

No. 23-0067

IN THE SUPREME COURT OF TEXAS

CHRISTINE LENORE STARY,
Petitioner,
v.
BRADY NEAL ETHRIDGE,
Respondent.

On Petition for Review from the First District Court of Appeals at
Houston No. 01-21-00101-CV

**AMICUS CURIAE BRIEF OF
HERITAGE DEFENSE FOUNDATION**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES	ii
IDENTIFICATION AND INTEREST OF AMICUS CURIAE	iv
INTRODUCTION	1
ARGUMENT AND AUTHORITIES.....	2
I. In the parent-child context, the lack of due process required to obtain a lifetime no-contact protective order shocks the conscience.....	2
II. Lifetime no-contact protective orders in a parent-child relationship violate due process.	8
(A) <i>Termination proceedings have stringent due process protections because they deprive parents of fundamental rights.</i>	9
(B) <i>Lifetime protective orders like the one in this case deprive parents of the most important of their fundamental parental rights.</i>	9
(C) <i>Protective orders have lower due process standards because they were never intended to permanently restrict fundamental parental rights.</i>	12
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE	16

INDEX OF AUTHORITIES

CASES

<i>Culver v. Culver</i> , 360 S.W.3d 526 (Tex. App.—Texarkana 2011, no pet.)	5
<i>In the Interest of D.T.</i> , 625 S.W.3d 62 (Tex. 2021).....	7, 9
<i>Roper v. Jolliffe</i> , 493 S.W.3d 624 (Tex. App.—Dallas 2015, pet. denied)	2, 4, 11

STATUTES

Tex. Fam. Code § 105.002(a)	9, 11
Tex. Fam. Code § 161.001(b)	9, 10, 11
Tex. Fam. Code § 161.2011(c)	10, 11
Tex. Fam. Code § 161.206(b)	11
Tex. Fam. Code § 161.2061	11
Tex. Fam. Code § 71.002	3
Tex. Fam. Code § 71.004	3
Tex. Fam. Code § 81.001	3
Tex. Fam. Code § 82.002	2
Tex. Fam. Code § 84.001	5, 11
Tex. Fam. Code § 84.002	5
Tex. Fam. Code § 84.004	5
Tex. Fam. Code § 85.022(b)	11
Tex. Fam. Code § 85.025	4, 6, 11
Tex. Fam. Code § 87.001	6, 11
Tex. Fam. Code, Title 5, Chapter 161	9

OTHER AUTHORITIES

2023, 88th Leg., H.B. 1432, § 1	3
Act of April 18, 1997, 75th Leg., R.S., ch. 34, § 1, sec. 85.025, 1997 Tex. Gen. Laws 76, 85.	13
Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 1, 1979 Tex. Gen. Laws 182.	13
Act of May 23, 2011, 82nd Leg., R.S., ch. 627, § 2, sec. 85.025, 2011 Tex. Gen. Laws 1523	13
Act of May 30, 1999, 76th Leg., R.S., ch. 1161, § 3, sec. 85.025, 1999 Tex. Gen. Laws 4065, 4066	13
House Comm. on Judiciary & Civ. Juris., Bill Analysis, Tex. S.B. 789, 82nd Leg., R.S. (2011)	14
House Research Organization, Bill Analysis, Tex. S.B. 50, 76th Leg., R.S. (1999)	13

S. Comm. on Juris., Bill Analysis, Tex. S.B. 789, 82nd Leg., R.S. (as filed, Aug. 5, 2011).....	14
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IDENTIFICATION AND INTEREST OF AMICUS CURIAE¹

Heritage Defense Foundation is a national, non-profit legal advocacy organization based in Texas. The organization employs attorneys who provide information, consultation, and legal representation for the protection of children and the preservation of civil rights and civil liberties secured by law for both parents and children. Heritage Defense Foundation has an interest in this case because the Court's decision directly impacts the mission of the organization.

¹ No legal fees were paid for the preparation of this brief. *See* Tex. R. App. P. 11(c).

INTRODUCTION

Imagine someone (an “applicant”) accusing a parent of committing a felony against a child. The accused parent is never charged or convicted. Yet the applicant believes the parent should be permanently cut off from being in the child’s life.

