

State Bar of Texas  
Appellate Section  
Diversity Committee  
CLE:  
“A Fresh Look at Civil  
Appeals”  
April 14, 2021

# THE TEXAS RULES OF PANDEMIC

What's Changed (and What Hasn't) in State Litigation

By Kirk Cooper Antuna  
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Eighth Court of Appeals

## Teaching by 'Phone Beats Flu Quarantine

SACRAMENTO, Jan. 29.—School teaching by telephone is today's latest educational wrinkle in California.

Long Beach has originated this novel innovation, according to Will C. Wood, state superintendent of public instruction, as a measure to beat the flu quarantine. The pupils in the high school there are doing home study work and holding regular telephonic conversation with their instructors.

Oakland Tribune, California, January 29, 1919

"Flu" Masks—Citizens should understand that masks are not calculated or made for adornment, for mufflers or as a substitute for earrings; but for the purpose of eliminating the "flu." To answer this purpose they must fully cover the mouth and nostrils to prevent the escape of the germs into the air that others may breathe.

The Journal, Logan, Utah, November 22, 1918

Many a man who wears laughable clothes from neckties to socks is afraid to put on an influenza mask for fear it might hurt his personal appearance.

The Evening Star, Washington DC, October 16, 1918



*A suggested substitute for kissing.  
Rubbing thumbs*

The Australasian, Melbourne, February 15, 1919

## WHY NOW?

- Emergency orders may be in effect for the next few weeks/months until the disaster declaration is lifted
- Case law may prove helpful in other disaster management situations (i.e. hurricanes, floods, etc.)
- Clarifications to the injunctive/emergency relief standards and procedures on appeal

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# THE GREAT TEXAS HIBERNATION



APPEALS FILINGS HAVE FALLEN XX%  
IN THE PAST YEAR



COVID CASE COUNTS HAVE  
FLUCTUATED AND CREATED  
UNCERTAINTY ABOUT LOCAL  
CONDITIONS



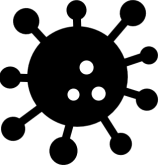



LAWYERS AND JUDGES HAVE  
GENERALLY PREFERRED TO “WAIT IT  
OUT” V. HAVING DIGITAL TRIALS

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# MAJOR AREAS OF LITIGATION

- Video Conferencing 
  - Deadline Extensions under the Emergency Order 
  - Continuances Based on Local Conditions 
  - “Ripped from the Headlines”  
(Injunctions and the Shadow Docket) 
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# VIDEOCONFERENCE ISSUES

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394th Judicial District Court

ording of this hearing or live stream  
is prohibited.

ation may constitute contempt of  
t and result in a fine of up to \$500  
nd a jail term of up to 180 days.

ct Court



***“Whoever fights  
monsters should  
see to it that in the  
process he does  
not become a  
monster himself.  
And if you gaze too  
long into the  
abyss, the abyss  
gazes back into  
you.”***

- Friedrich Nietzsche (1844-  
1900), describing Zoom  
meetings

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# CAN THE TRIAL COURT HOLD REMOTE HEARINGS OVER AN OBJECTING PARTY'S REQUEST FOR A JURY TRIAL?

*3. Subject only to constitutional provisions, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:*

*a. . . . modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than [XXX]*

- Suspension Clause of the Emergency Order

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## THE COURTS ARE SPLIT

**YES:** *In re Best Interest and Protection of K.G.*, No. 05-20-01053-CV, 2021 WL 688447, \*3-\*4 (Tex.App.--Dallas Feb. 23, 2021, no pet.)

Appellant who was ordered to be committed to a mental institution for ninety days and be administered psychoactive medication raised the remote hearing as a point of error under Tex. Health & Safety Code 574.203 because there was no written consent from parties (including appellant) as required by statute. Attorney did not object and Appellant further contended the attorney was ineffective.

HELD: Emergency Order allowed trial court to compel Zoom hearing without the parties' consent + no evidence of harm. Attorney was not ineffective for failing to object.

