



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 25, 2022

The Honorable John K. Greenwood
Lampasas County Attorney
409 South Pecan, Suite 203
Lampasas, Texas 76550

Opinion No. KP-0421

Re: Qualifications for a retired judge's appointment as a visiting judge to a constitutional county court under section 26.023 of the Government Code (RQ-0456-KP)

Dear Mr. Greenwood:

You ask whether a former constitutional county judge who does not meet the definition of a retired judge under Government Code subsection 74.041(6) may be appointed as a visiting judge under Government Code section 26.023.¹ You tell us the need for a visiting judge arises, because the elected county judge may be absent from the county or absent because of physical incapacity. *See* Request Letter at 1. You state that chapter 26 of the Government Code permits the appointment of a visiting judge in those circumstances but that it is difficult to secure the services of eligible judges. *Id.*; *see* TEX. GOV'T CODE § 26.023(a).

Government Code, Chapter 26

Texas law establishes both constitutional and statutory county courts. *See* TEX. CONST. art. V, §§ 1 (authorizing the Legislature to establish other courts as it deems necessary), 15 (establishing a county court for each county); *see also* TEX. GOV'T CODE § 21.009(1) (defining "county court" as the court created under article V, section 15), (2) (defining "statutory county court" as a county court created by the Legislature under article V, section 1). Constitutional county courts are presided over by the county judge and have jurisdiction "as provided by law." TEX. CONST. art. V, § 16; *see also* TEX. GOV'T CODE § 21.009(3) (defining "county judge" as the judge of the county court).

Government Code chapter 26 governs constitutional county courts. *See* TEX. GOV'T CODE §§ 26.001–.353. Chapter 26, subchapter B contains provisions for the appointment of a visiting judge in specified circumstances as a general matter, but subchapter C's provisions for the appointment of a visiting judge apply to only particular counties. *Id.* § 26.021 (providing

¹*See* Letter from Honorable John K. Greenwood, Lampasas Cnty. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 28, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0456KP.pdf> ("Request Letter").

subchapter C applies to counties “in which there is no statutory county court at law or statutory probate court [and the] duties of the county court devolve on the county judge”). You tell us that Lampasas County is subject to subchapter C. Request Letter at 1.

Within subchapter C, subsection 26.023(a) provides that “[t]he county judge may appoint a retired judge or a constitutional county judge from another county as a visiting judge when the county judge is absent from the county or absent because of physical incapacity.” TEX. GOV’T CODE § 26.023(a). You tell us the person the Lampasas County judge would like to appoint is a former constitutional county court judge who retired under the Texas County and District Retirement System (TCDRS) and who is “highly experienced in county court judicial matters,” but who is not a “retired judge” under Government Code subsection 74.041(6). Request Letter at 2. Subsection 26.023(a) does not provide for the appointment of a former constitutional county judge, so under the plain language of the statute this person is eligible for appointment in the circumstances you describe only if he or she is a retired judge. *See* TEX. GOV’T CODE § 26.023(a). You suggest that section 74.041’s language “In this chapter” precludes the use of the definition of “retired judge” for other purposes.² *See* Request Letter at 2.

Analysis

A court’s primary objective when construing a statute is to determine the Legislature’s intent, which, when possible, it discerns from the plain meaning of the words chosen. *See Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 642 S.W.3d 551, 557 (Tex. 2022); *see also City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995) (“Legislative intent remains the polestar of statutory construction.”). “Ordinarily, the truest manifestation of what legislators intended is what lawmakers enacted, the literal text they voted on.” *Maxim Crane Works, L.P.*, 642 S.W.3d at 557 (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006)). When a statute is clear and unambiguous, a court will apply its words according to their common meaning without resort to rules of construction or extrinsic aids. *Id.* Moreover, courts “use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired.” *Id.* (quoting *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008)).

