



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

June 1, 2020

The Honorable Heather Stebbins  
Kerr County Attorney  
700 Main Street, Suite BA-103  
Kerrville, Texas 78028

**Opinion No. KP-0312**

Re: Whether a hearing on an application for court-ordered mental health services conducted pursuant to section 574.031 of the Health and Safety Code must be recorded by an official court reporter (RQ-0321-KP)

Dear Ms. Stebbins:

You ask about subsection 574.031(g) of the Health and Safety Code, which states that a hearing on an application for court-ordered mental health services “is on the record” without defining the phrase or otherwise specifying the person responsible for its preparation.<sup>1</sup> *See* TEX. HEALTH & SAFETY CODE § 574.031(g). You question whether such a commitment hearing must “be recorded by an official shorthand court reporter as provided for by Government Code [section] 52.046.” Request Letter at 1. If not, you ask what options a county court conducting a mental health hearing has “to record a hearing under the Mental Health Code.” *Id.*<sup>2</sup>

The U.S. Supreme Court recognizes that “commitment to a mental hospital produces a massive curtailment of liberty, and in consequence requires due process protection.” *Vitek v. Jones*, 445 U.S. 480, 491–92 (1980) (citation and quotation marks omitted). Consistent with this federal protection, the Texas Constitution guarantees that “[n]o person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony” and authorizes the Legislature to “enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind.” TEX. CONST. art. I § 15-a. Chapter 574 of the Health and Safety Code governs court-ordered mental health services, the proceedings about which you ask. *See generally* TEX. HEALTH & SAFETY CODE §§ 574.001–.203; Request Letter at 1. The proceedings originate “in the statutory or constitutional county court that has the jurisdiction of a

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<sup>1</sup>Letter from Honorable Heather Stebbins, Kerr Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 10, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

<sup>2</sup>Title 7, subtitle C of the Texas Health and Safety Code is known as the Texas Mental Health Code. *See* TEX. HEALTH & SAFETY CODE § 571.001.

probate court in mental illness matters.”<sup>3</sup> TEX. HEALTH & SAFETY CODE § 574.008(a); *but see id.* § 574.031(a) (permitting a judge to hold the hearing at any suitable location in the county in a physical setting not likely to have a harmful effect on the proposed patient). The Legislature also permits a hearing to be conducted by secure electronic means through two-way electronic communication “capable of visually and audibly recording the proceedings” if certain conditions are met. *Id.* § 574.203(a). At a hearing for extended inpatient or outpatient services, or for temporary services where there is no waiver of the right to cross-examine witnesses, the court must hear testimony, including competent medical or psychiatric testimony, in accordance with the Rules of Evidence. *Id.* § 574.031(d-1), (d-2), (e). Subsection 574.031(g) provides that “[t]he hearing is on the record, and the state must prove each element of the applicable criteria by clear and convincing evidence.” *Id.* § 574.031(g); *see also id.* §§ 574.034–.0355 (establishing criteria for commitment for inpatient and outpatient mental health services). Commitment orders, including renewals or modifications of orders, may be appealed. *Id.* § 574.070(e); *see also* TEX. CONST. art. I § 15-a (providing that the Legislature may “provide for a method of appeal from judgments rendered in” commitment cases).

In construing a statute, a court’s objective is to determine and give effect to legislative intent as expressed by the statute’s plain language, an approach which “requires consideration of the language in the specific section, as well as the statute as a whole.” *Interest of B.C.*, 592 S.W.3d 133, 136 (Tex. 2019). The Health and Safety Code does not define the phrase “on the record” for purposes of subsection 574.031(g), but a statement, comment, or testimony given “on the record” is commonly understood to be “recorded as official evidence of a proceeding, such as a trial or deposition.” BLACK’S LAW DICTIONARY 1263 (10th ed. 2009); *see also State ex rel. Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018) (noting that courts typically look first to dictionary definitions to determine a statutory term’s common, ordinary meaning). Where a court conducts a hearing pursuant to secure electronic means rather than in person, “[t]he court shall provide for a recording of the communication to be made and preserved until any appellate proceedings have been concluded.” TEX. HEALTH & SAFETY CODE § 574.203(c); *see also id.* § 574.202(a), (d) (permitting a judge to allow a mental health professional to testify by closed circuit videoconferencing in certain circumstances and stating that “a recording of the testimony . . . shall be made and preserved with the court’s record of the hearing”). When read in the context of the statute as a whole, “on the record” for purposes of subsection 574.031(g) must mean a record in a form that would allow appellate review of whether the State met its evidentiary burden. As such, these references suggest that the court has a duty to have such a record made. *Cf. Stubbs v. Stubbs*, 685 S.W.2d 643, 645–46 (Tex. 1985) (interpreting a statutory directive in the predecessor to Family Code subsection 105.003(c) that “a record shall be made” of a trial affecting the parent-child relationship as placing an affirmative “duty on the court to make a record of proceedings,” which means that “all oral testimony must be recorded,” and it is “the responsibility of the trial