The applicant could file suit to terminate the parental rights of the accused parent. However, even when an applicant believes it is in the best interest of the child to completely sever their relationship with the accused parent, there are two big reasons the applicant may prefer to avoid this route.

First, termination proceedings are difficult. They generally take a long time and involve lengthy discovery. The applicant bears the high burden of proving their case by clear and convincing evidence. Plus, the accused is entitled to a jury trial.

Secondly, in a successful termination proceeding, while the parent-child relationship is legally severed, so is the accused parent’s financial responsibility.

Lifetime protective orders allow an applicant to have the best of both worlds. They can completely sever an accused parent’s relationship with their child, maintain the accused parent’s financial responsibility, and do it all with extremely minimal process, in just a couple of weeks, in front of a judge, and based on the lowest civil burden of proof.

But should this be so?

ARGUMENT AND AUTHORITIES

I. In the parent-child context, the lack of due process required to obtain a lifetime no-contact protective order shocks the conscience.

Current Texas statutes ostensibly allow for lifetime no-contact protective orders in parent-child relationships. Yet the due process requirements for these orders are woefully insufficient to what should be expected for such extreme measures. Simply describing the individual elements of the statutory scheme reveals many of its problems and opportunities for serious abuse.

Applicant

Any adult may apply for a protective order to protect a child from family violence.² Additionally, a prosecuting attorney or the Department of Family and Protective Services may apply for a protective order for the protection of any person alleged to be a victim of family violence.³

Factfinder

“The statute makes clear that the legislature intended that courts, not juries, act as the sole fact finders and have the responsibility for making the findings necessary for the issuance of a family violence protective order.”⁴

² Tex. Fam. Code § 82.002(c).

³ Tex. Fam. Code § 82.002(d).

⁴ *Roper v. Jolliffe*, 493 S.W.3d 624, 630 (Tex. App.—Dallas 2015, pet. denied).

Court

“‘Court’ means the district court, court of domestic relations, juvenile court having the jurisdiction of a district court, statutory county court, constitutional county court, or other court expressly given jurisdiction under this title.”⁵

Grounds

“Family violence” means:

(1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

(2) abuse, as that term is defined by Sections 261.001(1)(C), (E), (G), (H), (I), (J), (K), and (M), by a member of a family or household toward a child of the family or household; or

(3) dating violence, as that term is defined by Section 71.0021.⁶

Currently, an applicant is entitled to a protective order if the court finds that one of these three definitions of family violence has occurred *and* is likely to occur in the future.⁷ Note that on September 1, 2023, the provision requiring that a court find that family violence “is likely to occur in the future” will be stricken.⁸

⁵ Tex. Fam. Code § 71.002.

⁶ Tex. Fam. Code § 71.004.

⁷ Tex. Fam. Code § 81.001.

⁸ 2023, 88th Leg., H.B. 1432, § 1, effective September 1, 2023, amending, inter alia, Tex. Fam. Code §§ 81.001 and 82.025.

Burden of Proof

Because protective order proceedings are considered civil in nature, even when involving parent-child relationships, the burden of proof for a court to make its findings has been held to be a preponderance of the evidence.⁹

Duration

If the court finds any of the three grounds described above, the applicant is entitled to a protective order lasting up to two years.¹⁰

A court also has discretion to issue a protective order *exceeding* two years if the court, again by preponderance, finds at least one of the following:

[T]he person who is the subject of the protective order:

(1) committed an act constituting a felony offense involving family violence against the applicant or a member of the applicant's family or household, **regardless of whether the person has been charged with or convicted of the offense;**

(2) caused serious bodily injury to the applicant or a member of the applicant's family or household; or

(3) was the subject of two or more previous protective orders rendered:

(A) to protect the person on whose behalf the current protective order is sought; and

(B) after a finding by the court that the subject of the protective order:

(i) has committed family violence; and

(ii) is likely to commit family violence in the future.¹¹

⁹ *Roper v. Jolliffe*, 493 S.W.3d 624, 638 (Tex. App.—Dallas 2015, pet. denied).

¹⁰ Tex. Fam. Code § 85.025(a).

¹¹ Tex. Fam. Code § 85.025(a)(1). Similar to Tex. Fam. Code § 81.001, discussed above, the final clause, (3)(B)(ii), will be stricken effective September 1, 2023. 2023, 88th Leg., H.B. 1432, § 1.

