Mike Stafford
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January 14, 2004

The Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0166-GA

Certified Mail Return-Receipt Requested

FILE # ML-43433-04
I.D. # 43433

Attention: Opinion Committee

Re: Constitutionality of Family Protection Fee; C.A. File No. *03GEN2190*

Ladies and Gentlemen:

Section 51.961 of the Texas Government Code, which went into effect September 1, 2003, authorizes a commissioners court to adopt a family protection fee in an amount not to exceed $15.00. TEX. GOV'T CODE ANN. § 51.961 (Vernon Supp. 2004). We request your opinion as to whether the fee authorized under Section 51.961 of the Government Code is constitutional under the open courts provision of article 1, section 13 of the Texas Constitution. TEX. CONST. art. 1, § 13. Our Memorandum Brief is attached.

Sincerely,

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County Attorney

By: Marva Gay
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Approved:

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MEMORANDUM BRIEF

Section 51.961 of the Texas Government Code, which went into effect September 1, 2003, authorizes a commissioners court to adopt a family protection fee in an amount not to exceed $15.00 and reads as follows:

> (a) The commissioners court of a county may adopt a family protection fee in an amount not to exceed $15.
>
> (b) Except as provided by Subsection (c), the district clerk or county clerk shall collect the family protection fee at the time a suit for dissolution of a marriage under Chapter 6, Family Code is filed. The fee is in addition to any other fee collected by the district clerk or county clerk.
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> (c) The clerk may not collect a fee under this section from a person who is protected by an order issued under:
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> (1) Subtitle B, Title 4, Family Code; or
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> (2) Article 17.292, Code of Criminal Procedure.
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> (d) The clerk shall pay a fee collected under this section to the appropriate officer of the county in which the suit is filed for deposit in the county treasury to the credit of the family protection account. The account may be used by the commissioners court of the county only to fund a service provider located in that county or an adjacent county. The commissioners court may provide funding to a nonprofit organization that provides services described by Subsection (e).
>
> (e) A service provider who receives funds under Subsection (d) may provide family violence prevention, intervention, mental health, counseling, legal, and marriage preservation services to families that are at risk of experiencing or that have experienced family violence or the abuse or neglect of a child.
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> (f) In this section, "family violence" has the meaning assigned by Section 71.004, Family Code.

TEX. GOV'T CODE ANN. § 51.961 (Vernon Supp. 2004). [House Bill 2292, section 2.165, adopted by the 78th Texas Legislature, Regular Session.] [*Emphasis added*]. Therefore, it appears that pursuant to section 51.961 of the Government Code, a commissioners court of a county may adopt a family protection fee in an amount not to exceed $15. The district clerk or county clerk shall collect the family protection fee at the time a suit for dissolution of a marriage under Chapter 6 of the Family Code is filed. The clerk shall pay the fee collected to the appropriate officer of the county in which the suit is filed for deposit in the county treasury to the credit of the family protection account. A service provider who receives funds generated by the family protection fee may provide family violence prevention, intervention, mental health, counseling, legal, and marriage

preservation services to families that are at risk of experiencing or that have experienced family violence or the abuse or neglect of a child.

Article 1, Section 13 of the Texas Constitution contains an open courts provision and reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. 1, § 13. [*Emphasis added.*]

Texas courts have determined that the open courts provision includes three separate constitutional guarantees. First, the courts must actually be operating and available. *See Runge & Co. v. Wyatt*, 25 Tex. Supp. 294 (1860). Second, the legislature cannot impede access to courts through unreasonable financial barriers. *See LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986); *see also*, *Texas Ass'n of Business v. Air Control Board*, 852 S.W.2d 440, 448 (Tex. 1993) (holding citizens must have access to court unimpeded by unreasonable financial barriers "so that the legislature cannot impose a litigation tax in the form of increased filing fees to enhance the state's general revenue.") Third, meaningful remedies must be afforded, so the legislature may not abrogate well-established common law causes of action without a substantial interest that outweighs the litigant's constitutional right of redress. *See Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1983). These rights are substantial state constitutional rights that the legislature may not arbitrarily or unreasonably interfere with. *See Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984). The open courts test balances the legislature's purpose in enacting a law with the individual's right of access to the courts. *See Sax v. Votteler*, 648 S.W.2d 661, 666.

When considering whether the Legislature has unreasonably impeded access to the courts, which is the second open courts guarantee, it does not matter whether the claim that access is impeded arises through statute or common law. *See Central Appraisal Dist. v. Lall*, 924 SW2d 686, 689 (Tex. 1996). Texas courts have generally construed this second guarantee to prohibit filing fees that do not directly support a courthouse service. In *LeCroy v. Hanlon*, the Supreme Court held that filing fees that go to state general revenues are "in other words taxes on the right to litigate that pay for other programs besides the judiciary" and are unreasonable impositions on the right of access to the courts. *See LeCroy*, 713 S.W.2d 335, 342. The court further stated that "regardless of its size, such a fee is unconstitutional for filing fees cannot go for non-court-related purposes." *Id.* The *LeCroy* court also referenced and relied upon an Illinois case, *Crocker v. Findley*, 459 N.E.2d 1346 (1984), in which the Illinois Supreme Court declared a $5 fee charged in divorce suits unconstitutional because the fee supported a statewide domestic violence shelter program that had no relation to judicial services rendered. The *Crocker* court held:

> . . . court filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the courts. . . .
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> * * * * *
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> . . . Dissolution-of-marriage petitioners should not be required, as a condition to their filing, to support a general welfare program that relates neither to their litigation nor to their court system. If the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general revenue through charges assessed to those who would utilize our courts.

Crocker v. Finley, 459 N.E.2d 1346, 1351 (1984). In *Dallas County v. Sweitzer*, 881 S.W.2d 757 (Tex.App.—Dallas 1994, writ denied), the Dallas Court of Appeals struck down as unconstitutional a "sheriff's bailiff's" filing fee that was deposited directly into the County general fund. The court held that

> . . . a filing fee deposited in the state's general revenue fund is an arbitrary and unreasonable interference with a litigant's right of access to the courts. It is unreasonable and arbitrary because it is a general revenue tax on the right to litigate. *LeCroy*, 713 S.W.2d at 341. The money collected can go to programs other than the judiciary. *LeCroy*, 713 S.W.2d at 341. It is immaterial that the State spends money from the general revenue fund on the judiciary. *LeCroy*, 713 S.W.2d at 342.

Dallas County v. Sweitzer, 881 S.W.2d 757, 765 (Tex.App.—Dallas 1994, writ denied). [*Emphasis added*]. The *Sweitzer* court held that because the fee was deposited into the county general fund and the money could be spent on other services that do not necessarily support the judiciary, the fee violated the open courts provision of the Texas Constitution. Note that although the family protection fee is to be deposited in the county treasury to the credit of the family protection account rather than into a the County general fund pursuant to section 51.961(d) of the Government Code, it appears that the funds generated by the fees may be used broadly for "family violence prevention, intervention, mental health, counseling, legal, and marriage preservation services to families that are at risk of experiencing or that have experienced family violence or the abuse or neglect of a child." *See* TEX. GOV'T CODE ANN. § 51.961(d) and (e) (Vernon Supp. 2004). The services listed in section 51.961(e) of the Government Code could be interpreted as services that do not necessarily support the judiciary and, therefore, may be taxes on the right to litigate that pay for programs besides the judiciary and are unreasonable impositions on the right of access to the courts.

We request your opinion as to whether the family protection fee authorized under Section 51.961 of the Government Code is constitutional under the open courts provision of article 1, section 13 of the Texas Constitution.