COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CRYSTAL HENDREN,		§	No. 08-21-00141-CV
	Appellant,	§	Appeal from the
v.		§	County Court at Law No. 5
GABRIEL LAZAR,		§	of El Paso County, Texas
	Appellee.	§	(TC# 2020DCV3449)

O P I N I O N

This is an appeal from an interlocutory order that excludes one co-owner of real estate from the use and enjoyment of her property pending resolution of a partition. But that same party's pleadings below also seek a divorce, alleging that the co-owners are married. The decision point here is whether the trial court excluded the co-owner under the authority of the Family Code, which allows the trial court in a pending a divorce action to issue injunctive relief to preserve property and maintain the peace, or whether the trial court's order was made as a temporary injunction in a simple real property dispute. That same question determines our jurisdiction to hear this appeal. We would lack jurisdiction to review by appeal a trial court's interlocutory order, such as this, if the order is issued under the Family Code. Conversely, if the order is based on the general injunction statute, we can review the grant or denial of a temporary injunction. For the reasons

noted below, the trial court's order arises from the Family Code, and we lack jurisdiction to decide the case.

I. BACKGROUND

Crystal Hendren and Gabriel Lazar are listed on a June 2020 warranty deed as the purchasers of a property in El Paso County with the street address of 444 San Clemente Drive (the San Clemente property). Our record contains photographs suggesting this is a single-family residential dwelling.

In October 2020, Hendren sued in County Court at Law No. 6 seeking a partition of the property. She alleged that the property was held by her and Lazar as tenants in common and sought a declaration to that effect. Hendren also invoked the partition provisions under section 23.001 et seq. of Texas Property Code asking that the court partition the property, or alternatively, asserting that if the San Clemente property was not susceptible to partition, that the court should order a partition by sale under TEX.R.CIV.P. 770.

Lazar answered the suit, and in his own counterclaim, asserted that he and Hendren executed a Warranty Deed and Deed of Trust for the San Clemente property as "co-owners (tenants in common)[.]" In the counterclaim, Lazar also asked the court to partition the property by sale, alleging the estimated present value of the undivided tract as $728,360.

While the parties seemingly agreed on their status as co-owners, and the need to partition the property--including through a sale--the record shows they were likely to disagree on how the proceeds of the sale might be divided. Hendren alleged that an undeveloped lot the two previously owned as co-tenants was sold and used to purchase or improve the San Clemente property. Lazar alleged that he alone was making the on-going mortgage, tax, and insurance payments for the San Clemente property, as well as funding improvements. He in fact sought "temporary orders" pending the litigation to require Hendren to pay her fair share of those on-going expenses based

on who was given possession of the premises. Hendren responded, arguing that the motion in essence asked for a temporary injunction, and as such, failed to meet the standards for that kind of interim remedy. In addition, Hendren moved for summary judgment contending her status as a co-owner was undisputed and that she was entitled as a matter of right to a partition.

Before these motions were heard, however, the case was transferred to County Court at Law No. 5 which on El Paso County's Courts directory, is listed as a court for "Family Cases Only." Befitting that court's designation, Hendren filed an amended petition alleging that she and Lazar have a valid marriage. She asked for a divorce because the marriage had become insupportable due to discord or conflict of personalities without expectation of reconciliation. As an example of the discord, she alleged that Lazar had recently broke the lock and door on the property, locked Hendren's dog in a bathroom, and broke a window.

Her pleadings also sought temporary orders typical for a divorce suit, including an order that would prevent Lazar from terminating the utilities for the San Clemente property or excluding Hendren from the use and enjoyment of the residence. In fact, she sought the exclusive use and possession of the residence while the case was pending and moved to enjoin Lazar from entering or remaining on the premises. Her amended petition, however, still contained the claim for partition as in her original petition.

