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Mike Stafford
Harris County Attorney

OPEN RECORDS DIVISION

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July 8, 2005

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The Honorable ~~OPINION COMMITTEE~~
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

FILE # 044267-05
I.D. # D. 044267

Certified Mail Return-Receipt Requested

Attention: Opinion Committee

Re: Constitutionality of Paying Half of Family Protection Fee to State Child Abuse and Neglect Prevention Fund; C.A. File No. 05GEN1065

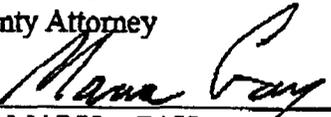
Ladies and Gentlemen:

Section 51.961 of the Texas Government Code has been amended, effective September 1, 2005, by adding a provision requiring a county clerk to pay one-half of the family protection fee collected pursuant to section 51.961 of the Government Code to the Texas Comptroller, who shall deposit the money to the credit of the child abuse and neglect prevention trust fund account established under section 40.105 of the Texas Human Resources Code. See Act of June 6, 2005, S.B. 6, § 1.66, 79th Leg., F.S. (to be codified at TEX. GOV'T CODE § 51.961), and TEX. HUM. RES. CODE ANN. § 40.105 (Vernon Supp. 2005). Please supply us with your opinion as to whether the payment required by the new section 51.961(g) of the Government Code of one-half of the family protection fee to the Texas Comptroller for deposit to the child abuse and neglect prevention trust fund account is unconstitutional under the open courts provision of article 1, section 13 of the Texas Constitution. See TEX. CONST. art. 1, § 13. Our Memorandum Brief is attached.

Because the new section 51.961(g) of the Texas Government Code goes into effect September 1, 2005, we respectfully request your expedited review and opinion on this matter.

Sincerely,

MIKE STAFFORD
County Attorney

By: 
MARVA GAY
Assistant County Attorney

MEMORANDUM BRIEF

Section 51.961 of the Texas Government Code has been amended, effective September 1, 2005, by adding a provision requiring a county clerk to pay one-half of the family protection fee collected under section 51.961 of the Government Code to the Texas Comptroller, who shall deposit the money to the credit of the child abuse and neglect prevention trust fund account established under section 40.105 of the Texas Human Resources Code. The amended section 51.961 of the Government Code reads as follows:

- (a) The commissioners court of a county shall ~~[may]~~ adopt a family protection fee in an amount not to exceed \$30 ~~[\$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.
- (c) The clerk may not collect a fee under this section from a person who is protected by an order issued under:
 - (1) Subtitle B, Title 4, Family Code; or
 - (2) Article 17.292, Code of Criminal Procedure.
- (d) The clerk shall pay one-half of the ~~[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 and child abuse prevention, intervention, family strengthening, 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.
- (f) In this section, "family violence" has the meaning assigned by Section 71.004, Family Code.
- (g) The clerk shall pay one-half of the fee collected under this section to the comptroller, who shall deposit the money to the credit of the child abuse and neglect prevention trust fund account established under Section 40.105, Human Resources Code.

Act of June 6, 2005, S.B. 6, § 1.66, 79th Leg., R.S. (to be codified at TEX. GOV'T CODE §51.961). Words added are underlined. Words removed are shown by strikeouts. Pursuant to the new section 51.961(g) of the Government Code, beginning September 1, 2005, the Harris County Clerk must pay one-half of the family protection fee collected under section 51.961 of the Government Code to the Texas Comptroller, who shall deposit the money to the credit of the

child abuse and neglect prevention trust fund account established under section 40.105 of the Texas Human Resources Code, which reads as follows:

- (a) The child abuse and neglect prevention trust fund account is an account in the general revenue fund.
- (b) The department may transfer money contained in the trust fund to the operating fund at any time. However, during a fiscal year the department may not transfer more than the amount appropriated for the operating fund for that fiscal year. Money transferred to the operating fund that was originally deposited to the credit of the trust fund under Section 118.022, Local Government Code, may be used only for child abuse and neglect primary prevention programs.
- (c) Interest earned on the trust fund shall be credited to the trust fund.
- (d) The trust fund is exempt from the application of Section 403.095, Government Code.

