179 S.W.3d 581

Court of Appeals of Texas,
Houston (1st Dist.).
In re Spiro NIKOLOUZOS by his Wife Jannette NIKOLOUZOS, Relator.
No. 01-05-00207-CV.
March 15, 2005.

Original Proceeding on Petition for Writ of Injunction.
Mario Caballero, Houston, for relator.
Earnest W. Wotring, Connelly, Baker, Maston, Wotring & Jackson, L.L.P., Houston, for respondent.

Panel consists of Justices NUCHIA, JENNINGS, and ALCALA.
OPINION

PER CURIAM.
On Saturday, March 12, 2005, relator, Spiro Nikolouzos by his wife Jannette Nikolouzos, filed with this Court both a notice of appeal (appellate cause number 01-05-00206-CV) and a petition for writ of injunction (appellate cause number 01-05-00207-CV) to prevent respondent, St. Luke's Episcopal Hospital, from taking Spiro Nikolouzos off life support.
Notices of appeals directed to the First and Fourteenth Courts of Appeals are filed with the trial-court clerk, who then makes a random assignment to either Court. See Tex. Gov't Code Ann. § 22.202(h) (Vernon 2004). Original proceedings directed to the First and Fourteenth Courts of Appeals are filed in the appellate Courts according to a procedure described in Time Warner Entertainment Co., L.P. v. Hebert, 916 S.W.2d 47, 49 (Tex.App.-Houston [1st Dist.] 1996, no writ). See also Tex. Gov't Code Ann. §§ 22.202(h), .215(e) (Vernon 2004) (authorizing transfer of cases between the First and Fourteenth Courts of Appeals).
Because the notice of appeal was filed directly with this Court on a Saturday and an emergency existed, this Court was unable to wait for the trial-court clerk to make an assignment of the appeal without the appeal possibly becoming moot. The Court accepted the notice of appeal pursuant to Texas Rule of Appellate Procedure 25.1(a) and issued a writ of injunction to prevent the appeal from becoming moot. See Tex. Gov't Code Ann. § 22.221(a) (Vernon 2004) (court of appeals may issue all writs necessary to enforce jurisdiction of court); Tex.R.App. P. 25.1(a) ("If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk, and the appellate clerk must immediately send the trial court clerk a copy of the notice."), (b) ("The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules ... does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal."); see also In re Washington, 7 S.W.3d 181, 182 (Tex.App.-Houston [1st Dist.] 1999, orig. proceeding) (appellate court has jurisdiction to determine whether it has jurisdiction).
On Monday, March 14, 2005, the Clerk of this Court sent a copy of the notice of appeal to the trial-court clerk pursuant to Texas Rule of Appellate Procedure 25.1(a). The trial-court clerk randomly assigned the appeal to the Fourteenth Court of Appeals, and the trial-court clerk notified both appellate Courts.

Because the appeal has not been assigned to this Court, we no longer have jurisdiction to issue a writ of injunction to *582 protect our appellate jurisdiction of the appeal. Accordingly, we dissolve the injunction and dismiss the original proceeding.
It is so ordered.

Justice JENNINGS concurring.

