

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-21-00618-CV**

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**Leah Ann Brisco, Appellant**

**v.**

**Kevin J. Kahlden, Appellee**

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**FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY  
NO. D-1-FM-19-003975, THE HONORABLE MARIA CANTÚ HEXSEL, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

After a three-day bench trial, the trial court signed a Final Decree of Divorce August 27, 2021. Leah Ann Brisco appeals from the trial court’s final decree. In two issues, she asserts that the trial court erred by denying her request for a jury trial and by denying her motion for continuance. We will reverse the judgment and remand the case to the district court.

**BACKGROUND<sup>1</sup>**

Brisco and Kahlden married in 2001. Kahlden filed for divorce in June 2019, alleging that the parties “continue to live together as spouses,” that the marriage has become insupportable and that no child is born, adopted, or expected of the marriage. Brisco filed a general denial in August 2019. In January 2020, Kahlden filed a notice of a one-day final hearing March 9, 2020, which Brisco moved to strike on the ground that it had been unilaterally

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<sup>1</sup> Because the parties are familiar with the facts of the case, we do not recite them in this opinion except as necessary to advise the parties of the Court’s decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

set by Kahlden’s counsel without conferring with Brisco’s counsel, among other allegations. Brisco filed an amended answer and counterpetition for divorce alleging cruel treatment, adultery, and insupportability of the marriage. Brisco sought a disproportionate share of the marital estate due to, among other things, Kahlden’s alleged fault in the breakup of the marriage, wasting of community assets, and actual and constructive fraud. Brisco sought reimbursement, post-divorce maintenance, and temporary orders and plead various tort causes of action. Brisco filed a motion to continue the March 9, 2020 trial setting on the ground that her counsel was unavailable that day as well as her need to conduct discovery related to her “allegations of actual and constructive fraud,” “complicated reimbursement claims requiring forensic tracing,” and “a separate tort matter.”<sup>2</sup>

Kahlden filed a notice of reset of the final hearing for a two-day hearing for May 18, 2020, and Brisco responded by filing a motion to compel discovery and for sanctions, asserting that Kahlden had provided an incomplete sworn inventory and “deficient” responses to discovery requests. The parties reached an agreement about their discovery disputes and the district court signed agreed temporary orders related to discovery, use of the marital residence and the parties’ vehicles, and temporary support for Brisco. The parties engaged in discovery, and in June 2020, Kahlden set the case for a final hearing on August 24, 2020. In July, Kahlden filed a motion to compel mediation and a motion for a scheduling order.

On August 24, 2020, Brisco filed a motion to continue the August 24 trial setting until November 2020. Brisco asserted that discovery had not been completed—both parties needed to supplement their discovery responses—and that the parties could not participate in

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<sup>2</sup> The “tort matter” was Brisco’s claim for intentional infliction of emotional distress arising out of her allegation that Kahlden had caused Brisco to contract a sexually transmitted disease.

mediation until completion of discovery. Brisco stated that she did not have financial information necessary to “make an informed decision at mediation” or “present an evidentiary supported defense at trial.”

In September 2020, the parties agreed to a scheduling order that set the case for trial on December 14, 2020, and Kahlden set an October 2020 hearing for the purpose of securing further temporary orders. At the end of September, counsel for Brisco filed a motion to withdraw on the ground that she was “unable to effectively communicate with” her client. The motion to withdraw acknowledged the agreed scheduling order, including the December 14 trial setting, and Brisco did not object to her attorney’s withdrawal, which the court granted. At the October 7 hearing, the court issued further temporary orders and granted Brisco’s counsel’s motion to withdraw. Brisco’s new counsel filed a notice of appearance on October 19, 2020, and, shortly thereafter, filed a motion for continuance of the December 14 trial setting. The motion stated that Brisco’s new counsel “has not had adequate time to prepare for a final trial,” was unable to try the case on December 14, and needed to gather additional discovery materials “[t]o be able to effect a [sic] equitable division of the parties estate.”

On November 18, 2020, the trial court signed an Agreed Order that set forth the parties’ agreement regarding responding to and supplementing outstanding discovery requests, ordered that the September Agreed Scheduling Order remained in full force and effect except for some agreed changes, and ordered that “no continuances will be sought in this case without significant cause or reason to do so.” One week later, Brisco filed a motion to modify the agreed scheduling order asserting that “unforeseen delays in transferring [Brisco’s] file” to her new counsel “delayed the process of establishing whether all documents necessary for the Court to be able to divide the[] estate in a just and right division have been turned over by both parties.”

