Dismissed For Lack of Appellate Jurisdiction and Memorandum Opinion filed August 15, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00068-CV

IN THE INTEREST OF B.H. AND J.H., CHILDREN

On Appeal from the 312th District Cout
Harris County, Texas
Trial Court Cause No. 2015-77550

MEMORANDUM OPINION

The petitioner in a modification suit under Family Code chapter 156 and in an enforcement suit under Family Code chapter 157 seeks to appeal from the trial court's order granting the respondent's motion to unseal records in the trial court's file. In this order the trial court does not actually dispose of all claims and all parties before the court or state with unmistakable clarity that the order is a final judgment. Texas Rule of Civil Procedure 76a does not apply to the order, so this order may not be deemed to be severed or a final and appealable judgment under Rule 76a(8). The parties have not cited, and research has not revealed, a statute that

provides for an interlocutory appeal from the order. Therefore, we dismiss this appeal for lack of appellate jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2016 the trial court rendered an Agreed Final Decree of Divorce dissolving the marriage between appellant Gina Calanni and appellee Franz Henning and setting the terms and conditions for access to and possession of their children. In 2019, Henning filed a modification suit against Calanni under Family Code chapter 156, seeking to modify the divorce decree ("First Modification Suit"). While that suit was pending, Calanni filed a motion to seal in which she asked the trial court to seal all the court records "in this case" and "in this action" ("Motion to Seal"). Calanni did not make this motion under Texas Rule of Civil Procedure 76a; instead, she stated that the documents filed in the trial court were not subject to the standard for sealing court records in Rule 76a because these documents were filed in an action that originally arose under the Family Code. *See* Tex. R. Civ. P. 76a(2) (defining "court records" subject to Rule 76a as "all documents of any nature filed in connection with any matter before any civil court, except . . . documents filed in an action originally arising under the Family Code"). Though Henning opposed the motion to seal, he agreed that the documents that Calanni asked the court to seal were not covered by Rule 76a. The trial court ordered that all documents bearing the cause number and style of the First Modification Suit be sealed, "except those documents that are required by law to be recorded in the minutes of the [trial court]" ("Sealing Order"). In October 2020, the trial court signed a final order in the First Modification Suit, in which the trial court did not mention the Sealing Order, and in which the trial court stated, "IT IS ORDERED that all relief requested in this case and not expressly granted is denied."

In September 2021, Calanni filed a modification suit against Henning under Family Code chapter 156, seeking to modify the final order in the First Modification Suit ("Second Modification Suit"). Calanni also filed an enforcement suit against Henning under Family Code chapter 157. In October 2021 Henning filed "Respondent's Motion to Unseal Court Records," in which he asked the trial court to unseal its file and allow Henning's lawyer to access the file and make copies of documents in the file ("Motion to Unseal"). Henning did not file the Motion to Unseal under Rule 76a. Calanni opposed the motion. On January 16, 2022, the trial court signed an order granting the Motion to Unseal, unsealing all documents that bear the trial court cause number, and ordering that the parties may identify with specificity any mental health records that have become part of the trial court's file and present those records to the trial court for a determination as to whether those records should remain sealed ("Unsealing Order").

Two weeks later Calanni filed a notice of appeal, seeking to appeal from the Unsealing Order. On appeal this court granted Calanni's motion to stay the Unsealing Order and stayed that order until the issuance of the mandate in this appeal.[1]

II. Issues and Analysis

Under two appellate issues Calanni argues that (1) the trial court lacked plenary power to vacate, modify, or otherwise change the Sealing Order and therefore the Unsealing Order is void; and (2) even if the trial court had jurisdiction, the trial court abused its discretion in granting the Motion to Unseal because no evidence supports the motion and because the Order is contrary to the

[1] Even though the Unsealing Order has been stayed, and thus the Sealing Order remains in effect, our appellate record is not sealed. Our description of what happened in the trial court is based on our unsealed appellate record.

children's best interest. On appeal, Calanni has not stated the alleged basis for this court's appellate jurisdiction, and Henning has not asserted that this court lacks appellate jurisdiction. Nonetheless, we must review sua sponte issues affecting our appellate jurisdiction.[2] *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004). Before addressing the merits of this appeal, we first determine whether we have appellate jurisdiction.