TERRY JENNINGS, Justice, concurring.
I dissented from this Court's May 12, 2005 order commanding that St. Luke's Episcopal Hospital (St. Luke's) "desist and refrain from proceeding with taking Spiro Nikolouzos off life support" because this Court never had jurisdiction to enter such an order on the appeal of the denial of a temporary restraining order.
Spiro Nikolouzos by his wife Jannette Nikolouzos, challenge the district court's orders, dated March 9, 2005 and March 11, 2005, denying "Plaintiff's First and Second Applications for a Temporary Restraining Order" against St. Luke's. In both applications, the Nikolouzoses requested that the district court "enjoin [appellee] from disconnecting Mr. Nikolouzos from life support." They contend that they were "entitled to a restraining order" because they "had proven a reasonable expectation of a transfer to another health care facility that would honor a patient's directive if the extension is granted." See Tex. Health & Safety Code Ann. § 166.046(g) (Vernon Supp. 2004-2005).
It is well-settled law that appellate courts have jurisdiction to consider immediate appeals of interlocutory orders "only if a statute explicitly provides appellate jurisdiction." Stary v. DeBord, 967 S.W.2d 352, 352-53 (Tex.1998); see Tex. Civ. Prac. & Rem.Code Ann. § 51.014 (Vernon Supp. 2004-2005) (allowing appeal of interlocutory order in 10 instances, not including the granting or denial of a temporary restraining order). No statutory provision exists permitting appeal from a temporary restraining order. Accordingly, the granting or denial of a temporary restraining order is generally not appealable. In re Tex. Natural Res. Conservation Comm'n, 85 S.W.3d 201, 205 (Tex.2002). When a party attempts to appeal a non-appealable interlocutory order, appellate courts have no jurisdiction except to declare the interlocutory nature of the order and to dismiss the appeal. Tex.R.App. P. 42.3(a); Yancey v. Jacob Stern & Sons, Inc., 564 S.W.2d 487, 488 (Tex.Civ.App.-Houston [1st Dist.] 1978, no writ); Lipshy Motorcars, Inc. v. Sovereign Assoc.'s, Inc., 944 S.W.2d 68, 70 (Tex.App.-Dallas 1997, no writ).
On the other hand, a temporary injunction is an appealable interlocutory order. Tex. Civ. Prac. & Rem.Code Ann. § 51.014(4). Our sister court has recognized that "where the force and effect of a temporary restraining order is indistinguishable from that of a temporary injunction, the order is appealable." Plant Process Equip., Inc. v. Harris, 579 S.W.2d 53, 54 (Tex.Civ.App.-Houston [14th Dist.] 1979, no writ). The "controlling factor" is "whether the relief granted does more than preserve the status quo" during the limited time span of a temporary restraining order. Id. (emphasis added). However, because the requests for a temporary restraining order in this case were denied rather than granted, this analysis is not applicable. Boone v. City of Houston, No. 14-97-01042-CV, 1998 WL 470364, at *1 n. 2 (Tex.App.-Houston [14th Dist.] Aug. 13, 1998, no pet.) (not designated for publication).
Accordingly, because this Court never had jurisdiction to review the interlocutory denial of the applications for a temporary restraining order in this matter, I concur *583 in the order dissolving the injunction and dismissing the original proceeding.
162 S.W.3d 678

Court of Appeals of Texas,
Houston (14th Dist.).
Spiro NIKOLOUZOS by his wife, Jannette Nikolouzos, Appellant,
v.
ST. LUKE'S EPISCOPAL HOSPITAL, Appellee.
No. 14-05-00267-CV.
March 17, 2005.

Background: Petitioner filed applications for restraining orders in context of petition to extend time for continued life support, injunctive relief, and damages. The 189th District Court, Harris County, William R. Burke, Jr., orally denied applications, and petitioner appealed.

Holding: The Court of Appeals, Charles W. Seymore, J., held that petitioner had no statutory right to appeal from order denying application for temporary restraining order.

Appeal dismissed.

Wanda McKee Fowler, J., filed concurring opinion.

*679 Mario Caballero, Houston, for appellants.
Earnest W. Wotring, Houston, for appellee.

Before the court en banc.
MAJORITY OPINION

CHARLES W. SEYMORE, Justice.
This is an attempted interlocutory appeal from the oral denial of appellant's first and second applications for temporary *680 restraining orders. We dismiss the appeal for want of jurisdiction.
The underlying action is brought under the Advance Directives Act, [FN1] specifically Texas Health and Safety Code section 166.046(g), which provides a mechanism to seek a judicial extension of the time period in which to find alternative treatment for a patient when the hospital has determined that life-sustaining treatment is inappropriate. The statute provides:
FN1. Tex. Health & Safety Code Ann. §§ 166.001-166.166 (Vernon Supp.2004-05).

At the request of the patient or the person responsible for the health care decisions of the patient, the appropriate district or county court shall extend the time period provided under Subsection (e) [10 days after the written decision by the hospital's ethics committee is provided to the patient or responsible person] only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive [regarding life-sustaining treatment] will be found if the time extension is granted.
Tex. Health & Safety Code Ann. § 166.046(g) (Vernon Supp.2004-05).
Appellant filed an original petition seeking an extension of time for continued life support, injunctive relief, and monetary damages. At the same time, appellant filed an application for a temporary restraining order and temporary injunction. The trial court conducted a hearing on appellant's first application for temporary restraining order on March 9, 2005. At the conclusion of the hearing, the court orally denied the application. The court permitted appellant to file a

second application for a temporary restraining order, and the court conducted a hearing on March 11, 2005. The court again orally denied the application. Appellant then filed a notice of appeal from the denial of both TRO applications.

On March 15, 2005, appellee filed a motion to dismiss the appeal for want of jurisdiction. See Tex.R.App. P. 42.3(a). Appellee argues that this court lacks jurisdiction over appellant's attempted appeal from the denial of temporary restraining orders in the absence of express statutory authority.