*See also S.B. v. Tex. Dep't of Family & Protective Servs.*, No. 03-20-00373-CV, 2020 WL 7414728 (Tex.App.—Austin Dec. 18, 2020, no pet.)(parental right termination proceeding could be done over Zoom over request for jury trial)

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## THE COURTS ARE SPLIT

**NO:** *In re State ex rel Ogg*, No. WR-91,936-01, 2021 WL 800761, \*3-\*4  
(Tex.Crim.App. Mar. 3, 2021)

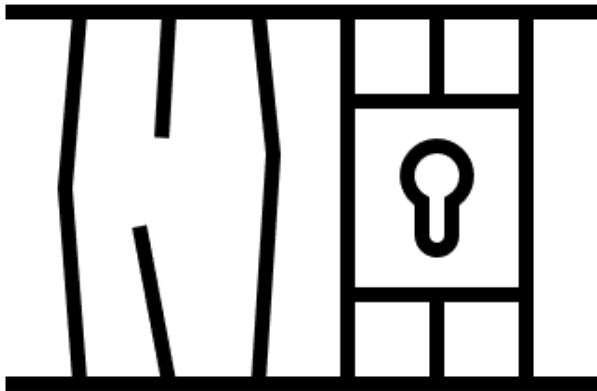
Mandamus granted where defendant waived his right to a jury trial in favor of a bench trial but the State objected; COVID-19 order preventing jury trials could not be used to force State to accept bench trial over State's objection, construing the order to allow "procedure" because a judge does not have any authority whatsoever to conduct a bench trial without the state's consent, and the order cannot be used to create authority for a court to act where none exists. Article 1.13 is not procedural, it is a grant of authority

**DREW A DISTINCTION BETWEEN A PROCEDURE AND  
STATUTORY GRANT OF AUTHORITY**

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# DOES *EX REL OGG* CHANGE THE GAME?



The Eastland Court of Appeals has interpreted *In re State ex rel Ogg* as invalidating plea agreements made over Zoom because Texas Code of Criminal Procedure provides for in-person plea hearings absent waiver.

*See Huddleston v. State*, No. 11-20-00149-CR, 2021 WL 924850 (Tex.App.--Eastland Mar. 11, 2021, orig. proceeding) (trial court is not authorized to engage in videoconference hearing because Article 27.18 requires defendant to consent first, reversing plea); *Lira v. State*, , 2021 WL 924893 (Tex.App.—Eastland Mar. 11, 2021, no. pet. h.)(same)

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# UNANSWERED QUESTIONS

## RAISED BY *State ex rel Ogg*:



- 1) Where is the line between a **procedure** and a **grant of authority**?
- 2) If an objection to a jury trial can stop a trial court from having a virtual hearing, but an emergency order prevents the trial court from being able to convene a jury...then what? Are we in limbo forever?

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## **Can a Trial Court Hear a Matter by Submission in Lieu of Zoom Hearing?**

*In re V.K.*, 607 S.W.3d 471 (Tex.App.--Houston [14th Dist.] Aug. 7, 2020, orig. proceeding).

Trial court ruled on motion to vacate temporary ex parte order in family law case by submission rather than holding an evidentiary hearing; this was an abuse of discretion correctable on mandamus

While motion for temporary ex parte hearing could be done by submission under the Texas Family Code, trial court was required to hold a hearing under the Texas Family Code for motion to vacate

- Motion to vacate was not "ancillary" to motion for temporary order but was part of the whole proceeding

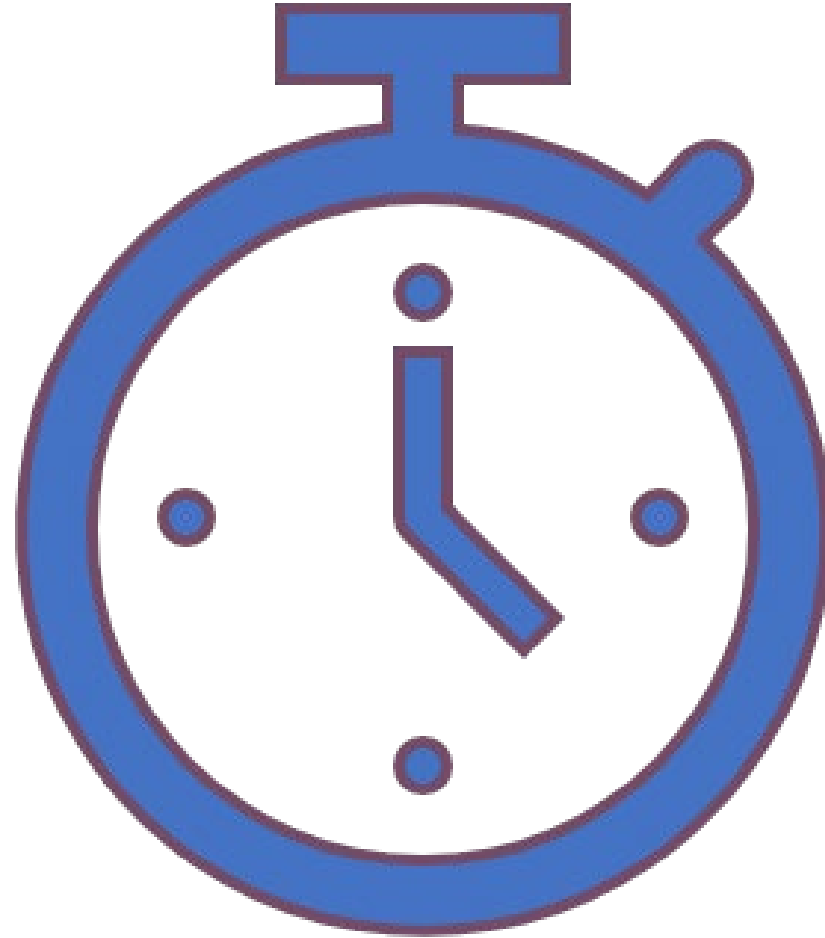
Local Harris County Family Court plan ID'd Title 4 proceedings (including protective orders) as Essential Hearings

