tex. Fam. Code § 263.401(a) (providing that termination cases must be dismissed on the first Monday following the one-year anniversary of commencement of the suit unless trial has begun or an extension granted). The trial court orally granted a

three-month extension on February 28, 2008, and noted the ruling in a docket entry. But it did not sign a written order until March 27, 2008. On June 2, 2008, Mother filed a motion to dismiss the case based on the trial court's retention of the case past the one-year deadline. CR 216.

A jury trial was conducted on June 2-6, 2008, and the jury concluded that Mother had failed to comply with the terms of her court-ordered service plan and that termination was in Jose's best interests. 12 RR 12-13; CR 224-25. Accordingly, the trial court signed an order terminating Mother's parental rights on June 13, 2008. CR 236.

Mother's statement of points was timely filed on June 27, 2008. CR 247. In it, she stated that she would appeal the legal and factual sufficiency of the evidence and ineffective assistance of counsel. She did not raise the denial of her motion to dismiss as a claim.

SUMMARY OF THE ARGUMENT

Section 263.401 of the Family Code requires the trial court to dismiss a termination case if it has not been tried or properly extended within one year after the suit commenced. The Family Code provides that this requirement may be waived if the parent does not file a proper motion in the trial court. But the Dallas Court of Appeals held that this requirement nonetheless cannot be waived on appeal because it is jurisdictional in nature. The plain language of the statute, this Court's 2009 ruling, and numerous lower courts of appeals establish that the dismissal deadline is merely procedural in nature and thus waivable, whether at the trial level or on appeal. The holding of the Dallas Court of Appeals is thus contrary to binding authority and should be reversed.

ARGUMENT & AUTHORITIES

The Fifth District Court of Appeals' classification of the dismissal deadline as jurisdictional directly contradicts the plain language of the statute, this Court's recent decision in *In re Department of Family & Protective Services*, and the holdings of numerous lower courts of appeals. Its application of this classification resulted in the reversal on appeal of an issue not raised in a timely statement of points. This is contrary to the Legislature's efforts to speed appeals involving abused and neglected children and reduce their time in the State's care. The decision of the Court of Appeals cannot be supported by either statute or caselaw, and it should be reversed and remanded so that the remainder of Mother's points of error may be considered.

I. The dismissal deadline is not a jurisdictional issue

Chapter 263 of the Family Code, which governs State removals of children from the home, is structured to balance the competing factors of the State's interest in protecting children, the parents' rights to raise their children, and minimizing the disruption to the children's lives. Accordingly, there are many procedures put in place to streamline the process and insure children are either returned to their families or made available for adoption as soon as possible rather than languishing for years in foster care. One such procedure is Section 263.401, which places strict time limits on TDFPS termination procedures. The trial court must dismiss the suit unless an extension is granted by the first Monday following the one-year anniversary of the commencement of the suit. Tex. Fam. Code § 263.401(a).

But the trial court’s failure to dismiss the suit after the deadline does not deprive it of jurisdiction. Although earlier versions of the statute declared that a trial court lost jurisdiction after the one-year deadline, the Legislature amended it in 2001 to delete any references to jurisdiction. Act of May 22, 2001, 77th Leg., R.S., ch. 1090, § 8, 2001 Tex. Gen. Laws 2396; *In re Department of Family & Protective Services* (“*Department*”), 273 S.W.3d 637, 642 n.5 (Tex. 2009). Instead, Section 263.401 now merely states that a trial court may “retain the suit on the court’s docket” with a timely extension order. Tex. Fam. Code § 263.401(a). When this Court reviewed the revised statute, it concluded that the plain language of the statute no longer indicates that the dismissal deadline is jurisdictional, and the Legislature’s specific deletion of the word “jurisdiction” supports this conclusion. *See Department*, 273 S.W.3d at 642.

Furthermore, the Legislature reinforced that the dismissal deadline was not jurisdictional by amending Section 263.402 at the same time. Under that section, a parent who fails to make a timely motion to dismiss the suit waives her right to a dismissal. Tex. Fam. Code § 263.402. Thus, a parent may forfeit her right to dismissal at the trial court level by failing to file a timely motion. But subject-matter jurisdiction cannot be waived. *Department*, 273 S.W.3d at 642; *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008). If the Legislature had intended to make the dismissal deadline a jurisdictional matter, it would not have expressly permitted it to be waived. *See Department*, 273 S.W.3d at 642.