On March 16, 2021, the trial court signed a Temporary Restraining Order that included a provision that neither Hendren nor Lazar were to exclude the other from any "marital property." But that order was quickly followed by an April 5, 2021 order that excluded Lazar from the San Clemente property and required him to continue to make mortgage payments. In that new temporary order, Hendren was granted exclusive possession of the residence, but with a caveat: the order warned Hendren that she should plan on possibly vacating the property by the end of April.

Then, on April 27th, the trial court continued its temporary orders until further order of court, allowing Hendren to remain in the property if she reimbursed Lazar with her share of the mortgage payment. Failing that, she was ordered to vacate no later than May 8th.

After a period marked by rancorous discovery disputes and re-settings, the trial court held an evidentiary hearing on June 9, 2021, at which it concluded that the evidence *failed to establish* a common law marriage between Hendren and Lazar.

Then on July 16th, the court entered another miscellaneous order that required Hendren to vacate San Clemente property no later than July 30, 2021. Lazar was required to pay 100% of the mortgage from that time forward. Hendren filed a notice of appeal from that order citing as a jurisdictional basis, TEX.CIV.PRAC. & REM.CODE § 51.014(a)(4) which permits interlocutory appeals from the grant or refusal to grant a temporary injunction. We docketed that notice of appeal under cause number No. 08-21-00132-CV.

While Hendren did in fact vacate the property, she asked that the trial court suspend enforcement of that order. Following a hearing on August 6, 2021, the trial court declined to grant that relief noting the following:

> (1) Hendren was the only party in possession of the San Clemente property for a "good part" of the year;
>
> (2) the monthly mortgage on the property is over $5,000 and Hendren made clear to the court that she is unable to pay her share of the mortgage;
>
> (3) while Hendren had earlier requested a TRO based on a fear of physical violence from Lazar, she represented at the hearing that Lazar could also use the property. The trial court found that representation was contrary to her prior allegations of physical and verbal confrontations between the two.

The trial court concluded: "In light of the current circumstances, for the safety and welfare of the parties and to avoid further physical and/or verbal confrontations, the court denies the requested relief." Hendren filed a separate interlocutory appeal from that order which we docketed

under cause No. 08-21-00141-CV. As both appeals involve similar issues, we resolve both simultaneously.

II. ISSUES ON APPEAL

Although Hendren lists six issues for review, they reduce to the following: Because the trial court found insufficient evidence of a marital relationship, it no longer had before it a suit for dissolution of a marriage. The trial court subsequently abused its discretion in issuing what amounts to a temporary injunction that excludes a tenant-in-common from the property during the pendency of a dispute between co-owners with undivided interest in the property.

Hendren's main contention is that when two or more persons own property in equal or unequal undivided shares, "each person has an equal right to possess the whole property[.]" *Frazier v. Donovan*, 420 S.W.3d 463, 467 (Tex.App.--Tyler 2014, no pet.); *see also Cass v. Stephens*, 156 S.W.3d 38, 61 (Tex.App.--El Paso 2004, pet. denied). Consequently, the trial court could not exclude one co-owner from the use and possession through an injunction without meeting the considerable burdens for issuance of injunctive relief. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (setting forth requisites for granting injunctive relief).

Both parties' original pleadings recognize that co-tenants can compel a partition of jointly owned property, [1] and for some properties, a partition by sale.[2] For reasons unclear in our record, the parties have made little progress in accomplishing the mechanics of a partition, or partition by sale, though both parties seek that relief. But our narrower question is whether under the present

[1] "A joint owner or claimant of real property or an interest in real property . . . may compel a partition of the interest or the property among the joint owners or claimants[.]" TEX.PROP.CODE ANN. § 23.001. When a party seeks partition, the trial court shall "determine the share or interest of each of the joint owners or claimants in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise." TEX.R.CIV.P. 760.

[2] The trial court must order partition if it "determines that the whole, or any part of such property is susceptible of partition." TEX.R.CIV.P. 761. "Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition." TEX.R.CIV.P. 770.

record, did the trial court err in excluding Hendren from the property pending further resolution of the case. And as we also note, that question bleeds into whether we have jurisdiction to hear this appeal.

