IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

June 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

KAREN ELAINE WHITE KITE,	)	C/A NO. 03A01-9603-CH-00095
	)	
Plaintiff-Appellant,	)	KNOX CHANCERY
	)	
v.	)	
	)	
ARLIN JAY KITE,	)	
	)	
Defendant-Appellee.	)	

D I S S E N T I N G O P I N I O N

The majority summarily affirms the Trial Court's judgment without discussion by a procedure that we ordinarily reserve for issues controlled by settled law. However, the Trial Court's judgment demonstrates that the system not only has failed the plaintiff, but has victimized her as well.

The plaintiff, relying on Tennessee Code Annotated §36-3-601 *et seq.*, petitioned the Knox County Chancery Court for an order of protection by filing a petition on December 27, 1995. The petition, which was sworn to, states that ?petitioner is in an immediate and present danger of abuse by respondent?. The petition also asked for an ex parte order and specifically prayed ?that a hearing in this cause be set within ten days, pursuant to Tennessee Code Annotated §36-3-605.? A Chancellor signed an ex parte order of protection on the date of filing, but that order set the hearing date for

January 22, 1996. The majority opinion outlines what the Chancellor did on the scheduled date of hearing, i.e., dismissed the action without hearing any evidence.

The system has victimized this plaintiff because she did everything that the statute required of her and all that was within her control to do. Yet the Court, either intentionally or by inadvertence, set the hearing date beyond the time mandated by the statute, and on the hearing date concluded that the Court's own action provided a basis to dismiss the claim, because in the Trial Court's view it had lost jurisdiction of the case because the matter was not heard within ten days of the issuance of the ex parte order.

The issue on appeal is essentially what the legislature intended in T.C.A. §36-3-605. The Supreme Court has cautioned all courts and we should remind ourselves, that the legislature ?cannot be supposed to intend its own stultification? and the courts should avoid construction that leads to absurd consequences. The Court said the presumption against absurdity is probably a more powerful guide in the construction of statutes, than the presumption against inconvenience or injustice. *Wise v. Morgan*, 101 Tenn. 273, 48 S.W. 971 (Tenn. 1898).

The majority for some reason only quoted a part of sections (a) and (b) of the statute. The complete wording of T.C.A. §36-3-605 reads as follows:

> **36-3-605. Protection order - Extension - Hearing - Costs and attorney's fees. -** (a) Upon the filing of a petition under this part, the courts may immediately, for good cause shown, issue an ex parte order of protection. An immediate and present danger of abuse to the petitioner shall constitute good cause for purposes of this section.

> (b) Within ten (10) days of service of such order on the respondent under this part, a hearing shall be held, at which time the court shall either dissolve any ex parte order which has been issued, or shall, if the petitioner has proved the allegation of abuse by a preponderance of the evidence, extend the order of protection for a definite period of time, not to exceed one (1) year unless a further hearing on the continuation of such order is requested by the respondent or the complainant in which case, on proper showing of cause, such order may be continued for a further definite period of one (1) year after which time a further hearing must be held for any subsequent one-year period. Any ex parte order of protection shall be in effect until the time of the hearing. *If no ex parte order of protection has been issued as of the time of the hearing, and the petitioner has proven the allegation of abuse by a preponderance of the evidence, the court may, at that time, issue an order of protection for a definite period of time, not to exceed one (1) year.* (Emphasis supplied).

A stated purpose by the General Assembly when this Act was initially passed was ?to provide certain means of protection? from physical and emotional abuse. Chapter 350 Public Acts 1979. The construction placed upon the statute by the Chancellor renders it vulnerable in many cases to failing of its essential purpose. The Chancellor and appellee focused upon the word ?*shall*? as being mandatory. However, while all language in the statute must be given meaning, it is a distortion to single out certain words to the exclusion of the whole statute. An analogous situation arose in *Shaeffer v. Richard*, 43 Tenn. App. 205, 306 S.W.2d 340 (1956). The Court in that case was confronted with the wording of Tennessee Code Annotated §20-9-506, which provides that in non-jury cases ?the judge shall be required to render the judge's decision? within sixty days of the completion of trial. In *Shaeffer* the Trial Judge had not followed this mandate, but had rendered the decision at a point in time beyond the 60-day requirement.

In that case the appellant insisted that the judgment was void because the Trial Judge had in effect lost jurisdiction when he failed to comply with the requirement that he render his decision within sixty days. In forcefully rejecting this contention, this Court said ?doubtless, if the legislature had intended for the judgment to be void when rendered by a trial judge more than sixty days after the hearing of the cause without a jury, it would have said so in specific words.? 43 Tenn. App. 212.

The increasing incidences of violence in our society prompted the legislature to enact this legislation, and the legislation provides that prompt ex parte protection can be afforded upon the petitioner's complying with the requirements of the statute. The legislature also took into account the rights of the defendant who may have been wrongfully sued and limited the efficacy of the ex parte order to ten days unless an evidentiary hearing was held within that time frame, but authorized the continuance of the order if the petitioner had ?proved the allegation of abuse by a preponderance of the evidence? for a period not to exceed one year.

There is nothing to indicate the legislature intended that the court would lose jurisdiction if it did not act on the matter within the ten day time frame, nor is there any suggestion that the court would be without power to act subsequently. Indeed, the statute provides if no ex parte order of protection has issued prior to the time of the hearing, the trial judge is expressly authorized to issue the order of protection upon the proof of abuse by a preponderance of the evidence.

In this case, while the ex parte order of protection had no force and effect beyond the ten-day statutory period,[1] the failure of the court to set a hearing within the ten day period did not divest the trial court of jurisdiction, and the trial court erred in refusing to hear the evidence and issue an order of protection if warranted on the behalf of petitioner.

I would reverse and remand for a trial on the issue.

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Herschel P. Franks, J.

[1]Upon expiration of ten days from the date of the ex parte order, the case was essentially in the posture of a case with no ex parte order of protection.