A. Is the Unsealing Order a final and appealable judgment?

In civil cases in which the judgment or amount in controversy exceeds $250, exclusive of interest and costs, a person may take an appeal to the court of appeals from a final judgment of a district or county court. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.012 (West, Westlaw through 2023 R.S.). An order issued without a conventional trial on the merits is final for purposes of appeal if it (1) actually disposes of all claims and all parties before the court or (2) states with unmistakable clarity that it is a final judgment. *See Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 192, 200 (Tex. 2001). In the Unsealing Order, the trial court did not dispose of any claims or parties or state with unmistakable clarity that the Unsealing Order is a final judgment. The trial court did not grant a severance.

The only way that the Unsealing Order might be a final and appealable judgment would be if the Unsealing Order were deemed to be a final and appealable judgment under Texas Rule of Civil Procedure 76a(8).[3] *See* Tex. R.

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[2] We have given all parties ten days' notice under Texas Rule of Appellate Procedure 42.3. *See* Tex. R. App. P. 42.3. No party filed a response to the notice, so no party has asserted an alleged basis for this court's appellate jurisdiction.

[3] There are several Family Code sealing provisions, but none of them apply in this context. *See* Tex. Fam. Code Ann. §§ 58.251–.262 (juvenile cases) (West, Westlaw through 2023 R.S.); *id.* § 65.201 (West, Westlaw through 2023 R.S.) (truancy records); *id.* § 161.210 (West, Westlaw through 2023 R.S.) (termination of the parent-child relationship); *id.* § 162.021 (West, Westlaw through 2023 R.S.) (adoption). In addition, none of these statutes have a provision under which an order is deemed to be severed or deemed to be final and appealable. *See* Tex. Fam. Code Ann.

Civ. P. 76a(8) (providing that "[a]ny order (or portion of an order or judgment) relating to sealing or unsealing court records shall be **deemed to be severed from the case and a final judgment which may be appealed** by any party or intervenor who participated in the hearing preceding issuance of such order") (emphasis added). But, for the purposes of Rule 76a, "court records" means "all documents of any nature filed in connection with any matter before any civil court, except . . . documents filed in an action originally arising under the Family Code." Tex. R. Civ. P. 76a(2). All of the documents unsealed by the Unsealing Order are documents filed in an action originally arising under the Family Code. *See Emerson v. Emerson*, 559 S.W.3d 727, 737 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Under Rule 76a's plain text, the rule does not apply to the Sealing Order or to the Unsealing Order. *See* Tex. R. Civ. P. 76a; *Emerson*, 559 S.W.3d at 737. Therefore, Rule 76a(8) does not apply, and the Unsealing Order is not deemed severed or final and appealable under Rule 76a(8). *See* Tex. R. Civ. P. 76a; *Emerson*, 559 S.W.3d at 737.

Under both the form and the substance of the Sealing Order and the Unsealing Order, neither order is a protective order under Texas Rule of Civil Procedure 192.6. *See* Tex. R. Civ. P. 192.6(b). Therefore, Rule 192.6 does not apply in today's case.

The parties have not cited and research has not revealed any sealing statute that applies to the Sealing Order or the Unsealing Order. Thus, the common law of sealing applies to these orders. *See* Tex. R. Civ. P. 76a(9) (stating that "access to documents in court files not defined as court records by this rule remains governed by existing law"). Under the common law, an order sealing or unsealing court records is not deemed severed from the case or final and appealable. *See P.I.A. of*

§§ 58.251–.262, 65.201, 161.210, 162.021.