Violation of constitutional due process and a statutory due process right

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EXTENDING  
DEADLINES  
UNDER  
THE  
EMERGENCY  
ORDERS



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3. *Subject only to constitutional provisions, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:*

a. . . . *modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order . . .*

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# TCPA Deadlines?

**YES:**

*CBS Stations Grp. of Tex., L.L.C. v. Burns*, No. 05-20-00700-CV, 2020 WL 7065827 (Tex.App.—Dallas Dec. 3, 2020, no pet.)(mem. op.)(Seventh Emergency Order’s language authorizing trial courts to extend statutory deadlines in response to local COVID-19 conditions meant that **trial court could extend TCPA deadline for ruling on TCPA motion** and that the **TCPA motion was not overruled by operation of law**)

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Motion for New Trial / Plenary Power?

NO:

*Quaraib v. Khalili*, No. 05-20-00979-CV, 2021 WL 960646 (Tex.App.--Dallas Mar. 15, 2021, no pet. h.)(where trial court lost jurisdiction over case on July 20, party could not use Emergency Order to allow TC to grant motion to reinstate--citing State ex rel Ogg, the emergency order cannot be used to create jurisdiction where none exists)

\* First example of In re State ex rel Ogg being cited in a civil case

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Tolling of Statute of Limitations?

YES

Allen v. Sherman Op. Co., L.L.C., , 2021 WL 860458 (N.D.Tex. Feb. 18, 2021)(emergency order worked to toll statute of limitations for state claim)

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# Time to File a Notice of Appeal?

**NO:** *Cantu v. Trevino*, No. 13-20-00299-CV, 2020 WL 6073267 (Tex.App.—Corpus Christi Sept. 24, 2020, orig. proceeding)(mem. op.)(emergency orders do not allow the COAs to expand the time to file a notice of appeal; that time is a jurisdictional requirement and is explicitly exempted from the emergency order’s time extending powers)

- *See also Arriola v. State*, No. 04-20-00306-CR, 2020 WL 5214765, at \*1 (Tex. App.—San Antonio Sept. 2, 2020, no pet.) (mem. op., not designated for publication)(COVID-19 orders could not extend NOA filing deadline in criminal case); *Satterthwaite v. First Bank*, No. 02-20-00182-CV, 2020 WL 4359400, at \*1 n.1 (Tex. App.—Fort Worth July 30, 2020, no pet.)(mem. op.); *Huaman v. Sherry*, No. 05-20-00845-CV, 2021 WL 761789, at \*1 n.3 (Tex.App.—Dallas Feb. 25, 2021, no pet. h.)(mem. op.)
- *Porch v. Daimler Trucks N. Am., L.L.C.*, No. 03-20-00445-CV, 2020 WL 7063575 (Tex.App.—Austin Dec. 3, 2020, orig. proceeding)(mem. op.)(assuming without deciding the power exists, no good cause for extending time to file NOA based on generalized challenges from practicing during COVID-19); *Griffin v. Via Metropolitan Transit*, No. 04-21-00032-CV, 2021 WL 883470 (Tex.App.—San Antonio Mar. 10, 2021, no pet. h.)(same applied in case of federal prisoner who did not file NOA for 118 days)