Both the plain language of the statute and this Court’s holding in *Department* unambiguously establish that the dismissal deadline is not a jurisdictional claim.

Numerous lower courts of appeals have likewise held this very complaint to be procedural and waivable even prior to this Court's decision in *Department*. See, e.g., *In re Walker*, 265 S.W.3d 545, 549 n.10 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *In re Ludwig*, 150 S.W.3d 819, 822 (Tex. App.—Austin 2004, no pet.); *In re J.B.W.*, 99 S.W.3d 218, 224 n.27 (Tex. App.—Fort Worth 2003, pet. denied); *In re D.D.M.*, 116 S.W.3d 224, 229 (Tex. App.—Tyler 2003, no pet.); *In re A.B.*, 125 S.W.3d 769, 773 n.2 (Tex. App.—Texarkana 2003, pet. denied). But despite the controlling precedent from this Court, the Dallas Court of Appeals nonetheless held that Mother's complaint was an objection to subject matter jurisdiction because it "relates to the trial court's ability to retain the case after the dismissal date." *In re J.H.G.*, 2009 WL 1335156, at *2. The court's entire analysis was:

However, the mother's third issue does not involve terms of the final order. Instead, it relates to the trial court's ability to retain the case after the dismissal date and objections to subject matter jurisdiction cannot be waived. [*Department*], 273 S.W3d at 642 (citing *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (per curiam)); see also, *In re T.D., S.T., and C.T.*, No. 07-08-0399-CV, 2009 WL 1011110 (Tex. App.—Amarillo, April 15, 2009, no pet. h.) ("Generally, we are barred from considering an issue not raised in a timely statement of points . . . [h]owever, the issue may constitute a challenge to the trial court's jurisdiction to render judgment and thus to this court's jurisdiction to consider the merits of the appeal, so we will address it."). We conclude the mother's third issue has not been waived.

Id.

The court of appeals did not attempt to distinguish or even address this Court's controlling precedent on the issue. Indeed, it cited *Department* for the premise that subject-matter jurisdiction cannot be waived, but it did not acknowledge that the same

opinion expressly that held the dismissal deadline is *not* an issue of subject-matter jurisdiction. *Id.*

The holding of the Dallas Court of Appeals is contrary to the plain language of the statute, the controlling precedent of this Court, and the findings of numerous lower courts of appeals. Because a parent may forfeit her right to complain about the dismissal deadline at the trial court by not filing a timely motion, then she may also forfeit the right to complain in the appellate court by not filing a timely statement of points. The dismissal deadline is not jurisdictional.

II. The decision of the court of appeals frustrates the purpose of the statement of points requirement

In concluding that the dismissal deadline is a jurisdictional requirement, the court of appeals held that it could address Mother's complaint despite her failure to raise it in a timely statement of points. *In re J.H.G.*, 2009 WL 1335156, at *2-3. Any defendant wishing to appeal a termination under Chapter 263 must first file a statement of points within fifteen days of the trial court signing a written order. Tex. Fam. Code § 263.405(b)(2). Appellate courts are prohibited from considering any issue not specifically raised in a timely statement of points. Tex. Fam. Code § 263.405(i). The purpose of this requirement is to reduce post-judgment delays by avoiding meritless appeals, thereby reducing the time children spend in state care. *See In re R.J.S.*, 219 S.W.3d 623, 627 (Tex. App.—Dallas 2007, pet denied). The Legislature has explained:

Compliance, as the Legislature intended, would correct any wrongs 30 days after trial, as opposed to extending reversals months or years after a trial. If a mistake is pointed out to the trial court that warrants a new trial, the trial court can immediately order a new trial, and the Legislature's goal to

decrease post-judgment delays is accomplished. Encouraging appellants to ignore the post-judgment procedures enacted by the Legislature in 2001, not only increases the amount of time that abused and neglected children spend in foster care, it bogs down the appellate courts with mistakes that could have been quickly and easily corrected at the trial level.

House Comm. on Juvenile Justice and Family Issues, Bill Analysis, H.B. 409, 79th Leg., R.S. 2005.

In short, the purpose of a statement of points is to require a parent to bring an error to the trial court's attention early enough in the process that it may be quickly corrected rather than holding the complaint until the appellate courts and extending the process for months or years. This is much like other preservation rules, which require a party to bring her complaints to the trial court's attention at a time they can be easily corrected or forfeit them on appeal. *See, e.g.,* Tex. R. App. P. 33.1 (requiring complaints to be first made to the trial court). The decision of the Dallas Court of Appeals declaring the dismissal deadline to be jurisdictional bypasses these legislatively mandated procedures. Because Mother's complaint was not included in a timely filed statement of points, the court of appeals was prohibited from considering it on appeal.