TEX. HUM. RES. CODE ANN. § 40.105 (Vernon Supp. 2005). Section 40.102(a) of the Human Resources Code sets out the programs that may be funded with the child abuse and neglect prevention fund as follows:

The department shall operate the children's trust fund to:

- (1) set policy, offer resources for community primary prevention programs, and provide information and education on prevention of child abuse and neglect;
- (2) develop a state plan for expending funds for child abuse and neglect primary prevention programs that includes an annual schedule of transfers of trust fund money to the operating fund;
- (3) develop eligibility criteria for applicants requesting funding for child abuse and neglect primary prevention programs; and
- (4) establish funding priorities for child abuse and neglect primary prevention programs.

TEX. HUM. RES. CODE ANN. § 40.102(a) (Vernon Supp. 2005) [*emphasis added*]. Pursuant to section 40.102(a)(1), the Texas Department of Protective and Regulatory Services shall operate the child abuse and neglect prevention fund to set policy, offer resources for community primary prevention programs, and provide information and education on prevention of child abuse and neglect. Nothing in section 40.102(a) restricts funding from the child abuse and neglect prevention fund to services and activities that are court related. Note that section 40.105(b) states that money transferred to the child abuse and neglect prevention funds from marriage license and declaration fees pursuant to section 118.022 of the Local Government Code may be used only for child abuse and neglect primary prevention programs, which are defined in section

40.101(2) of the Human Resources Code as services and activities available to the community at large or to families to prevent child abuse and neglect before it occurs. However, nothing in section 40.105 of the Human Resources Code restricts the use of funds collected pursuant to section 51.961 of the Government Code to services and activities that are court related. *See* TEX. HUM. RES. CODE ANN. §§ 40.101, 40.102, and 40.105 (Vernon Supp. 2005). *See also* TEX. LOC. GOV'T CODE ANN. § 118.022 (Vernon 1999). Therefore, it appears that funds deposited to the child abuse and prevention trust fund may be used for a wide range of services and activities for child abuse and neglect primary prevention program, and the use of such funds is not further limited to activities and services that are court related.

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.*] In 2004, we asked for your opinion regarding whether the then enacted provisions of section 51.961 of the Government Code violated the open court provision of the Texas Constitution. Your August 10, 2004, opinion concluded as follows:

A 1986 decision of the Texas Supreme Court, *LeCroy v. Hanlon*, construes the open courts provision to prohibit the use of filing fee revenues that are used for non-court-related programs. . . .

* * * * *

Given *LeCroy* and the Illinois and Louisiana cases specifically addressing the use of filing fee revenues for family-violence purposes, we conclude that Government Code section 51.961 is constitutional, but that family protection fee revenues may be used for court-related purposes only. . . .

We cannot say as a matter of law that all possible uses may be court related, however. Whether any particular use of family protection fee revenues is court related is a question requiring the resolution of fact questions, and is, therefore, ultimately beyond this office's authority. *See* Tex. Att'y Gen. Op. No. GA-0156 (2004) at 10 (stating that fact questions cannot be answered in the opinion process). A county commissioners court, which has sole authority to distribute the fee revenues, must determine whether a particular proposed use is court related. *See* Tex. Gov't Code Ann. § 51.961(d) (Vernon Supp. 2004).

To avoid contravening the open courts provision, article 1, section 13 of the Texas Constitution, revenues from the family protection fee, which a county may adopt under section 51.961 of the

Government Code, may be used only for court-related purposes. Many uses that are consistent with those listed in section 51.961, "family violence prevention, intervention, mental health, counseling, legal, and marriage preservation services," may be found to be court related. The county commissioners court must determine whether any particular use of family protection fee revenues is court related, however.

Op. Tex. Att'y Gen. No. GA-0231 (2004) [*emphasis added*]. In accordance with the above-quoted opinion, Harris County Commissioners Court developed eligibility criteria for applicants requesting funding from the family protection fee to assure that revenue from the family protection fee is used only for services and activities that are determined to be court-related and that meet all other requirements of section 51.961 of the Government Code. Harris County restricts the receipt of family violence fee revenues to service providers that provide services that are determined to be court related.

The activities and services funded pursuant to the new section 51.961(g) of the Government Code through the child abuse and neglect prevention trust fund account appear to include 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 payment required by the new section 51.961(g) of the Government Code of one-half of the family protection fee to the Texas Comptroller for deposit to the child abuse and neglect prevention trust fund account is unconstitutional under the open courts provision of article 1, section 13 of the Texas Constitution. See TEX. CONST. art. 1, § 13. Because the new section 51.961(g) of the Texas Government Code goes into effect September 1, 2005, we respectfully request your expedited review and opinion on this matter.