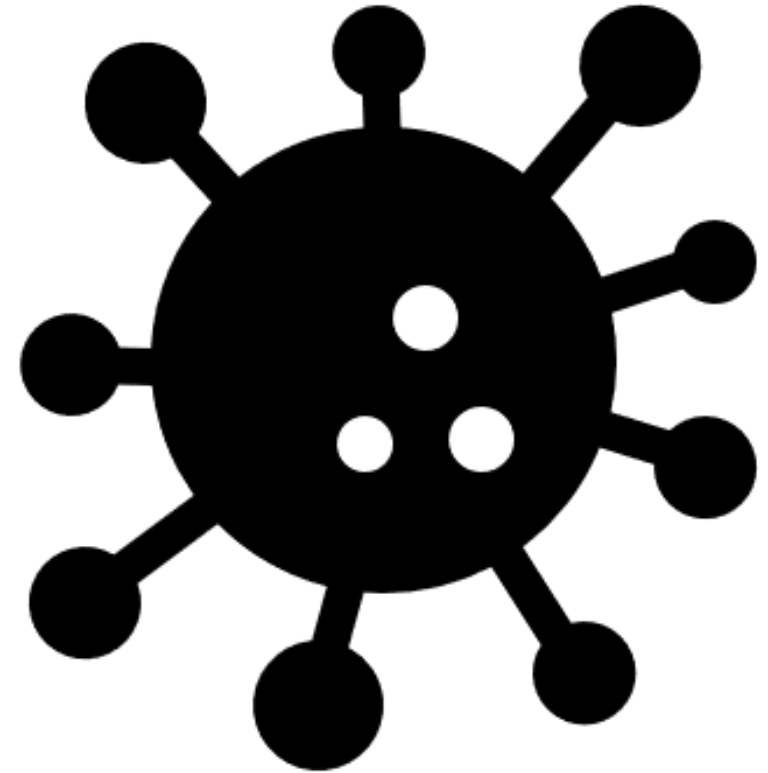
## **YES (in dissents):**

- *Haddad v. Tri-County A/C & Heating, L.L.C.*, No. 04-20-00407-CV, 2020 WL 7753988 (Tex.App.—San Antonio Dec. 30, 2020, )(Alvarez, J., dissenting to denial of motion for en banc reconsideration)
  - *North Central Baptist Hosp. v. Chavez*, No. 04-00590-CV, 2021 WL 983352 (Tex.App.—San Antonio Mar. 17, 2021)(dissent)(majority had assumed without deciding COVID-19 disaster order granted court discretion to extent deadline for file NOA beyond period specified in Tex.R.App.P. 26.3 but said appellant did not file extension motion or provide good enough explanation, dissent disagreed)
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LOCAL  
CONDITION  
CONTINUANCES  
& MANDAMUS

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*In re Rodriguez*, No. 05-20-00523-CV, 2020 WL 2487061 (Tex.App.—Dallas May 13, 2020, orig. proceeding)(mem. op.)

Common law marriage divorce case in which the parties (after the pandemic emergency began) came to a Rule 11 agreement:

- File an agreed motion for continuance on May 5;
- Exchange sworn inventories and appraisals by June 1;
- Mediate with a specific mediator by June 30;

Trial court ordered a remote trial on May 14, 2020. Both parties objected, asking for a hearing in July. Trial court rejected the request and confirmed the May 14 trial date. Mandamus action followed.

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*In re Rodriguez*, No. 05-20-00523-CV, 2020 WL 2487061 (Tex.App.—Dallas May 13, 2020, orig. proceeding)(mem. op.)

Trial court abused its discretion by not granting the full continuance; mandamus granted

Ordinarily, an order denying a motion for a continuance is an incidental ruling that cannot be reviewed by mandamus absent extraordinary circumstances; case-by-case approach

- Request was only for three months
- Helped facilitate discovery
- Allowed parties to mediate
- Agreement was “precipitated by a health crisis and emergency orders unparalleled in our nation’s history”—response requires flexibility and both counsel were behaving ethically and cooperating

*See also In re Sakyi*, No. 05-20-00574-CV, 2020 WL 4879902 (Tex.App.—Dallas Aug. 20, 2020, orig. proceeding)(mem. op.)(abuse of discretion to deny continuance due to COVID logistics issues)

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*In re Kinder Morgan Production Co., L.L.C.*, No. 20-0634 (filed 8/14/2020, pet. denied 8/19/2020 on the shadow docket)