Fort Worth, Inc. v. Sullivan, 837 S.W.2d 844, 845–46 (Tex. App.—Fort Worth 1992, orig. proceeding); *Ashpole v. Millard*, 778 S.W.2d 169, 170–72 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding).

In the Unsealing Order, the trial court did not actually dispose of all claims and all parties before the court, nor did the trial court state with unmistakable clarity that the Unsealing Order is a final judgment. *See Lehmann*, 39 S.W.3d at 192, 200. The trial court did not grant a severance. The Unsealing Order is interlocutory and not appealable under section 51.012 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.012; *Lehmann*, 39 S.W.3d at 192, 200. Neither Calanni nor Henning have briefed any argument to the contrary.

B. Does a statute provide for an interlocutory appeal from the Unsealing Order?

Interlocutory orders are not appealable unless explicitly made so by statute. *Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998). No party argues that a statute provides for an interlocutory appeal from the Unsealing Order. No party has cited, and research has not revealed, such a statute. Calanni correctly states on appeal that Rule 76a does not apply to the Unsealing Order. In response, Henning asserts that Calanni is estopped from contending that Rule 76a does not apply because she invited error in the trial court by seeking and obtaining the Sealing Order under Rule 76a. That assertion is factually incorrect. Calanni stated in the Motion to Seal that the documents filed in the trial court were not subject to the standard for sealing court records in Rule 76a because these documents were filed in an action that originally arose under the Family Code. *See* Tex. R. Civ. P. 76a(2). Without citing any authority for the proposition, Calanni also asserted in the Motion to Seal that "[t]he sealing of the records in this action will not have an adverse effect on the public health or safety, and the records do not involve matters

that should be available to the general public." This assertion does not constitute an invitation to the trial court to apply Rule 76a. Calanni did not seek or obtain the Sealing Order under Rule 76a. In any event, appellate jurisdiction cannot be created by estoppel or the invited-error doctrine. *See Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 354 (Tex. 2005).

Though Calanni argues that the Unsealing Order is void because the trial court lacked plenary power to issue it, absent a statute authorizing an interlocutory appeal, there is no right to appeal an interlocutory order that is void because the trial court lacked jurisdiction to render it. *See Cepeda v. Rodriguez*, No. 14-18-00541-CV, 2018 WL 3653692, at *1 (Tex. App.—Houston [14th Dist.] Aug. 2, 2018, pet. denied); *Young v. Villegas*, 231 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Because the Unsealing Order is not final and no statute authorizes an appeal from this interlocutory order, we lack appellate jurisdiction over this appeal, and we dismiss the appeal for this reason. *See Cepeda*, 2018 WL 3653692, at *1; *Young*, 231 S.W.3d at 6. Without addressing the merits of this appeal or whether Calanni may be entitled to mandamus relief, we note that Calanni may file an original proceeding and seek mandamus relief as to the Unsealing Order. *See, e.g., In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (stating that "[m]andamus is proper if a trial court issues an order beyond its jurisdiction").

III. Conclusion

Under Rule 76a's plain text, Rule 76a(8) does not apply to the Unsealing Order, and therefore the Unsealing Order is not deemed severed or final and appealable under Rule 76a(8). In the Unsealing Order, the trial court did not actually dispose of all claims and all parties before the court, nor did the trial court state with unmistakable clarity that the Unsealing Order is a final judgment. The

trial court did not grant a severance. The Unsealing Order is interlocutory and not appealable under section 51.012 of the Civil Practice and Remedies Code. The parties have not cited and we have not found a statute providing for an interlocutory appeal of the Unsealing Order. Therefore, we dismiss this appeal for lack of appellate jurisdiction. This dismissal is without prejudice to a party's ability to timely perfect an appeal from an appealable order or judgment that the trial court may sign in the future and without prejudice to a party's ability to file an original proceeding seeking mandamus relief.

/s/ Randy Wilson
Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Wilson.