III. JURISDICTION

We first address our jurisdiction to hear this matter. Generally, appeals may be taken only from final judgments. *Qwest Commun. Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000) ("An appellate court lacks jurisdiction to review an interlocutory order unless a statute specifically authorizes an exception to the general rule, which is that appeals may only be taken from final judgments."). Interlocutory orders may be appealed only when expressly permitted by statute. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). Hendren premises this Court's jurisdiction on TEX.CIV.PRAC. & REM.CODE § 51.014(a)(4) which permits interlocutory appeals from the grant or refusal to grant a temporary injunction "as provided by Chapter 65." In turn, Chapter 65 of the Texas Civil Practices and Remedies Code sets out the general provisions for issuance of injunctions. *Id.* § 65.001 to § 65.045.

Lazar, however, contends that the family court's order was issued under the Family Code, and not Chapter 65. Under the Family Code, the trial court is expressly authorized to issue temporary injunctions and other temporary orders. TEX.FAM.CODE ANN. § 6.502. And relevant here:

> While a suit for dissolution of a marriage is pending and on the motion of a party or on the court's own motion after notice and hearing, the court may render an appropriate order, including the granting of a temporary injunction for the preservation of the property and protection of the parties as deemed necessary and equitable and including an order directed to one or both parties:
> . . .
> (6) awarding one spouse exclusive occupancy of the residence during the pendency of the case[.]"

Id. § 6.502(a)(6). The Code also provides parallel authority for the same type of order "pending the appeal." *Id*. § 6.709(a)(4). And most important to our jurisdiction, section 6.507 provides: "An order under this subchapter, except an order appointing a receiver, is not subject to interlocutory appeal." *Id*. § 6.507.

Courts have held that the prohibition against interlocutory appeal under the Family Code takes precedence over section 51.014(a)(4) of the Civil Practice and Remedies Code. *Perkins v. Perkins*, No. 03-21-00135-CV, 2021 WL 2816008, at *1 (Tex.App.--Austin July 7, 2021, pet. denied); *Hudson v. Aceves*, 516 S.W.3d 529, 536-37 (Tex.App.--Corpus Christi 2016, no pet.); *Cook v. Cook*, 886 S.W.2d 838, 839 (Tex.App.--Waco 1994, no writ) (construing former TEX.FAM.CODE ANN. § 3.58(g). This Court held the same under the predecessor to the Civil Practices and Remedies Code. *Beckler v. Beckler*, 114 S.W.2d 618, 619 (Tex.App.--El Paso 1938, no writ). We concluded that we lacked jurisdiction to hear an interlocutory appeal of a trial court's temporary injunction in a divorce suit that barred one party from selling or disposing of community property. *Id*. We acknowledged that then existing article 4664 allowed for an interlocutory appeal of the grant or denial of a temporary injunction under then Title 76 of the Texas Civil Statutes.[3] But because the injunction in that case was issued as part of a divorce governed by Title 75, the general statutory provision did not apply. *Id.*

But Hendren counters that the trial court's order could not have arisen under the Family Code, as the trial court concluded in an evidentiary hearing just a month earlier that the evidence failed to support the existence of a marriage. And without an underlying marriage, she urges that

[3] Act of 1909 codified at Tex.Rev.Civ.Stat. Ann. art 4662 ("Any party to a civil suit wherein a temporary injunction may be granted or refused . . . under any provision of this title . . . may appeal for such order or judgment to the Court of Civil Appeals . . . ." Repealed by Act of May 17,1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 TEX.GEN.LAWS 3242, 3322. Title 76 of the civil statutes was titled "Injunction."

the trial court could not be dividing community property. Hence, the parties primary dispute on the merits of the appeal necessarily decides our jurisdiction, so we next turn there.

IV. DISCUSSION

The question before us, then, is whether the complained of order is necessarily an injunction issued under chapter 65 of the Texas Civil Practices and Remedies Code, or whether it was more like a temporary order issued under the Texas Family Code. And if a chapter 65 temporary injunction, did the trial court satisfy the predicates for temporary injunctions.