Brisco asserted that she was unable to prepare for trial and requested that the court modify the scheduling order to “reflect a date in the future” for the trial and that such date be “after [Kahlden] has complied” with discovery requests. At a December 3 hearing on Brisco’s motion, the court noted that, although the Agreed Scheduling Order set a trial date of December 14, the case was not set on the court’s docket for that date. The parties agreed to a mediation date of December 9 and a final trial setting of February 22, 2021.

On December 17, the court held a hearing on Kahlden’s motion for further temporary orders at which it ordered that the parties have separate bank accounts and appointed a receiver to sell the house. Brisco sought de novo review of the orders and, after a hearing, the reviewing district judge denied the requested relief. After the parties brought additional discovery disputes before the court for resolution, on February 5, Brisco filed a notice of appeal of the court’s order denying her de novo appeal from the order appointing the receiver. The same day, Brisco moved for a stay of the receivership and final trial until “the Third Court of Appeals has had an opportunity to consider and rule on” her appeal. In the meantime, an extreme weather event occurred during February 2021, disrupting court dockets.

In March 2021, Brisco filed a request for a temporary restraining order in which she stated that, although the parties were scheduled for a final hearing on February 22, 2021, due to the weather and power outages in the area, the hearing was passed and had not been reset. Brisco sought to enjoin the receiver from taking possession of the marital home, hiring a realtor, or signing a listing agreement for the sale of the home. The trial court denied the request for a temporary restraining order. Regarding her de novo appeal of the order appointing the receiver, this Court temporarily stayed the trial court’s receivership order and abated the appeal and remanded the case to the trial court “for a determination of whether [Brisco’s] rights would

be adequately protected by supersedeas or another order under Texas Rule of Appellate Procedure 24 and, if so, the amount and type of security that [Brisco] must post.” *See Brisco v. Kahlden*, No 03-21-00066-CV, 2021 WL 1400698, at \*1 (Tex. App.—Austin Apr. 9, 2021, no pet.) (mem. op.). After submitting motions and briefing to the trial court on the remanded supersedeas issue, the court held a hearing to consider whether a supersedeas bond would be appropriate and at what level. The court’s docket notes state that, at the hearing, “[p]arties agreed and court ordered receiver be dismissed, appeal be dismissed. Trial set for June 28, 2021. No continuances should be given.” The court later signed an order directing Brisco to dismiss her appeal and stating: “It is ordered that the parties shall set and appear for Final Trial in this cause on June 28, 2021.” On Brisco’s motion, this Court dismissed her appeal, *See Brisco v. Kahlden*, No. 03-21-00066-CV, 2021 WL 2274067, at \*1 (Tex. App.—Austin June 4, 2021, no pet) (mem. op.), and Kahlden filed a notice setting the case for a final trial on June 28, 2021.

On May 25, 2021, about 34 days before the trial date, Brisco filed a request for a jury trial and paid the jury fee. Kahlden on June 2 filed a response to Request for Jury Trial, alleging the request would injure the parties and the community estate and disrupt the docket and impede the ordinary handling of the Court’s business, without supporting evidence or affidavits, asserting that the case had been set for trial on the non-jury docket on six dates, including the June 28, 2021, trial setting ordered by the trial court, arguing that the circumstances demonstrated that Brisco’s jury demand was not made a reasonable amount of time before the June 28 trial date, and requesting that the court deny Brisco’s request for a jury trial. Brisco responded by filing a motion to strike the case from the non-jury docket and permit the case to be tried to a jury in October 2021. Kahlden filed a Trial Brief Concerning Jury Request on June 11 without specifics as to the court’s docket or the community estate.

The court held a hearing on Brisco's motion to strike the case from the non-jury docket on June 11. At the hearing, Kahlden's counsel emphasized that the case had been set on the non-jury docket six times and had been reset for various reasons, but never due to a request for a jury trial. Kahlden argued that the reason for Brisco's request for a jury trial at that time was simply to delay the trial and postpone her having to leave the marital home where she had been living while the divorce was pending. Kahlden's counsel noted that Brisco did not file her jury demand until after the trial court's order setting the case for trial on June 28 and that, while the parties disagreed about the date of the trial setting, there had never been any disagreement about whether it would be a non-jury trial. Kahlden argued that he had agreed to forego pursuing the receivership order in exchange for Brisco's agreement to a firm trial setting and that moving the case from the non-jury docket would result in significant delay because they would be "on the back end of hundreds of cases [] set on the jury docket" and would likely not get a setting until 2022. Finally, Kahlden asserted that moving the case from the non-jury to the jury docket would disrupt the court's docket, and the delay would injure him because it would postpone the sale of the marital home and risk the parties' missing out on the extremely favorable sellers' market that existed in Austin in June 2021.