[1] Because appellant sought other relief that remains pending in the trial court, the rulings appellant seeks to appeal are interlocutory. See North East I.S.D. v. Aldridge, 400 S.W.2d 893, 895 (Tex.1966) (noting "to be final a judgment must dispose of all issues and parties in a case"). It is well settled that appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute specifically provides for appellate jurisdiction. Stary v. DeBord, 967 S.W.2d 352, 352-53 (Tex.1998). Section 166.046 does not expressly provide a right to appeal the trial court's ruling on a request for extension of time for life sustaining treatment, thus indicating the legislature did not intend to permit such an appeal. See, e.g., Ex parte Burr, 139 S.W.3d 446, 448 (Tex.App.-Dallas 2004, pet. stricken) (holding that failure to include right to appeal in statute indicated legislature did not intend to permit appeal from denial of temporary restraining order).

[2] [3] [4] [5] While an interlocutory appeal from the grant or denial of a temporary injunction is allowed, no statutory provision permits an appeal from a temporary restraining order. [FN2] See *681 Lesikar v. Rappeport, 899 S.W.2d 654, 655 (Tex.1995); Cross Media Network, Inc. v. Sandefer, 2000 WL 1260251, *1 (Tex.App.-Houston [14th Dist.] 2000, no pet.) (not designated for publication); see also Tex. Civ. Prac. & Rem.Code Ann. § 51.014 (Vernon Supp.2004-05) (specifically permitting appeal of interlocutory orders in ten instances, but not including the grant or denial of a temporary restraining order). Thus, the grant or denial of a temporary restraining order is generally not appealable. In re Tex. Nat. Res. Conservation Comm'n, 85 S.W.3d 201, 205 (Tex.2002).

FN2. "A temporary restraining order is one entered as part of a motion for a temporary injunction, by which a party is restrained pending the hearing of the motion. A temporary injunction is one which operates until dissolved by an interlocutory order or until the final hearing." Del Valle I.S.D. v. Lopez, 845 S.W.2d 808, 809 (Tex.1992).

[6] However, the fact that the order is denominated a temporary restraining order is not determinative of whether the order is appealable. Whether an order is a nonappealable temporary restraining order or an appealable temporary injunction depends on the order's characteristics and function, not its title. Qwest Communications Corp. v. AT & T Corp., 24 S.W.3d 334, 336 (Tex.2000). If the force and effect of the order is indistinguishable from that of a temporary injunction, then the order is appealable. Plant Process Equip., Inc. v. Harris, 579 S.W.2d 53, 54 (Tex.App.-Houston [14th Dist.] 1979, no writ). The record in this case demonstrates that the initial relief requested was a temporary restraining order pending a subsequent hearing on a temporary injunction, and the parties at the hearings treated them as hearings on applications for temporary restraining orders. No testimony was taken at the hearings. At the conclusion of each hearing, the trial court denied appellants' applications for temporary restraining orders. Under these facts, the rulings at issue are denials of temporary restraining orders, not denials of injunctions.

[7] On March 16, 2005, appellant filed a response to appellee's motion to dismiss. In support of the court's exercise of jurisdiction over the appeal from the denial of temporary restraining

orders, appellant cites Lord v. Clayton, 163 Tex. 62, 352 S.W.2d 718 (1961). In Lord, however, the relators sought a writ of mandamus to resolve a jurisdictional dispute between two criminal courts, in which one court had issued an order restraining a habeas corpus proceeding in the other court. Id. at 719 (emphasis added). The Texas Supreme Court recognized that normally mandamus would not issue to interfere with a trial court's injunctive orders because, even though a restraining order is not appealable, any injunction would have been appealable and the parties would have been required to appeal rather than seek mandamus relief. Id. The court found that the jurisdictional conflict between the two courts had reached a point where the public interest and orderly administration of justice would suffer irreparably unless it resolved the conflict. Id. Although there is no question that appellant has the most compelling personal interest at stake, this court lacks the power to exercise jurisdiction where none is provided by law.

[8] After having considered the motion and response, we hold that we lack jurisdiction over this attempted appeal from the denial of temporary restraining orders. When a party attempts to appeal a nonappealable interlocutory order, an appellate court has no jurisdiction except to dismiss the appeal. Lipshy Motorcars, Inc. v. Sovereign Assocs., Inc., 944 S.W.2d 68, 70 (Tex.App.-Dallas 1997, no writ); Harper v. Welchem, Inc., 799 S.W.2d 492, 496 (Tex.App.-Houston [14th Dist.] 1990, no writ).