TALES FROM  
THE SHADOW  
DOCKET

- Tax valuation suit arising in Scurry County, set as a “test case” under the Court’s emergency orders.
- Lead counsel’s physician ordered him to self-quarantine for 12 weeks and prohibiting him from traveling to Scurry County and participating in-person at trial due to his age and long-existing underlying health conditions.
- Kinder Morgan: continuance is necessary because it would be unfair to allow Lead Counsel for one side to appear remotely while counsel for the other side got in-person interaction + delay would not prejudice D
- Mandamus petition challenging TC’s failure to grant a continuance of several weeks DENIED (in one-line notation on docket sheet)

DISSENTS FROM: Chief Justice Hecht, Justice Guzman, Justice Lehrmann, and Justice Bland

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*In re EnVen Energy Corp.*, No. 21-0030 (filed 1/13/21, emergency stay granted 1/15/21, Blacklock, J., dissents from stay)---pet denied w/out opinion 3/5/21 (stay lifted)



TALES FROM  
THE SHADOW  
DOCKET

- Executive pay dispute set for in-person jury trial in Houston on January 18, 2021— trial projected to last two weeks. Company’s trial team is based in New York City.
  - EnVen submits affidavits from trial team and infectious disease doctor that a trial cannot be conducted in Houston at that time based on present circumstances (i.e. under Level One Stay at Home orders) and team’s risk profile. Additionally:
    - Lead counsel recently lost a close family member to COVID
    - Trial team had several high risk family members
    - One week prior, a trial witness had tested positive for COVID
  - Trial court denied motion for continuance and bumped case from seventeenth on the docket to top of the docket, ensuring trial would happen
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*In re EnVen Energy Corp.*, No. 21-0030 (filed 1/13/21, emergency stay granted 1/15/21, Blacklock, J., dissents from stay)---pet denied w/out opinion 3/5/21 (stay lifted)



TALES FROM  
THE SHADOW  
DOCKET

RESULT:

- On February 2, 2021, while mandamus was pending, TC reset trial to May 17, 2021
  - Parties argued over whether or not new trial date mooted the mandamus action, given that the TC did not grant all the relief requested (i.e. “until summer”) and given that the Court did not answer what the standard was for dealing with health issues like this.
  - SCOTX held onto the case until March 5, 2021, when it denied the mandamus petition and lifted the emergency stay without opinion.
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# “RIPPED FROM THE HEADLINES”

Injunctions and More Tales from the Shadow Docket

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# STANDARD FOR STATE TO ENJOIN OFFICIAL'S CONDUCT

*State v. Hollins*, No. 20-0729, -- S.W.3d --, 2020 WL 5919729 (Tex. Oct. 7, 2020)

- AG seeks to enjoin Harris County Clerk from mailing unsolicited ballot applications to all registered voters when only some were allegedly eligible to vote by mail; AG asserts this action by the Clerk is ultra vires.
  - SCOTX agrees Clerk does not have implied authority under the Election Code to send ballot applications to people who have not requested them. Issue is whether injunction should have issued.
  - HELD: For purposes of irreparable harm, ultra vires conduct automatically results in harm to the sovereign as a matter of law—State does not need to show particularized harm arising from local official's specific unauthorized actions
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# ORDERS PENDING INTERLOCUTORY REVIEW (TEX.R.APP.P. 29.3)



TALES FROM  
THE SHADOW  
DOCKET

**State of Texas v. El Paso County**, No. 08-20-00226-CV, 2020 WL 6737510  
(Tex.App.—El Paso Nov. 13, 2020, no pet.)

- Litigation regarding conflict between Governor’s open-up order and local partial shutdown order; Court splits 2-1 in favor of the Governor
  - Trial court denied AG’s request for a temporary injunction; AG files an interlocutory appeal and requests equivalent of immediate injunctive relief under TRAP 29.3 (11/6 – County’s order would expire 11/11 at 11:59 p.m.)
  - In lieu of immediate injunctive relief, Court on 11/9 delayed decision on temporary relief until 11/12 and expedited a final merits decision for 11/13
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# ORDERS PENDING INTERLOCUTORY REVIEW (TEX.R.APP.P. 29.3)



TALES FROM  
THE SHADOW  
DOCKET

**State of Texas v. El Paso County**, No. 08-20-00226-CV, 2020 WL 6737510  
(Tex.App.—El Paso Nov. 13, 2020, no pet.)

- AG files a writ of mandamus on 11/10 against the 8<sup>th</sup> Court in the Texas Supreme Court: *In re State*, No. 20-0903 (alleging abuse of discretion under Rule 29.3)
- AG also requests equivalent of immediate injunctive relief against county's order pending merits resolution of the mandamus against the COA under Tex.R.App.P. 52.10 (temporary relief pending mandamus action)