Brisco's counsel responded that Brisco's jury request was timely and, therefore, presumed to have been made within a reasonable time before trial, that Brisco had never agreed to waive a jury trial when she agreed to dismiss her appeal of the receivership order, that she was "not trying to delay to stay in the house" but was unemployed, and that no one could predict how long the Austin market would continue to be a strong seller's market. The trial court denied Brisco's motion to strike the non-jury setting and directed the parties to "move forward on that June 28th setting."

On June 14, two weeks before the trial date, Kahlden amended his petition to allege that Brisco was guilty of cruel treatment to him and had committed adultery. He also sought a disproportionate share of the marital estate due to, among other things, Brisco's alleged fault in the breakup of the marriage, wasting of community assets, and actual and constructive fraud. On June 21, Brisco filed a motion for reconsideration of her motion to strike the case from the non-jury docket and set the case for a jury trial. She argued that Kahlden's amendment to his petition to add allegations of cruel treatment and adultery raised fact issues for a jury. The same day, Brisco filed a motion for continuance on the ground the amendments were "a total surprise" to her and that she was not prepared to defend against the new allegations "without further discovery and preparation prior to a trial on the merits." She asserted that the amended pleading was contrary to Texas Rule of Civil Procedure 63, which provides that parties may amend their pleadings "at such time as not to operate as a surprise to the opposite party." *See* Tex. R. Civ. P. 63. Brisco did not, however, move to strike the amended pleading. *See Hardin v. Hardin*, 597 S.W.2d 347 (Tex. 1980) (right to amend pleadings under rule 63 is subject to opposing party's right to object to amendment and trial court has discretion to strike pleading if it determines that opposing party has shown that, on its face, amendment is "calculated to surprise or that the amendment would reshape the cause of action, prejudicing opposing party and unnecessarily delaying the trial").

The trial court held a hearing on Brisco's motion for continuance on June 25, the Friday before the Monday, June 28 trial setting. The court denied the motion for continuance without prejudice to reassert the motion before the trial judge.<sup>3</sup> On the first day of trial, Brisco's counsel reurged both the request that the case be reset for a jury trial and the motion for

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<sup>3</sup> The hearing was before the Travis County district court duty judge, who was not the presiding judge at trial.

continuance, arguing that the amended pleading raised issues for a jury and that the amendment “kind of blind-sided” them and that “we should go forward with the jury trial.” Counsel asserted that Kahlden had provided no reason “the case shouldn’t go forward” to a jury trial other than his assertion that further delaying trial would cause him financial harm. Counsel stated that “there’s no reason why we shouldn’t have a jury trial” given that Kahlden had raised “fault grounds” in his amended petition. Kahlden’s counsel countered that the evidence supporting the claims included in his amended petition had been produced by Brisco and therefore could not cause her surprise. He also stated that, in the event the trial court was inclined to grant a continuance based on Brisco’s alleged surprise, Kahlden would abandon the cruelty and adultery claims as well as the claim for a disproportionate share of the estate, which the court could order regardless of whether that was supported by a pleading as part of its discretion to make a just and right division of the marital estate.

The trial court denied the request to reconsider the denial of Brisco’s motion to strike the case from the non-jury docket and the motion for continuance. The court then conducted a three-day bench trial and rendered a final decree of divorce. Brisco perfected this appeal in which she argues that the trial court abused its discretion in (1) denying Brisco’s motion for a continuance and (2) denying Brisco her constitutional right to a trial by jury.