(emphasis added).

If a court finds any one of these three grounds satisfied, there is no maximum limit on the duration of the protective order.

Timeline

Once the applicant has filed a request for a protective order, a court must set a hearing for not later than the 14th day after the date the application is filed¹² (unless, in certain counties, a prosecuting attorney requests a later date¹³).

If service on a respondent is delayed and respondent receives service within 48 hours before the time set for the hearing, respondent may request the court to reschedule the hearing, which must reschedule the hearing for a date not later than 14 days after the date set for the hearing.¹⁴

Discovery

In protective order proceedings, there is no real opportunity for discovery.¹⁵

Modification

After a court issues a protective order, any party may move to modify it:

“On the motion of any party, the court, after notice and hearing, may modify an existing protective order to:

¹² Tex. Fam. Code § 84.001(a).

¹³ Tex. Fam. Code § 84.002.

¹⁴ Tex. Fam. Code § 84.004.

¹⁵ See *Culver v. Culver*, 360 S.W.3d 526, 534 (Tex. App.—Texarkana 2011, no pet.).

- (1) exclude any item included in the order; or
- (2) include any item that could have been included in the order.”¹⁶

There does not appear to be a limit to the number or frequency allowed of such motions to modify.

Vacation

Not earlier than the first anniversary of the date on which the order was rendered, a person subject to it may request the court to review it to determine whether there is a continuing need for the order.¹⁷

If the court denies the request, and the protective order duration exceeds two years, then not earlier than the first anniversary of the date on which the first request to review was denied, a person subject to the order may request the court to review it again to determine whether there is a continuing need for the order.

After these two opportunities, no additional requests to review the order are permitted.

Outcome

Put together, these elements paint a picture of a process with very bare protections for accused parents.

¹⁶ Tex. Fam. Code § 87.001.

¹⁷ Tex. Fam. Code § 85.025(b).

Under this scheme, any adult, related or not, can file an application for a protective order to protect a child. The application can be filed in nearly any court, including a constitutional county court.

The applicant can then wait to serve the respondent until 49 hours before a hearing. Even if served immediately, the respondent still has zero opportunity to conduct discovery within 14-20 days.

The applicant can claim that the respondent has committed an act constituting a felony offense involving family violence even if the respondent is never charged with or convicted of it.

Then, with no right to a jury, a judge can find the respondent guilty of committing a criminal act based on the lowest civil burden of proof, and then based on such finding that judge can effectively sentence the respondent to something akin to what this Court has called the “death penalty” of civil cases.¹⁸

Does that pass for due process in our state?

If that is the process considered due in this context, it speaks ill of the value we place on the relationship between parents and children.

Moreover, in many ways, a lifetime no-contact protective order is a harsher sanction than termination of parental rights. While the severance of parental rights

¹⁸ *In the Interest of D.T.*, 625 S.W.3d 62, 69 (Tex. 2021) (citing with approval *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring)).

is more complete in a termination order, several aspects of a lifetime no-contact protective order are actually more onerous.

After termination, nothing inherently prohibits contact between the child and their biological parent, which is instead generally left up to the discretion of the conservator or adoptive parent. Later, once the child reaches adulthood, nothing whatsoever limits contact other than the wishes of the parties. Yet under a lifetime no-contact protective order, the biological parent is legally barred from any kind of communication or other contact with the child, even into the child's adulthood.

After termination, the biological parent no longer bears any responsibility for the child, such as for child support. Yet under a lifetime no-contact protective order, those obligations could continue. The biological parent maintains responsibility but is permanently prohibited from any kind of real relationship.

While such outcomes may be entirely appropriate under certain tragic circumstances, should not such an extraordinary result be reached only after significantly more due process than provided under this statutory scheme?

II. Lifetime no-contact protective orders in a parent-child relationship violate due process.

It is unconstitutional to circumvent due process requirements by executing an effective termination of parental rights under the guise of a protective order.

(A) Termination proceedings have stringent due process protections because they deprive parents of fundamental rights.