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# ORDERS PENDING INTERLOCUTORY REVIEW (TEX.R.APP.P. 29.3)



TALES FROM  
THE SHADOW  
DOCKET

**State of Texas v. El Paso County**, No. 08-20-00226-CV, 2020 WL 6737510  
(Tex.App.—El Paso Nov. 13, 2020, no pet.)

- In 5-4 decision issued by letter, SCOTX leaves the mandamus action against COA pending but denies the emergency motion for temporary relief, with the following comment:

The court of appeals has set a highly expedited briefing schedule and committed to issuing a ruling on temporary relief tomorrow. The record does not reflect the court clearly abused its discretion in deferring a decision on temporary relief until then. *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 92 (Tex. 2019) (mandamus relief requires a “clear abuse of discretion”). The court of appeals has jurisdiction to decide the merits of the underlying appeal, which it has committed to doing within two days, and discretion to grant temporary relief until disposition of the appeal. *See* Tex. R. App. P. 29.3. This Court expresses no opinion on the likelihood of success of either party on the merits.

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# ORDERS PENDING INTERLOCUTORY REVIEW (TEX.R.APP.P. 29.3)



TALES FROM  
THE SHADOW  
DOCKET

**BUT SEE *State of Texas v. City of Austin***, No. 21-0001, 2021 WL 1313348 (Tex.App.—Austin Apr. 8, 2021, no pet .h.)(holding that State’s appeal from New Year’s Eve shutdown order was moot because orders were expired)

- Noting that in SCOTX mandamus action *In re State*, No. 21-0001, SCOTX decided in less than a few hours to grant mandamus and direct COA to instantly grant Rule 29.3 relief suspending enforcement of the City/County shutdown order pending resolution of the appeal

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# ORDERS PENDING INTERLOCUTORY REVIEW (TEX.R.APP.P. 29.3)



TALES FROM  
THE SHADOW  
DOCKET

So why was the failure to immediately enjoin okay in the *El Paso County* case but not in the *City of Austin* case?

- The answer may be that the El Paso Court of Appeals granted expedited consideration of the interlocutory appeal on the merits and promised a quick decision on the merits, which may affect whether the court of appeals abuses its discretion under Rule 29.3.

*See In re Texas Education Agency*, 64 Tex.Sup.Ct.J. 547, 2021 WL 1045648, at \*8-\*9 & n. 61 (Tex. Mar. 19, 2021)(citing *El Paso County* in upholding right of COAs to issue countersupersedeas under Rule 29.3 in state agency case)

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# SPECIFICITY STANDARD FOR CONTEMPT OF A TEMPORARY INJUNCTION

***In re Shelley Luther, No. 20-0363 (Tex. Apr. 9, 2021)***

Habeas corpus attacking contempt judgment which stated Luther (hairstylist/owner of Salon a la Mode) violated a temporary injunction:

**“Defendants are immediately ordered to cease and desist from operating the Salon A La Mode business for in-person services . . . in violation of State of Texas, Dallas County, and City of Dallas emergency regulations related to the COVID-19 pandemic.”**

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\* Previous original jurisdiction challenge to orders brought directly to SCOTX denied for failure to first present matter to district courts. *See In re Salon a la Mode*, 2020 WL 2125844 (Tex. May. 5, 2020)

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# SPECIFICITY STANDARD FOR CONTEMPT OF A TEMPORARY INJUNCTION

## ***In re Shelley Luther, No. 20-0363 (Tex. Apr. 9, 2021)***

SCOTX holds that this language failed to set forth in specific, unambiguous, and reasonably detailed terms the acts to be restrained and the reasons for its issuance TRCP 683. No reasonable clarity.

- “But it nowhere specifies any particular state, county, or city regulation that Luther has violated, is threatening to violate, or is being commanded to stop violating. Nor does it describe with specificity which ‘in-person services’ were restrained . . . The temporary restraining order should have set this out in reasonable detail, without ambiguity, but it didn’t” – she would have had to analyze “a multitude of regulations—state, county, and city emergency orders referenced in the temporary restraining order, plus the federal guidelines they reference”
  - Distinguish this from a case in which “public nuisance” was held to be sufficient; in that case, public nuisance was being defined in relation to a specific statute.
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