As Government Code chapter 26 does not define the term “retired judge,” we first consider its common meaning. *Id.* “Retired” commonly means “having left one’s job and ceased to work.” NEW OXFORD AMERICAN DICTIONARY 1491 (3d ed. 2010). A “judge” is “a public official appointed or elected to hear and decide legal matters in court; a judicial officer who has the authority to administer justice.” BLACK’S LAW DICTIONARY 968 (10th ed. 2014). Pursuant to these definitions, a “retired judge” is a public official appointed or elected to hear and decide legal matters or administer justice in court who has left the job and ceased to work.

At the same time, the Code Construction Act directs that where an undefined term has acquired a technical or particular meaning, it shall be construed to have that meaning. *See* TEX.

²Government Code subsection 74.041(6) defines a “retired judge” to mean a retiree or a “person who served as an active judge for at least 96 months in a statutory probate or statutory county court and has retired under the Texas County and District Retirement System.” TEX. GOV’T CODE § 74.041(6); *see also id.* § 74.041(3) (defining “retiree” by reference to specific judicial retirement systems that are not one under which the former constitutional county judge retired).

GOV'T CODE § 311.011(b) (providing that “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly”). In instances when the “legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, its meaning in the subsequent statute will ordinarily be the same.” *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 647 (Tex. 2020) (internal citations omitted). In the greater context of appointment of visiting judges, to the extent the term retired judge has acquired a particular meaning it is likely the one provided in subsection 74.041(6). The one judicial opinion we find that considers the meaning of retired judge under section 26.023 relies on the definition in subsection 74.041(6). See *Lackey v. State*, 322 S.W.3d 863, 867 n.8 (Tex. App.—Texarkana 2010), *aff'd*, 364 S.W.3d 837 (Tex. Crim. App. 2012).

In *Lackey*, the constitutional county judge appointed a local, practicing attorney to preside over her bench in her absence. See *id.* at 864. The court determined that the appointed attorney was neither a retired judge nor a constitutional county judge from another county, and thus was not qualified to be appointed as a visiting judge under subsection 26.023(a). See *id.* at 869. As a result, the actions and orders of the acting judge were not “merely voidable” but were void, as “[t]he actions of a judge without authority are void if the judge is either disqualified, or is not qualified.” *Id.* The court reached its determination by looking to the definition of retired judge from Government Code subsection 74.041(6). See *id.* at 867 n.8. While there is a potential textual argument that similar provisions expressly incorporate specific provisions for the appointment of visiting judges, so that section 26.023’s lack of such provision means that it should be construed with the common meaning, we cannot ignore the court’s analytical approach of defining the term pursuant to subsection 74.041(6). See generally TEX. GOV'T CODE §§ 26.012 (providing that “a visiting judge shall be assigned in accordance with Section 25.0022(h)”), 26.011 (providing that the “presiding judge shall appoint a visiting judge to hear [certain cases] in accordance with Subchapter C, Chapter 74”).

“[A] judgment rendered by a special judge who had not been appointed or selected in accordance with the constitutional and statutory requirements governing such matters is an absolute nullity.” *Saylor v. State*, 836 S.W.2d 769, 770 (Tex. App.—Waco 1992, pet. ref'd). Given the *Lackey* opinion’s reliance on the definition in Government Code subsection 74.041(6), a court addressing your question today would likely conclude that the term “retired judge” should be defined by reference to Government Code subsection 74.041(6). Accordingly, a former constitutional county judge who does not otherwise satisfy the definition in Government Code subsection 74.041(6) is not a retired judge eligible to be appointed as a visiting judge under Government Code subsection 26.023(a), and any actions that judge takes or orders that judge enters would likely be void or at least subject to attack on that basis.

S U M M A R Y

A court would likely define the term “retired judge” for purposes of Government Code subsection 26.023(a) by reference to its definition in Government Code subsection 74.041(6). Under that construction, a former constitutional county judge who does not otherwise satisfy subsection 74.041(6) is not eligible to be appointed as a visiting judge under Government Code subsection 26.023(a).

Very truly yours,

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

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