Hendren pitches her claim that the Family Code is irrelevant here because the trial court failed to find evidence to support a marriage. And if no marriage, there was no predicate for a divorce, or division of community property. She principally relies on *Ex parte Threet*, 333 S.W.2d 361, 362 (Tex. 1960). *Threet* is a habeas corpus case. A trial court held Mr. Threet in contempt for failing to make support payments pending a divorce action. He then petitioned for habeas in the Texas Supreme Court challenging his detention. Based on the facts of the case, the court held that there was insufficient evidence of a marriage--a prerequisite for the support order. *Id*. at 363-64. And absent a basis for the support order, the contempt finding was set aside. *Id*.

The case here, however, differs from *Threet* in several respects. Unlike Mr. Threet who always disclaimed the existence of a marriage, Hendren herself filed a pleading alleging the existence of a marriage. She invoked provisions of the Family Code, such as when she asked for post-divorce maintenance. And she asked the trial court to grant injunctive relief to deny one "spouse" the right to occupy jointly owned property. Mr. Threet had never conceded the existence of a valid marriage, and thus never invoked a court's jurisdiction to decide a divorce proceeding. But here, Hendren did make that contention, and herself invoked and benefited from the trial court's issuance of a temporary injunction under the Family Code.

Additionally, the *Threet* court, citing common law authority, held that a "valid marriage is a prerequisite to a support order in an action for divorce." *Id*. at 363-64, *citing*, Annotation, 11 A.L.R.2d 1040; 17 American Jurisprudence 659; 27A C.J.S. Divorce s 208(3), p. 902; Keezer, Marriage and Divorce (3rd ed.) 604. Its rationale, therefore, was grounded in the common law and not a statute. But here, we are guided by section 6.502 of the Family Code that provides: *"[w]hile a suit for dissolution of a marriage is pending* . . . the court may render an appropriate order, including the granting of a temporary injunction for the preservation of the property and protection of the parties. . . ." TEX.FAM.CODE ANN. § 6.502 (emphasis supplied). The provision does not require a preliminary showing of the existence of a marriage, and it applies while the suit is *pending*. The divorce suit is still pending below. The pleading that Hendren filed has never been withdrawn.[4] And while the trial court did make a finding that there is no proof of a marriage, that ruling is interlocutory and subject to being revisited by the trial court or challenged on appeal once the case become final.

We also note that the order below lacks the indicia of a typical temporary injunction order as would a non-family law injunction. It does not set a hearing date for a permanent injunction. *See* TEX. R. CIV. P. 683 ("Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought."). Nor does it set a bond. TEX. R. CIV. P. 684 ("In the order granting any temporary restraining order or temporary injunction, the court shall fix the amount of security to be given by the applicant."). These specific requirements, however, do not apply to temporary injunctions issued under the Family Code. TEX.FAM.CODE ANN. § 6.503 (dispensing with requirement for a bond, and setting date for trial on merits). The very appearance of the order thus further suggests that the trial court issued its

[4] The case thus also differs from another case discussed by Lazar which addressed the effect on temporary orders when a party non-suits their suit for divorce. *Georgiades v. Di Ferrante*, 871 S.W.2d 878, 882 (Tex.App.--Houston [14th Dist.] 1994, writ denied).

order under the Family Code, and did not intend to issue a temporary injunction pursuant to the Civil Practices and Remedies Code.

Because the trial court's order here is founded in the Family Code, and not chapter 65 of the Texas Civil Practices and Remedies Code, we lack the jurisdiction to review its propriety as a temporary injunction under TEX.CIV.PRAC. & REM.CODE § 51.014(a)(4).

V. CONCLUSION

For the reasons noted, we dismiss the appeal for want of jurisdiction.

JEFF ALLEY, Justice

February 11, 2022

Before Rodriguez, C.J., Marion, C.J. (Ret.), and Alley, J.
Marion, C.J. (Ret.), sitting by assignment