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<sup>3</sup>In Kerr County, the statutory and constitutional county courts concurrently hold “the jurisdiction of a probate court in proceedings under . . . Subtitle C, Title 7, Health and Safety Code.” TEX. GOV’T CODE § 25.1352(b)(2) (footnote omitted); *see also id.* § 25.1351 (establishing one statutory court in Kerr County); TEX. CONST. art. V, § 15 (establishing a county court in every county). Thus, the Kerr County Court and Court at Law have jurisdiction to hear mental health commitment proceedings.

judge to see that the court reporter performs this duty”). The question becomes how a court must accomplish this task.

The Kerr County Court and Court at Law are courts of record and thus must appoint official court reporters. *See* TEX. CONST. art. V § 15 (establishing a county court in each county “which shall be a court of record”); *Ex parte Hayden*, 215 S.W.2d 620, 621 (Tex. Crim. App. 1948) (recognizing that courts with original criminal jurisdiction such as county courts, county courts at law, and district courts are courts of record); TEX. GOV’T CODE § 52.041 (providing that the judge of a court of record must appoint an official court reporter). Section 52.046 of the Government Code, about which you ask, sets forth an official court reporter’s duties. *See* TEX. GOV’T CODE § 52.046. “On request, an official court reporter shall,” among other duties, “attend all sessions of the court” and “take full shorthand notes of oral testimony offered before the court, including objections made to the admissibility of evidence, court rulings and remarks on the objections, and exceptions to the rulings.” *Id.*<sup>4</sup> Shorthand reporting involves “making a verbatim record . . . using written symbols in shorthand, machine shorthand, or oral stenography.” *Id.* § 52.001(a)(5). Thus, the standard means of producing a reporter’s record is by an official court reporter recording court proceedings using shorthand notes.<sup>5</sup>

An “appellate record consists of the clerk’s record and, if necessary to the appeal, the reporter’s record.” TEX. R. APP. P. 34.1; *see also id.* 34.6(b)(1) (providing that an appellant “must request in writing that the official reporter prepare the reporter’s record” for the appeal). In a mental commitment appeal, an official court reporter’s record takes on particular importance. *See Munoz v. State*, 569 S.W.2d 642, 643–44 (Tex. App.—Corpus Christi 1978, no writ) (stating that in an appeal from a mental commitment order “based on evidentiary matters, findings of fact and a statement of facts would be necessary for proper review” and referring to the necessity of the court reporter, among others, “to give proper consideration to the matters presented on appeal”); *see also* TEX. R. APP. P. 34 cmt. (explaining that a court reporter’s record was formerly known as a “statement of facts”). Given the heightened due process concerns of mental health proceedings and the duty of the court to have an official record made for appeal purposes, a court would likely conclude that a hearing on an application for court-ordered mental health services in Kerr County must be recorded by the official shorthand court reporter.<sup>6</sup>

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<sup>4</sup>Subsection 52.046(a) preconditions the official court reporter’s performance of these duties on a “request,” while a similar provision in the Texas Rules of Appellate Procedure governing the duties of official court reporters does not, which has caused a split among courts of appeals regarding whether error is preserved when, absent a request, an official court reporter fails to make a record. *See* TEX. R. APP. P. 13.1(a) (“The official court reporter . . . must . . . unless excused by agreement of the parties, attend court sessions and make a full record of the proceedings.”); *Sareen v. Sareen*, 350 S.W.3d 314, 316 (Tex. App.—San Antonio 2011, no pet.) (acknowledging the conflict among various courts of appeal regarding who bears the burden on the court reporter’s obligation to transcribe the record).

<sup>5</sup>We do not address the making of a record by electronic recording, as Kerr County’s courts are not among those authorized by the Texas Supreme Court to record court proceedings electronically. *See* TEXAS RULES OF COURT VOL. 1 – STATE 397 (Thomson Reuters 2018) (“Rules Governing the Procedure for Making a Record of Court Proceedings by Electronic Recording”).

<sup>6</sup>Having determined that subsection 574.031(g) of the Health and Safety Code likely requires a mental health commitment hearing to be recorded by the official court reporter, we need not address your second question regarding alternatives. *See* Request Letter at 1.

**S U M M A R Y**

Subsection 574.031(g) of the Health and Safety Code requires that a hearing on an application for court-ordered mental health services be on the record. A court would likely conclude that subsection 574.031(g) imposes a duty on a county court or court at law holding such a hearing in Kerr County to use its official court reporter to make a record of the proceedings.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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