



CAMERON COUNTY DISTRICT ATTORNEY

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District Attorney

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OPINION COMMITTEE

October 23, 2013

FILE # ML-47432-13
I.D. # 47432

RQ-1160-GA

The Honorable Greg Abbot
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

Re: Request for Attorney General Opinion

Dear General Abbott:

We request your opinion as to whether a justice of the peace is authorized to grant 72-hour waivers under Texas Family Code section 2.204(c); and if so, whether the justice of the peace may charge a fee for issuing said waiver; and if so, must that fee be deposited into the county treasury. Because this matter is urgent, **we respectfully request expedited consideration of this matter**. Our memorandum brief is set forth below.

QUESTIONS PRESENTED:

1. Does section 2.204(c) of the Texas Family Code authorize a justice of the peace to sign and issue a waiver of the 72-hour waiting period after the issuance of a marriage license?
2. Assuming that the answer to question number one is in the affirmative, may a justice of the peace charge a fee for the signing and issuance of a waiver of the 72-hour waiting period after the issuance of a marriage license?
3. Assuming that the answer to question number two is in the affirmative, may a justice of the peace retain fees received for signing and issuing a waiver of the 72-hour waiting period, or would the justice of the peace be required to pay these fees into the county treasury?

FACTS:

The Justice of the Peace for Precinct 2, Place 2 of Cameron County, Texas, has, on several occasions, signed and issued waivers of the 72-hour waiting period after the issuance of a marriage license. These waivers have been granted in connection with said Justice of the Peace also conducting marriage ceremonies immediately following the execution of a waiver.

Additionally, said Justice of the Peace has charged a \$25 fee for the signing and issuance of each of said waivers, together with a \$150 fee for conducting each marriage ceremony. None of these fees have been submitted to the county treasurer.

DISCUSSION:

Section 2.204(a) of the Texas Family Code provides that “[e]xcept as provided by this section, a marriage ceremony may not take place during the 72-hour period immediately following the issuance of the marriage license.” Subsection (b) of this same section then provides certain situations when the 72-hour waiting period does not apply. Included in these situations which obviate the 72-hour waiting period is the situation where a person obtains a waiver under subsection (c). Subsection (c) provides as follows:

- (c) An applicant may request a judge of a court with jurisdiction in family law cases, a justice of the supreme court, a judge of the court of criminal appeals, a county judge, or a judge of a court of appeals for a written waiver permitting the marriage ceremony to take place during the 72-hour period immediately following the issuance of the marriage license. If the judge finds that there is good cause for the marriage to take place during the period, the judge shall sign the waiver. Notwithstanding any other provision of law, a judge under this section has the authority to sign a waiver under this section.

Conspicuously absent from this list in subsection (c) is any reference to the office of justice of the peace; and therefore, on the face of the statute it appears that a justice of the peace has no authority to sign or grant a waiver of the 72-hour period immediately following the issuance of a marriage license. We do acknowledge that the statute makes reference to “a judge of a court with jurisdiction in family law cases”; however, neither Title 1 nor chapter 101 of the Family Code defines this term.

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We note that Texas Government Code section 25.0002, while not directly applicable to the situation at hand, does define “family law cases and proceedings” as cases and proceedings under Titles 1, 2, 4, and 5 of the Texas Family Code. An examination of the Texas Family Code reveals that Justice Courts in Texas do have jurisdiction over juvenile matters (truancy) in certain circumstances, pursuant to section 54.021 of the Family Code; however, this is jurisdiction over cases and proceedings under Title 3 of the Family Code (the Juvenile Justice Code). Therefore, we can find no express authority that would authorize a justice of the peace to issue a waiver under section 2.204 of the Family Code; nevertheless, we seek an opinion on this matter to determine if justices of the peace do, in fact, have such authority.

In the event that the Office of the Attorney General should determine that the law does authorize a justice of the peace to issue a waiver of the 72-hour waiting period, then we next inquire as to whether a justice of the peace can charge a fee for the signing and issuance of such a waiver. In much the same manner that there is no statute establishing a fee for a marriage ceremony performed by a judge, we can find no statute establishing a fee to sign and issue a waiver of the 72-hour waiting period. Nevertheless, this fact does not prohibit a judge from charging for services they are under no legal obligation to perform. *See Moore v. Sheppard*, 192 S.W.2d 559 (1946); Tex. Att’y Gen. Op. No. DM-397 (1996). In *Moore v. Sheppard*, the Texas Supreme Court addressed the disposition of fees received by clerks of the courts of civil appeals for furnishing uncertified copies of opinions of the courts, where no statute made it the clerks’ duty to provide uncertified copies, or fixed fees for providing these copies, and concluded that the clerks were not required to pay the fees to the state. *Id.* at 562. Attorney General Opinion DM-397 relied on the rule stated in *Moore* to conclude that a judge of a court of record could charge a fee for conducting a marriage ceremony.

Based on the foregoing authority, it would appear that, if a justice of the peace does have authority to sign and issue a waiver of the 72-hour waiting period, then said justice of the peace may also have authority to charge a fee for same.

In the event that the Office of the Attorney General should determine that the law does authorize a justice of the peace to both issue and charge a fee for the issuance of a waiver of the 72-hour waiting period, then we finally inquire whether a justice of the peace may retain said fees or whether they must pay said fees into the county treasury.

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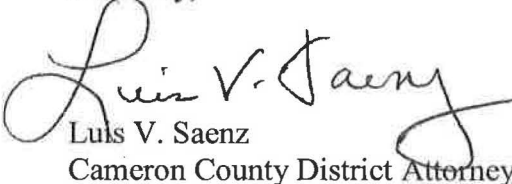
Without express authority to retain fees received for signing and issuing waivers of the 72-hour waiting period, a justice of the peace would be required by law to pay the fees into the county treasury. Tex. Local Gov't Code §§ 113.021, 154.003; *see also* Tex. Att'y Gen. Op. DM-397(1996). The only authority which may possibly allow a justice of the peace to retain fees collected for the issuance of a waiver is found in section 154.005(a) of the Texas Local Government Code, and is the same authority which would allow a justice of the peace to retain the fee for performing a marriage ceremony. The statute reads:

- (a) A justice of the peace may receive, in addition to a salary, all fees, commissions, or payments for performing marriage ceremonies, for acting as registrar for the Bureau of Vital Statistics, and for acting as ex officio notary public.

The question remains whether the collection of a fee for the signing and issuance of a waiver of the 72-hour period following the issuance of a marriage license would fall into the category of "all fees...for performing marriage ceremonies."

We thank you in advance for your consideration on this matter, as we look forward to your opinion as to whether a justice of the peace is authorized to grant 72-hour waivers under Texas Family Code section 2.204(c), and the other related questions.

Sincerely,


Luis V. Saenz
Cameron County District Attorney