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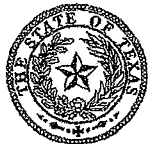

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Harold V. Dutton, Jr.
District 142

September 21, 2015

Committees:
Juvenile Justice and Family Issues, Chair
Public Education
Sunset Advisory Commission

RQ-0060-KP

Via email Opinion.Committee@texasattorneygeneral.gov
The Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
Opinion Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for opinion concerning whether SB1876, passed by the 84th regular session of the Texas Legislature, violates Article II, Section 1 of the Texas Constitution under the separation of powers doctrine.

Request for opinion concerning whether SB1876 is unconstitutionally vague.

Dear General Paxton:

I am requesting your opinion, on behalf of the Honorable Rory Olsen, Judge of Probate Court No. 3, Harris County, Texas concerning the following issues:

1. Whether SB1876, passed by the 84th regular session of the Texas Legislature, violates Article II, Section 1 of the Texas Constitution (separation of powers clause) because it deprives judges of discretion in the appointment process.

2. Whether SB1876 is unconstitutionally vague because it requires courts to appoint "qualified" appointees but fails to define what attributes are necessary to be considered "qualified."

Background Facts

On March 13, 2015, Senator Judith Zaffirini filed SB 1876, which related to the appointment of attorneys ad litem, guardians ad litem, and mediators. It was amended by the House and then approved by both the Senate and the House the end of May. SB 1876 was signed by the Governor and became effective on September 1, 2015.

SB 1876 applies to all State Courts located in a county with a population of 25,000 or more and affects the method by which judges make appointments for guardians ad litem and attorneys ad litem. Under SB 1876, judges are required to make a list of "qualified" attorneys and then they are forced to make individual appointments for each individual case on a rotating

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basis, unless good cause has been found not to appoint the next attorney on the list for a particular case.

Legal Argument

Article II, Section 1 of the Texas Constitution provides for the division of powers among three separate branches of government: legislative, executive, and judicial ("separation of powers doctrine"). The separation of powers doctrine mandates that no department may exercise any power of another department. As such, "the legislature may not interfere with the functions and powers of the judicial branch so as to usurp those functions and powers." *Armadillo Bail Bonds v. State*, 772 S.W.2d 193, 195 (Tex. App. – Dallas 1989, pet. denied). Here, in order to determine whether the legislature is interfering with judicial power via SB 1876, it is important to note the three types of judicial power.

The first type of judicial power is express. Specifically, Article 5 of the Texas Constitution establishes the judicial branch of the government and vests the judicial power of the state in the Supreme Court, Court of Criminal Appeals, Courts of Appeals, District Courts and County Courts. Section 1, Article 5, Texas Constitution. Article 5 also dictates the particular courts' jurisdiction, terms, and responsibilities. As one example, Section 31 of Article 5 sets forth the following:

> (a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.
>
> (b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.
>
> (c) The legislature may delegate to the Supreme Court or Court of Criminal Appeal the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

As noted by case law, express judicial power encompasses "1) the power to hear facts, 2) the power to decide the issues of fact made by the pleadings, 3) the power to decide questions of law involved, 4) the power to enter a judgment on the facts found in accordance with the law as determined by the court, and 5) the power to execute the judgment or sentence." *Armadillo Bail Bonds*, 772 S.W.2d at 195.

In addition to such powers and jurisdiction as is directly provided by law, courts have such further powers and jurisdiction as are reasonable, proper, and necessary, or those that can be inferred from the powers and jurisdiction directly granted. *Commissioners Court of Lubbock Co. v. Martin*, 471 S.W.2d 100, 109 (Tex. App. – Amarillo 1971, N.R.E). This type of power is referred to as implied powers. Implied powers arise out of those express powers specifically

articulated by law. However, the third type of power, inherent power, is not derived from legislative grant or specific constitutional provision. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979). Instead, inherent power arises from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities. Inherent power allows the courts to act to protect and preserve the proper administration of the judicial system. *Vondy v. Commissioners Court of Uvalde Co.*, 620 S.W.2d 104, 110 (Tex. 1981)

Examples of the exercise of inherent power by courts in Texas and other jurisdictions include:

- The power of courts to control their judgments - *Coleman v. Zapp*, 105 S.W. 1040, 1041 (1912);
- The power of courts to punish by contempt – *Ex parte Barnett*, 600 S.W.2d 252, 254 (Tex. 1980);
- The power to provide for adult probation officers – *Commissioners Court of Lubbock*, 471 S.W.2d at 398;
- The power to hire and require salaries to be paid for secretaries – *Millholen v. Riley*, 211 Cal. 29, 293 P. 69, 71 (1930);
- The power to require constables, who serve process, to be compensated – *Vondy v. Commissioners Court of Uvalde Co.*, 620 S.W.2d at 110; and
- The power to ensure an adversarial proceeding – *Public Utility Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988).

In addition to those listed above, courts have inherent power to control the disposition of cases with economy of time and effort for itself, for counsel, and for the litigants. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014). They also have the inherent power to manage their dockets. *Herewearagain, Inc. v. City of Houston*, 383 S.W.3d 703, 709 (Tex. App. – Houston [14th Dist.] 2012).

