

SECTION 263.401: problems/solutions

First Annual Child Protection Law Seminar

Presented by Office of Vince Ryan

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Problems

1. Lengthy; key-terms undefined.
2. Repetitive amendments,
3. Recent conflicting application dates.

1997 VERSION - jurisdictional

Sec. 263.401. DISMISSAL AFTER ONE YEAR EXTENSION.

(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 rendered a temporary **order** appointing the department as temporary managing conservator, the **court shall dismiss the suit ...**

(b) 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), ...

Act of May 28, 1997, 75th Leg. R.S., ch. 600 §17 (emphasis added)

2001 VERSION –not jurisdictional

Sec. 263.401. DISMISSAL AFTER ONE YEAR EXTENSION. (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 rendered a temporary order appointing the department as temporary managing conservator, the court shall **dismiss the suit** ...

(b) *The* [~~On or before the time described by Subsection (a) for the dismissal of the suit, the~~] **court may retain** [~~extend the court's jurisdiction of~~] the suit *on the court's docket* for a period *not to exceed* [~~stated in the extension order, but not longer than~~] 180 days after the time described by Subsection (a), if the court *finds that* [~~has~~] continuing [~~jurisdiction of the suit and~~] the appointment of the department as temporary managing conservator is in the best interest of the child

Act of May 22, 2001, 77th Leg. R.S., ch. 1090 (emphasis added)

2005 VERSION –retain w/findings

Sec. 263.401. DISMISSAL AFTER ONE YEAR EXTENSION. (a) Unless the court has **rendered a final order** or granted an extension ... 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** ...

(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

Act of May 29, 2005, 79th Leg., R.S., ch. 268

2007 VERSION- commencement

Sec. 263.401. DISMISSAL AFTER ONE YEAR EXTENSION. (a) Unless the court has commenced the trial on the merits [~~rendered a final order~~] or granted an extension under Subsection (b), on the first Monday after the first anniversary, the court shall dismiss

(b) Unless the court has commenced the trial on the merits, the [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

Act of May 27, 2007, 80th Leg. R.S., ch. 866 (emphasis added)

2015 VERSION – new trial

Sec. 263.401. DISMISSAL AFTER ONE YEAR EXTENSION. (a) Unless the court has commenced the trial on the merits or granted an extension under Subsection (b) or (b-1), ...

(b-1) If, after commencement of the initial trial on the merits within the time required by Subsection (a) or (b), the court grants a motion for a new trial or mistrial, or the case is remanded to the court by an appellate court following an appeal of the court's final order, the court shall retain the suit on the court's docket and render an order in which the court:

Act of May 29, 2015, 75th Leg., R.S. ch. 944

2017 VERSION - jurisdictional

Sec. 263.401. DISMISSAL AFTER ONE YEAR EXTENSION. (a) Unless the court has commenced the trial on the merits or granted an extension under Subsection (b) or (b-1), 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's jurisdiction** over [~~court shall dismiss~~] the suit affecting the parent-child relationship or requests that the department be named conservator of the child is terminated and the suit is **automatically dismissed** without a court order. *Not later than the 60th day before the day the suit is automatically dismissed, the court shall notify all parties to the suit of the automatic dismissal date.*

Act of May 26, 2017, 85th Leg., ch.317 (HB 7) – § 79 (*effective 9/1/17*)

Act of May 28, 2017, 85th Leg., ch.319 (SB11) – § 33 (*suits filed on or after 9/1/17*)

SOLUTION

1. Be positive, & logical without emotion
2. Take it apart
3. View easy parts first

3 deadlines

1. Monday after anniversary Dept TMC
2. No later 180 days after first deadline
3. No later 180 days after new trial/remand

What event satisfies the deadlines?

“Commenced the trial on the merits”

Uncertain meaning of “commenced the trial on the merits”

Case law suggestions:

1. Called for trial. Supreme Court (1876)
2. Not *just* called for trial. Amarillo (2016)
3. Announcement w/preliminary evidentiary rulings may be enough – Houston (2016)
4. We don't know. Tyler (2016).

TRCP 247. Cases tried when set.

Every suit shall be *tried when it is called*, unless continued or postponed to a future day or placed at the end of the docket to be called again for trial in its regular order. No cause which has been set upon the trial docket of the court shall be taken from the trial docket for the date set except by agreement of the parties or for good cause upon motion and notice to the opposing party.

Courts can recommence

- San Antonio Court found disingenuous for judge with 10 years experience to suggest she could not stop trial to comply with mandamus order because she not think she could recommence trial after starting. In re Reed, 901 S.W.2d 604, 614 (Tex.App.-San Antonio, 1995, orig. proceeding).

Commence on Separate Issues

Rule 174(b) can separate trial on any issue in the interest of convenience or to avoid prejudice.

Tarrant Re'l Water Dist. v. Gragg, 151 S.W.3d 546, 556
(Tex. 2004) Also see *Winfield v. Renfro* 821 S.W.2d 640,
652 -653 (Tex.App.-Hous. [1 Dist.],1991, no pet.)
(separate jury trials on the issues of marriage and divorce)

Courts have power to recommence for additional evidence

- **Rule 270:** When it clearly appears to be necessary to the due administration of justice, the court *may permit additional evidence to be offered at any time*; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

Courts can commence trial on
noncontested matters
anytime, set or not

Rule 245: Noncontested cases may be tried or disposed at any time whether set or not, and may be set at any time for any other time.” Rule 245.

PROBLEM:

Does Subsection(b-1) apply to any

- Mistrial.
- New trial.
- Remand.

NOT if the court orders the new trial order vacated.

Yes.

- (1) Trial court may ungrant a motion for new trial., *See Hidalgo v. Hidalgo* 310 S.W.3d 887, 889 (Tex. 2010) (“a trial court has power to set aside an order granting a motion for new trial ‘any time before a final judgment is entered.’”)
- (2) Appellate court might be able to undo if it was an abuse of discretion.

*NOT when partial new trial
granted on conservatorship only
and intervenor sued for that.*

- *In re E.C., 431 S.W.3d 812 (Tex. App. 14th
2014)*

PROBLEM:

- What if parent requires more time to do services to avoid being forced to trial and facing termination under TFC 161.001(b)(1)(O)?

2 alternatives

263.401(b) (regular 180 day extension)

OR

263.403 (a-1) transition plan for return
w/more time.

PROBLEM:

What if 263.401 forecloses State's ability to maintain meritorious action to protect a child from peril?

- Intent of Section 263.401 is to “ensure children’s lives are not kept in limbo while judicial processes crawl forward.”
- –not to unreasonably prevent constitutionally assigned officers from performing duty to protect most vulnerable citizens of society: children.

Consider how violates constitution
& properly preserve

*In re Bishop, 8 S.W.3d 412, 422 n. 6 (Waco 1999)
(263.401 may be subject to challenge on the basis
it violates separation of powers but Dept does not
raise that)*

DEPRIVATION OF LIFE

- No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by due course of the law of the land.
- Art. 1 §19

EQUAL RIGHTS

- All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.
- Art. 1 §3