As this Court has stated, a termination of parental rights is the “death penalty of civil cases.”¹⁹

Due to the serious nature of this deprivation, termination proceedings are subject to stringent due process requirements. Suing to terminate parental rights is a formal proceeding subject to all the procedures of a lawsuit,²⁰ including discovery and the option to elect a trial by jury.²¹ One of the most important of these protections is the burden of proof. Like other fundamental constitutional rights, parental rights may only be terminated based on clear and convincing evidence.²²

(B) Lifetime protective orders like the one in this case deprive parents of the most important of their fundamental parental rights.

A lifetime protective order effectively deprives parents of the most important of their fundamental parental rights.

¹⁹ *In the Interest of D.T.*, 625 S.W.3d 62, 69 (Tex. 2021) (Quoting *In re K.M.L.*, 443 S.W.3d 101, 121 (Tex. 2014) (Lehrmann, J., concurring)).

²⁰ See, Tex. Fam. Code, Title 5, Chapter 161.

²¹ Tex. Fam. Code § 105.002(a).

²² Tex. Fam. Code § 161.001(b).

While a protective order does not terminate *all* parental rights, as the court of appeals admitted, “Undoubtedly, the rights [Petitioner] retains pale in comparison to the rights she lost by the protective order.”²³ Petitioner cannot see, communicate, or otherwise interact with her children. In essence, a lifetime protective order in a parent-child relationship deprives both the parent and the child of *the relationship itself*.

See Table 1 for a side-by-side comparison of terminations to protective orders. It is worth noting that under a suit for *termination*, the standard for denying a parent access to their child is that the parent has actually been *indicted* for criminal activity that constitutes a ground for termination. Additionally, the order lasts only until the charges have been resolved and the court issues a new order.²⁴

Table 1: termination of parental rights and protective orders

	Termination of Parental Rights	Normal Protective Order
Grounds	Includes if the parent has “engaged in conduct . . . which endangers the physical or emotional well-being of the child” ²⁵	Family violence ²⁶
Inheritance	May inherit (unless	May inherit

²³ *Stary v. Ethridge*, No. 01-21-00101-CV, 2022 Tex. App. LEXIS 9166, at *16 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, pet. filed).

²⁴ Tex. Fam. Code § 161.201(c).

²⁵ Tex. Fam. Code § 161.001(b)(1)(E).

²⁶ Tex. Fam. Code §§ 85.001(b); 71.004(1).

	court limits) ²⁷	
Burden of proof	Clear and convincing evidence ²⁸	Preponderance of the evidence ²⁹
Jury Trial	May demand jury trial ³⁰	Court hearing; no jury trial. ³¹
Timeline	Normal civil trial proceedings, typically >1 year	Hearing 14 days after application ³²
Length	Lifetime	≤ 2yrs unless possible felony, then unlimited ³³
Contact	Optional post-termination contact ³⁴	Generally, severely limited ³⁵
Modifiability	n/a	Modifiable ³⁶
Grounds for restricting access	During a suit for termination, denial of parental access may be granted in a separate proceeding if parent has been indicted for criminal activity that constitutes grounds for termination. ³⁷	Protective order may exceed 2 yrs if the court finds a family violence felony was committed, regardless of criminal charges or conviction. ³⁸

²⁷ Tex. Fam. Code § 161.206(b).

²⁸ Tex. Fam. Code § 161.001(b).

²⁹ *Roper v. Jolliffe*, 493 S.W.3d 624, 638 (Tex. App.—Dallas 2015, pet. denied).

³⁰ Tex. Fam. Code § 105.002(a).

³¹ *Roper*, 493 S.W.3d at 636.

³² Tex. Fam. Code § 84.001.

³³ Tex. Fam. Code § 85.025.

³⁴ See Tex. Fam. Code § 161.2061.

³⁵ Tex. Fam. Code § 85.022(b).

³⁶ Tex. Fam. Code § 87.001.

³⁷ Tex. Fam. Code § 161.2011(c).

³⁸ Tex. Fam. Code § 85.025(a-1)(1).

The appellate court previously rejected the argument that a lifetime protective order is essentially a termination of parental rights, claiming without much discussion that there is a difference between terminations and protective orders.³⁹ But this is conclusory. Of course there is a difference between the two. The problem is that the protective order at issue is so broad as to nullify the most important distinctions except one: the amount of due process provided. Additionally, as already discussed here, by Petitioner, and by the dissenting justice in the court of appeals, many of the differences make a lifetime protective order substantively worse than a termination of parental rights.