*682 Accordingly, we grant appellee's motion, and the appeal is ordered dismissed. This court's writ of injunction issued March 15, 2005, under our cause number 14-05-00273-CV is dissolved by its own terms.

FOWLER, J., concurring.

WANDA MCKEE FOWLER, Justice concurring.

I write separately for two reasons. First, in the very short time we have had to research the issues in this case, I believe the decision is correct; however, if it is not, I want to allay any thoughts by the Nikolouzoses that they might have been able to prevail on the merits if we had jurisdiction. Next, I want to address procedural problems inherent in the statute, making it an ineffectual tool for both families of patients and health care providers.

I turn first to the proof presented below. I acknowledge that our normal procedure when we have no jurisdiction is to dismiss the case without addressing its merits. This is an exceptional case, however, and the family might appreciate knowing that, in my view, the outcome would not have changed even if we had jurisdiction.

As noted in the majority opinion, the statute at issue requires proof, "by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted." Tex. Health & Safety Code Ann. § 166.046(g) (Vernon Supp.2004-05). A review of the sworn applications presented at the two hearings reveals that this level of proof was not met.

Mrs. Nikolouzos attached to her first application for TRO her own affidavit attesting to the accuracy of the facts contained in the application. According to those facts, "Plaintiff feels that there are doctors and hospitals who will be willing to continue treatment for Spiro if sufficient time is given to adequately contact all relevant parties." The trial judge told the parties this affidavit did not reflect a reasonable expectation that a doctor or another health care facility would honor Mr. or Mrs. Nikolouzos's directive. The trial judge also observed that no other affidavit, or any other evidence, was offered. As a result, the trial judge denied the TRO while expressing her compassion for the family's plight and her sincere regret.

Two days later, Mrs. Nikolouzos filed a second application for TRO, which the trial judge agreed to hear, though noting that a rehearing was an exceptional procedure for an exceptional case. At this second hearing, Mrs. Nikolouzos attached a more detailed affidavit in which she averred the following:

. that she had contacted Avalon Place, a skilled nursing home facility in San Antonio; and

. that a social worker there told her "it looked likely that Spiro would get accepted at Avalon Place and that they had a room for him."

She also attached a letter from Dr. John Sterling Meyer stating that Spiro Nikolouzos did not meet the criteria for "brain death" because cerebral blood flow was present.

When some question arose as to the accuracy of the doctor's affidavit and the sufficiency and admissibility of this evidence, the trial judge agreed twice to recess for several hours to enable Mrs. Nikolouzos to obtain additional evidence. However, even with these two recesses, Mrs. Nikolouzos was unable to obtain the necessary proof that a doctor or another health care facility was willing to take Mr. Nikolouzos.

*683 By the conclusion of the additional hearings, counsel for Mrs. Nikolouzos was forced to admit that, in spite of their efforts, their most promising alternative health care facility, Avalon Place, had declined to accept Mr. Nikolouzos because his Medicare eligibility would be reduced to 80% coverage within two days. Mrs. Nikolouzos would need to obtain Medicaid benefits to cover the additional 20% of the cost of his care, and no application for Medicaid had been made. In addition, Mrs. Nikolouzos's attempt to obtain authorization from Dr. Bryan Walker to have Mr. Nikolouzos released to home care with a home-based ventilator failed; Dr. Walker told them this was impossible.

As for the proof already before the court from Dr. John Meyer that Mr. Nikolouzos was not brain dead, St. Luke's has pointed out, and the trial judge found, this evidence, if admissible, was irrelevant to the issue before the court. Section 166.046 permits the withdrawal of life-sustaining care for patients who are not brain dead if the hospital's ethics committee has determined the care is inappropriate.

So, this was the state of the record before the trial judge when she denied the request for temporary restraining order. She was correct to tell Mrs. Nikolouzos and other family members, "I'm sorry ... I believe that the [Nikolouzoses] have worked very hard and the family is very grieved, as any family would be, but I'm sorry that the TRO is still denied...."

Thus, although the family expended great effort to meet its burden, and although there were some glimmers of hope for it, ultimately the family was unable to give the court assurance of any sort that Mr. Nikolouzos could be moved elsewhere. Based upon this record, I would not have found that the trial judge abused her discretion in denying Mrs. Nikolouzos's applications for temporary restraining orders.