III. Response to Mother's arguments

In her response to the State's Petition for Review, Mother raises three main arguments. Mother focuses primarily on arguing that the court of appeals correctly found the trial court abused its discretion in failing to grant her motion to dismiss, simply repeating her arguments from her original brief. *See* Response at 3-6; *compare* Appellant's Brief at 30-32. But that issue is not before this Court. The State's Petition is

limited to the question of whether the dismissal deadline is a jurisdictional issue. If it is not jurisdictional, then neither the court of appeals nor this Court has authority to consider the motion to dismiss because it was not raised in Mother's statement of points. Tex. Fam. Code § 263.405(i).

Second, Mother claims that she was not required to include the motion to dismiss issue in her statement of points because the issue did not concern the final order of termination, only the trial court's retention of the case on its docket past the dismissal deadline. *See* Response at 6-7. But Mother did not attempt to file an application for a writ of mandamus on the dismissal issue.³ Rather, she included it as a point of error in her appeal of the trial court's final order terminating her parental rights. This Court has held that an accelerated appeal under Section 263.405 is an appropriate means of appealing a trial court's failure to dismiss. *See In re Department of Family & Protective Services*, 210 S.W.3d 609, 614 (Tex. 2006). Mother chose to appeal this issue with the final order, and she was thus obligated to follow the rules governing such an appeal.

Finally, Mother argues that the dismissal issue was included in her statement of points because she "specifically reserved the right to raise other anticipated points of error in the court of appeals." *See* Response at 7-8. But this does not comply with either the requirements or the purpose of the statement of points requirement. The statute requires that the parent file a statement of "the point or points on which the party intends to appeal," and it provides that an appellate court may not consider *any* issue not raised.

³ Indeed, Mother did not even file her motion to dismiss until June 2, 2008, the day trial began and three months past the dismissal deadline. CR 216.

Tex. Fam. Code § 263.405(b)(2), (i). Moreover, the statute requires specificity in the complaints: it provides that generalized complaints that the verdict is contrary to the evidence or that the evidence is insufficient are not sufficiently specific to preserve the complaint for appeal. Tex. Fam. Code § 263.405(i). Indeed, the purpose of the statement of points—to give the trial court the opportunity to correct its mistakes and accelerate the appellate process—would be wholly frustrated by allowing a defendant to simply file a statement reserving the right to raise other issues. And Mother never attempted to file an amended statement of points or motion for new trial addressing the complaint. Rather, she raised it for the first time in the court of appeals, precisely the outcome the Legislature sought to avoid. Her statement of points did not raise any complaint about the denial of her motion to dismiss and thus was not sufficient to preserve her complaint for appeal.

V. Conclusion

The holding of the Dallas Court of Appeals that the dismissal deadline is jurisdictional is contrary to the plain language of the statute, the controlling precedent of this Court, and the decisions of numerous lower courts of appeals. The dismissal deadline is not a jurisdictional issue because the statute expressly permits a parent to waive her complaint by failing to file a timely motion to dismiss at the trial court. A parent may similarly waive her complaint by failing to raise the issue in a timely statement of points. Because Mother failed to raise the dismissal issue in her statement of points, the court of appeals was prohibited from considering it on appeal. The opinion

granting Mother's third point of error should be reversed and the case remanded to the court of appeals for consideration of her remaining points of error.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, TDFPS prays that the Supreme Court reverse the decision of the Court of Appeals and remand for consideration of Mother's remaining points of error.

Respectfully submitted,

JOHN R. ROACH
Criminal District Attorney
Collin County, Texas

JOHN R. ROLATER, JR.
Assistant Criminal District Attorney
Chief of the Appellate Division

/s/ Andrea L. Westerfeld
ANDREA L. WESTERFELD
Assistant Criminal District Attorney
2100 Bloomdale Road, Suite 20004
McKinney, Texas 75071
State Bar No. 24042143
(972) 548-4323
FAX (214) 491-4860

CERTIFICATE OF SERVICE

A true copy of the State's Brief on the Merits has been sent via first-class mail to opposing counsel, the Honorable J. Matthew Goeller, 400 Chisholm Place, Suite 400, Plano, Texas 75075, on this, the 9th day of September, 2009.

/s/ Andrea L. Westerfeld
Andrea L. Westerfeld