(C) Protective orders have lower due process standards because they were never intended to permanently restrict fundamental parental rights.

Unlike terminations, protective orders are generally not limited by the same due process requirements under Texas law. This is because protective orders do not appear to have been intended by the legislature to deprive parents of their fundamental rights in a manner this permanent.

³⁹ *Stary v. Ethridge*, No. 01-21-00101-CV, 2022 Tex. App. LEXIS 9166 at *13-14 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, pet. filed).

When Title 4 of the Texas Family Code was enacted in 1979, the stated purpose of protective orders was to reduce law enforcement officer deaths and injuries by aiding them in protecting victims of family violence.⁴⁰

Originally, protective orders could not exceed one year.⁴¹ In 1999, the legislature changed the one-year limit to two years.⁴² The apparent rationale behind the two-year protective order was to protect women who were likely to be victimized within two years of a divorce.⁴³ Proponents of the bill argued that it gave women more time to establish their new, post-divorce life and cited other states that had two to three year protective orders.⁴⁴

In 2011, Tex. Fam. Code § 85.025 was amended to include the provisions for extending a protective order beyond two years.⁴⁵ The apparent goal was to

⁴⁰ Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 1, 1979 Tex. Gen. Laws 182.

<https://lrl.texas.gov/legis/BillSearch/BillDetails.cfm?legSession=66-0&billTypeDetail=HB&billNumberDetail=1075&submitbutton=Search+by+bill>

⁴¹ Act of April 19, 1979, 66th Leg., R.S., ch. 98, § 11, sec. 71.13, 1979 Tex. Gen. Laws 182, 188. In 1997, Title 4 was renumbered, and Tex. Fam. Code § 71.13 became § 85.025. Act of April 18, 1997, 75th Leg., R.S., ch. 34, § 1, sec. 85.025, 1997 Tex. Gen. Laws 76, 85.

<https://lrl.texas.gov/legis/billsearch/text.cfm?legSession=75-0&billTypeDetail=SB&billNumberDetail=797&billSuffixDetail=>

⁴² Act of May 30, 1999, 76th Leg., R.S., ch. 1161, § 3, sec. 85.025, 1999 Tex. Gen. Laws 4065, 4066.

<https://lrl.texas.gov/legis/BillSearch/BillDetails.cfm?legSession=76-0&billTypeDetail=SB&billNumberDetail=50&billSuffixDetail=>

⁴³ House Research Organization, Bill Analysis, Tex. S.B. 50, 76th Leg., R.S. (1999) (“Supporters Say” section, pp. 3-4).

<https://lrl.texas.gov/scanned/hroBillAnalyses/76-0/SB50.PDF>

⁴⁴ *Id.*

⁴⁵ Act of May 23, 2011, 82nd Leg., R.S., ch. 627, § 2, sec. 85.025, 2011 Tex. Gen. Laws 1523. <https://capitol.texas.gov/tlodocs/82R/billtext/pdf/SB00789F.pdf#navpanes=0>

prevent timeline gaps between limited protective orders in extreme cases when the protected person was “still in danger after the expiration of the order.”⁴⁶

Protective orders were originally meant to temporarily protect people from danger, most commonly adults against adults. They do not appear to have been intended to permanently deprive parents of their fundamental rights. If anyone seeks to terminate parental rights, whether in name or de facto, they should be held to all the due process requirements of a termination proceeding.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant Petitioner’s petition for review and reverse the trial court’s final protective order.

Respectfully submitted,

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⁴⁶ S. Comm. on Juris., Bill Analysis, Tex. S.B. 789, 82nd Leg., R.S. (as filed, Aug. 5, 2011) (Author’s/Sponsor’s Statement of Intent); House Comm. on Judiciary & Civ. Juris., Bill Analysis, Tex. S.B. 789, 82nd Leg., R.S. (2011) (Background and Purpose).
<https://capitol.texas.gov/billlookup/text.aspx?LegSess=82R&Bill=SB789>

CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 3,417 words in the contents subject to calculation, according to the word count of the computer program used to prepare it, in compliance with Tex. R. App. P. 9.4(i).

/s/ Bradley W. Pierce
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following persons via the Court's electronic filing system this 11th day of July 2023.

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