This leads me to my second point. This statute is replete with procedural problems that threaten to sabotage a family's attempt to obtain additional time under section 166.046(g) to locate alternate care for its loved one. The problems all stem from lack of specificity in the statute and could be rectified if the legislature chose to be as specific in this statute as it has been, for example, with the procedures a minor must follow to obtain an abortion without notification to one of her parents. Tex. Fam.Code §§ 33.001 et seq. This subject deserves no less specificity because this statute affects no less than the life and death of men, women, and children. Counsel's attempts to comply with the statute and its short deadlines underscore the problems the statute creates. I summarize them below.

To obtain an immediate hearing within the ten-day period provided by the statute, Mrs. Nikolouzos filed an application for a TRO because the statute offered no alternatives. But as we have already held, this procedural avenue is inadequate, most obviously because it leaves a party

without a right to appeal. Counsel confronted other problems also. The statute requires proof by a preponderance of the evidence that "there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted." Tex. Health & Safety Code Ann. § 166.046(g) (Vernon Supp.2004-05). Hearings on applications for TROs, however, are not evidentiary hearings. The purpose of a TRO is to preserve the status quo of the subject matter of the litigation until a preliminary hearing can be held on an application for a temporary injunction. Cannan v. Green Oaks Apts., Ltd., 758 S.W.2d 753, 755 (Tex.1988) (per curiam). The status quo is the last, actual, peaceable, noncontested status that preceded the controversy. *684 Big Three Indus., Inc. v. R.R. Comm'n, 618 S.W.2d 543, 548 (Tex.1981); State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 528 (Tex.1975). The last noncontested status in this case occurred before St. Luke's determined that continued life-sustaining care was inappropriate. Thus, Mrs. Nikolouzos sought a TRO to maintain that status quo pending a hearing on a temporary injunction, at which time evidence would be produced that another health care facility would accept Mr. Nikolouzos. Under this unique statutory scheme, the time to produce his evidence was at the TRO hearing, not the temporary injunction hearing. In short, the lack of a specific procedure leaves already bereaved families with no clear procedure to secure alternate care for their loved one.

Admittedly, the legislature has many important issues to address in an undeniably short time. But this is an important issue that has a solution. If the legislature addresses the problems listed below, all of which either arose in this case, or could have arisen, it can at the very least lessen the load for both families and health care facilities.

First, the statute should state specifically in which court a family or trustee must file the action. Currently, the statute provides only that the action should be filed in "the appropriate district or county court." Tex. Health & Safety Code Ann. § 166.046(g) (Vernon Supp.2004-05). When the Nikolouzoses filed in the district court, St. Luke's moved for a dismissal claiming that the probate court in Harris County had exclusive jurisdiction. See Tex. Gov't Code § 25.0021(b). In contrast, the parental notification bill leaves no room for guess work by declaring that a bypass request may be "filed in any county court at law, court having probate jurisdiction, or district court, including a family district court, in this state." Tex. Fam.Code. § 33.003(b).

Next, the statute should direct a family what to call their action, specify the steps a family must take to have its complaint heard, and include timetables within which the parties and the court must act. Currently, the statute gives no direction on these issues. See Tex. Health & Safety Code Ann. § 166.046 (Vernon Supp.2004-05). No doubt perplexed as to the proper procedure to follow, counsel for Mrs. Nikolouzos filed an original and amended petition in which he asked for a TRO and injunctive relief; probably he did this because procedures are already established in Harris County for a judge to provide a quick hearing when a party requests a TRO. In contrast, the parental notification bill tells a requesting party and the courts and their clerks exactly what an action should be called, informing all of these persons that a minor should file an "application." Tex. Fam.Code § 33.03(a). Styling the action as an "application" and referring to the parental notification statute enables a court and its personnel to know immediately that they are dealing with a very specific type of case with its own unique accelerated procedures.

Finally, the statute should state if the family or hospital has the right of appeal from a ruling on a request for an extension of time under section 166.046(g). Currently, the statute says nothing about an appeal. See Tex. Health & Safety Code Ann. § 166.046 (Vernon Supp.2004-05). In the parental notification bill, the legislature explicitly addressed the right to appeal. Tex. Fam.Code § 33.004.

In short, in its current form, the statute creates confusion where there should be clarity. This confusion not only is a disservice to both families and health care providers, but also ironically

increases litigation when it should lessen it. I respectfully *685 urge the legislature to revisit section 166.046 and to clarify the procedures a family must follow to secure alternate care for their loved one. The legislature has already seen the importance of clarity at the inception of life; clarity is no less important at the end of life.

With these comments, I concur in the court's opinion and judgment.

Tex.App.-Houston [14 Dist.],2005.

Nikolouzos v. St. Luke's Episcopal Hosp.

162 S.W.3d 678

• 14-05-00267-CV (Docket) (Mar. 14, 2005)