## **DISCUSSION**

Because it is dispositive, we first address Brisco’s second issue in which she asserts that the trial court abused its discretion by denying her motion to strike the case from the non-jury docket and set the case for a jury trial. “The right to a jury trial is one of our most precious rights, holding ‘a sacred place in English and American history.’” *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (quoting *White v. White*, 196 S.W. 508, 512



(1917)). The Texas Constitution provides that “[t]he right to trial by jury shall remain inviolate,” Tex. Const. art. I, § 15, and guarantees litigants the right to a jury trial “of all causes in the District Courts,” *id.* art. V, § 10. Accordingly, the right to a jury trial in Texas has been characterized as “exceptionally broad,” *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997), and any denial of that right is “closely scrutinized,” *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 559 (Tex. App.—Dallas 1998) (en banc), *aff’d.*, 22 S.W.3d 351 (Tex. 2000); *see also G.W. v. Texas Dep’t of Family & Protective Servs.*, No. 03-14-00580-CV, 2015 WL 658466, at \*2 (Tex. App.—Austin Feb. 11, 2015, no pet.) (mem. op.) (“The ‘right to a jury trial as guaranteed by our Constitution is one of our most precious rights and the denial of that right is a very serious matter.’” (quoting *In re J.C.*, 108 S.W.3d 914, 917 (Tex. App.—Texarkana 2003, no pet.))).

To perfect one’s right to a jury trial in a civil case, the rules require that a jury demand be filed in writing within “a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.” Tex. R. Civ. P. 216. Brisco complied with Texas Rule of Civil Procedure 216(a) by making a written jury request more than thirty days before the trial was scheduled to begin. Brisco’s request is presumed timely because it was made at least thirty days before the June 28 trial date. *See Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991).

Trial courts, however, are not required to honor every jury request simply because it is received more than thirty days before trial. *Girdner v. Rose*, 213 S.W.3d 438, 443 (Tex. App.—Eastland 2006, no pet.). Courts have the discretion to determine what is a reasonable amount of time considering the individual circumstances of each case. *See Wittie v. Skees*, 786 S.W.2d 464, 465 (Tex. App.—Houston [14th Dist.] 1990, writ denied). The party opposing

the request may rebut the presumption of reasonableness by showing that a jury trial will injure them, disrupt the trial court's docket, or impede the ordinary handling of the court's business. *Crittenden v. Crittenden*, 52 S.W.3d 768, 769 (Tex. App.—San Antonio 2001, pet. denied).

Kahlden opposed the motion to strike the case from the non-jury docket arguing that Brisco's making the jury request shortly before the sixth non-jury trial setting was solely to delay trial of the case so that she could continue to live in the marital home. However, to deny a party her right to a jury trial absent a showing of harm to the opposing party or disruption of the trial court's docket is contrary to the law as announced by the Texas Supreme Court. *See Gayle*, 951 S.W.2d at 477, *Halsell*, 810 S.W.2d at 371. Kahlden had the burden to show harm, but nothing in the record indicates that granting Brisco her right to a jury trial in this case would have interfered with the court's docket, delayed the case, or injured Kahlden.<sup>4</sup> Rather, Kahlden's main argument for denying Brisco her right to a jury trial was his belief that she was simply seeking to delay resolution of the case. This belief does not operate to rebut the presumption that Brisco's jury demand was timely. Additionally, Kahlden and the trial court had additional remedies in place of denying the jury demand, including additional temporary orders and effecting a just and right property division in the final divorce. On this record, we conclude that the trial court abused its discretion when it denied Brisco's demand for a jury trial. "A refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified." *Halsell*, 810 S.W.2d at 372. This divorce

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<sup>4</sup> Although Kahlden testified that he believed the real estate market would be less favorable in the future and that would negatively impact the sales price of the marital home, Kahlden's speculation about future events is not sufficient to demonstrate harm to him from granting Brisco her right to a jury trial. Similarly, Kahlden's attorney's statement that "I don't think it's a stretch either to make the argument that the Court's docket will be disrupted" does not constitute evidence that granting Brisco's request for a jury trial would impede the court's handling of its business or disrupt the court's docket.

involved material issues of fact regarding the valuation of the marital property and the community estate and fault grounds asserted in Brisco's live pleadings and raised by Kahlden just two weeks before trial. We cannot conclude that a directed verdict would have been justified in this case because of the disputed facts surrounding issues material to the division of the marital estate. We sustain Brisco's second issue.<sup>5</sup>

### CONCLUSION

Having concluded that the trial court abused its discretion by denying Brisco's timely jury demand, we reverse the trial court's final decree of divorce and remand the case to the trial court for further proceedings.

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Thomas J. Baker, Justice

Before Justices Baker, Theofanis, and Jones\*

Reversed and Remanded

Filed: July 13, 2023

\*Before J. Woodfin Jones, Chief Justice (Retired), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code § 74.003(b).

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<sup>5</sup> Because of our disposition of Brisco's second issue, we need not address her first issue challenging the trial court's denial of a motion for continuance. *See* Tex. R. App. P. 47.1.