

Affirmed as Modified and Majority and Concurring Opinions filed February 23, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00836-CV

ASHLEIGH ELISE TEEL, Appellant

V.

KENNETH RICHARD SHIFFLETT, Appellee

**On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 2008-23087**

CONCURRING OPINION

I write separately to address appellant’s challenge to the constitutionality of sections 81.001 and 85.001 of the Texas Family Code. Section 81.001 provides that “[a] court shall render a protective order as provided by Section 85.001(b) if the court finds that family violence has occurred and is likely to occur in the future.” Tex. Fam. Code Ann. § 81.001 (Vernon 2008). Section 85.001 lists the required findings and orders to be issued by the court if it finds that family violence has occurred and is likely to occur in the future. Tex. Fam. Code Ann. § 85.001 (Vernon 2008).

Appellant argues that she is entitled to a jury trial before the issuance of a protective order and that by prohibiting such a trial, sections 81.001 and 85.001 violate her right to jury trial under Article V, Section 10 of the Texas Constitution.¹ Article V, the Judiciary Article, was added to the Texas Constitution to broaden the right to a jury afforded by Article I, section 15 because that section did not extend to causes in equity.² *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 292 (Tex. 1975).

Special circumstances justify holdings that not all adversary proceedings qualify as a “cause” under the Judiciary Article requiring a jury trial. These cases have been isolated upon a case-by-case determination and include such proceedings as election contests, *Hammond v. Ashe*, 103 Tex. 503, 131 S.W. 539 (1910) (election contest is not a “cause” as contemplated by the Texas Constitution); habeas corpus proceedings for the custody of minor children, *Burckhalter v. Conyer*, 9 S.W.2d 1029 (Tex.Com.App.1928, jdgmt adopted); *Pittman v. Byars*, 112 S.W. 102, 106 (Tex.Civ.App.1908, no writ); appeals in administrative proceedings, *Texas Liquor Control Board v. Jones*, 112 S.W.2d 227, 229 (Tex.Civ.App.1937, no writ), and applications for family protective orders. *Williams v. Williams*, 19 S.W.3d 544 (Tex. App.—Fort Worth 2000, pet. denied).

In *Williams v. Williams*, 19 S.W.3d 544 (Tex. App.—Fort Worth 2000, pet. denied), the court addressed an identical challenge to sections 81.001 and 85.001 and found the statutes constitutional. *Id.* at 548. The court noted that in promulgating the statutes that control family protective orders, the legislature provided that an applicant for a protective order is entitled to a hearing not later than 14 days after the date of filing unless a later date is requested by the applicant. *See* Tex. Fam. Code Ann. § 84.001(a) (Vernon 2008). A request for jury trial in a civil suit is required to be filed not less than 30 days in advance of

¹ In the trial of all causes in the District Courts the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature. Tex. Const. art. V, § 10

² The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Tex. Const. art. I, § 15

the date set for trial. Tex. R. Civ. P. 216(a). The *Williams* court noted that it is not possible to comply with the statutory requirement to hold a hearing within 14 days, yet also comply with the rule that requires filing of a written request for a jury trial 30 days in advance. *Williams*, 19 S.W.3d at 548.

While the right to a jury trial is by constitutional mandate to remain inviolate, the legislature is also directed to pass such laws as maintain its efficiency. *Green v. W.E. Grace Mfg. Co.*, 422 S.W.2d 723, 725 (Tex. 1968). The inviolate right to a jury trial is regulated by those rules which specify its availability. *Green*, 422 S.W.2d at 725. The Family Code requires a hearing to be held on an application for family protective order within 14 days of the filing of the application with few exceptions permitted to continue the hearing. Tex. Fam. Code Ann. § 84.001(a) (Vernon 2008). A party requesting a jury trial must comply with the procedure set forth in rule 216 of the Texas Rules of Civil Procedure, which requires a request for a jury be made not less than 30 days before the date set for trial. *Howell v. Texas Workers' Compensation Com'n*, 143 S.W.3d 416, 438 (Tex. App.—Austin 2004, pet. denied). By requiring a hearing within 14 days of the application and requiring a court to make the determination, the legislature recognized the immediate nature of most family protective orders. If the legislature permitted jury trials to determine facts in an application for a protective order, the individual from whom protection is sought could effectively delay the hearing by requesting a jury. Such a delay would work to the disadvantage of the individual seeking protection because he or she would have to wait at least 30 days before the hearing could be held. The legislature had the undoubted right to make this additional protection in the interest of ensuring that a protective order is issued as timely as possible and, in so doing, violated no constitutional guarantee to appellant.

I agree with the majority that Teel's first issue should be overruled, but disagree with the majority's conclusion that Teel did not properly preserve the issue. Thus, I respectfully concur.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Frost, and Brown. (Frost, J. Majority)