Here, SB 1876 violates the inherent powers of a court to manage its docket and dispose of its cases. Specifically, there are certain situations where judges must appoint guardians ad litem or attorneys ad litem to fulfill their judicial duties of hearing facts, and entering a judgment based on those facts and law as determined by a court. For example, under Texas Rule of Civil Procedure 173, a court must appoint a guardian ad litem for a party represented by a next friend if the next friend appears to have an interest adverse to the party. Under Texas Rule of Civil Procedure 244, a court must appoint an attorney ad litem to represent a defendant who was served by publication and failed to make an appearance within the prescribed time. Additionally, under the Estates Code, there are a litany of other statutes that allow for or require the appointment of an attorney ad litem or guardian ad litem for minors, incapacitated persons, unknown or missing persons, and unborn persons.

SB 1876 interferes with a court's inherent power by taking away a judge's discretion when making appointments. SB 1876 also improperly interferes with how a court manages its docket. As characterized by Judge Olsen, SB 1876 requires judges to make a list of "qualified persons" for appointments, then move down the appointment list in a robotic fashion, "mindlessly pick[ing] the next person on the list, unless there is cause." The judge is no longer

free to pick the best qualified person at his disposal, unless he jumps through the hoop of finding good cause based on elements that are not always implicated. Furthermore, by requiring a judge to make individual appointments for each case, the legislature is interfering with the manner by which a judge manages his docket. The same way a statute that requires a judge to act or refrain from acting within a specified time is deemed an unwarranted encroachment by the legislative branch upon the prerogative and functions of the judiciary, so too is a statute that takes away a judge's discretion in fulfilling his duties to make appointments.

SB 1876 is also unconstitutional under the doctrine of vagueness. SB 1876 requires judges to compile a list of "qualified" attorneys or persons eligible to accept appointments, but fails to describe any specifications for what is needed to be deemed "qualified." This is an alternative argument to the separation of powers argument, since a "vagueness" analysis applies when considering delegation of the legislature's authority. In other words, if the power to determine the method of ad litem appointments does not rest with the judiciary, then it rests with the legislature, and the legislature must establish reasonable standards to guide the entity to which the powers are delegated. *See generally, Andrews v. Proctor*, 950 S.W.2d 750, (Tex. App. – Amarillo 1997).

The Texas Supreme Court has previously analyzed the word "qualified" under the vagueness doctrine. In *Proctor v. Andrews*, the Texas Supreme Court reversed the Amarillo Court of Appeals, which had held the term "qualified" was impermissibly vague. The law in question related to selecting an independent hearing examiner when police officers were appealing suspension or termination by the City of Lubbock Police Force. If the parties could not agree on a hearing examiner, then the City was to request a list of seven qualified neutral arbitrators from the American Arbitration Association or the Federal Mediation and Conciliation Service. *Andrews*, 950 S.W.2d at 753. The City did not follow this process and then alleged that the term "qualified" was unconstitutionally vague.

In analyzing the term "qualified," the Amarillo Court of Appeals stated,

> In delegating its authority, the Texas Legislature must 'establish reasonable standards to guide the entity to which powers are delegated.' The language granting the authority must not be so broad and vague that people of 'common intelligence must necessarily guess at its meaning and differ as to its application.'
>
> We conclude that the term 'qualified' as used in §143.057(d) is impermissibly vague....Webster's Dictionary defines 'qualified' as 'having complied with the specific requirements or precedent conditions (as for an office or employment).' In other words, the word 'qualified' is defined by the requirements of a particular situation. Section 143.057(d), in effect, empowers the AAA and FMCS to decide what the qualifications of a hearing examiner will be. However, the legislature does not set forth any standards to guide the AAA or FMCS in setting these qualifications.... Therefore, the AAA and FMCS are given free reign to arbitrarily

> decide the qualifications of hearing examiners without reference to any guiding principles whatsoever.

Andrews, 950 S.W.2d at 753-54 (internal citations omitted).

The Texas Supreme Court agreed with the propositions of law articulated by the Amarillo Court of Appeals, but it did not agree with the application of the facts. The Texas Supreme Court stated that while the legislature did not set forth specific requirements in how to determine which arbitrators were "qualified" and "neutral," those specific requirements were not necessary when the terms provided sufficient guidance in and of themselves. *Proctor*, 972 S.W.2d at 737. The Court went on to state that, "the AAA and FMCS are specialized entities with acknowledged expertise in selecting appropriately trained arbitrators to serve in particular cases." *Id.* As such, the AAA and FMCS could be trusted to provide "qualified" persons under their commonly understood meaning.

Here, however, the use of "qualified" within SB 1876 can be distinguished from the discussion within *Proctor*. Section 37.003 does not provide reference to an outside entity to select "qualified" persons to serve as attorneys ad litem or guardians ad litem. Specifically, section 37.002(a)(1) requires a court to maintain a list of "all attorneys who are qualified to serve as an attorney ad litem" and subsection (2) requires a court to compile a list of "all attorneys and other persons who are qualified to serve as a guardian ad litem." There are absolutely no standards or prerequisites to be considered "qualified" within SB 1876. The statute does not require an attorney to be licensed a certain number of years or for others persons (not licensed to practice law) to be part of an organization, such as AAA, which enforces its own standards on its membership. If the legislature is going to take away a judge's discretion on who and how to make appointments, it should at least provide the judge's with some criteria to follow its directive. However, that criterion is totally lacking and as such, SB 1876 is unconstitutionally vague.

Conclusion

For the foregoing reasons, SB 1876 is unconstitutional. As the person authorized to provide advisory opinions, I seek your counsel and opinion on this issue.

Thank you for your consideration, and I look forward to your response.

Best regards,

HAROLD V. DUTTON, JR.
/me