OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Leo C. Buckley
County Attorney
Zapata County
Zapata, Texas

Dear Sir:

Opinion No. O-1201
Re: What is meant by the phrase "not previously registered" in the quoted provision of House Bill No. 614? Should applications for delayed recording of births or deaths be numbered and entered on the docket of the Probate Court and should such proceedings be entered in the minutes of said court?

We are in receipt of your letter of July 27, 1939, in which you request an opinion on the following two questions:

"1. What is meant by the phrase 'not previously registered' in the following provision of said H.B. 614: (Acts of the 46th legislature recently adjourned, amending Section 18 - Rule 51a- of Article 4477 of the Revised Civil Statutes as amended);

"' And provided further, that any citizen of the State of Texas wishing to file the record of any birth or death, not previously registered, may submit to the Probate Court in the county where the birth or death occurred, a record of that birth or death written on the adopted forms of birth and death certificates.' (Parenthetical insertion above ours).

"2. Should applications for such registration be numbered and entered on the docket of the Probate Court and should such proceedings be entered in the minutes of said court?"

NO COMMUNICATION IS TO BE CONSTRUED AS A DEPARTMENTAL OPINION UNLESS APPROVED BY THE ATTORNEY GENERAL OR FIRST ASSISTANT

In answering your first question, we find it necessary to review the various provisions of Article 4477, Vernon's Annotated Civil Statutes, i.e., the Sanitary Code, with respect to registration of births and deaths.

Section 12 (Rule 45a. Births) provides as follows:

"Sec. 12. That the birth of each and every child born in this state shall be registered as hereinafter provided."

Section 13 (Rule 46a. Birth Certificates) reads as follows:

"Sec. 13. That within five days after the date of each birth, there shall be filed with the local registrar of the district in which the birth occurred a certificate of such birth, which certificate shall be upon the form adopted by the State Department of Health with a view to procuring a full and accurate report with respect to each item of information enumerated in Section 14 (Rule 47a.) of this Act.

"In each case where a physician, midwife, or person acting as midwife, was in attendance upon the birth, it shall be the duty of such physician, midwife, or person acting as midwife, to file in accordance herewith the certificate herein contemplated.

"In each case where there was no physician, midwife, or person acting as midwife, in attendance upon the birth, it shall be the duty of the father or mother of the child, the householder or owner of the premises where the birth occurred or the manager or superintendent of the public or private institution where the birth occurred, each in the order named, within five days after the date of such birth, to report to the local registrar the fact of such birth. In such case and in case the physician, midwife, or person acting as midwife, in attendance upon the birth is unable, by diligent inquiry, to obtain any item or items of information contemplated in Section 14 of this Act (Rule 47a.), it shall then be the duty of the local registrar to secure from the person so reporting, or from any

other person having the required knowledge, such information as will enable him to prepare the certificate of birth herein contemplated, and it shall be the duty of the person reporting the birth or who may be interrogated in relation thereto to answer correctly and to the best of his knowledge all questions put to him by the local registrar which may be calculated to elicit any information needed to make a complete record of the birth as contemplated by said section 14(Rule 47a), and it shall be the duty of the informant as to any statement made in accordance herewith to verify such statement by his signature, when requested so to do by the local registrar." (Underscoring ours)

It is clear that the above quoted provisions of the law provide for the filing of a birth certificate of each and every child born in Texas "within five days after the date of each birth".

Turning to the portions of the Code dealing with certificates of death, Section 9 (Rule 42a. Undertakers' certificate.) provides:

"That the undertaker, or person acting as undertaker, shall file the certificate of death with the local registrar of the district in which the death occurred and obtain a burial or removal permit prior to any disposition of the body; provided that any person who furnishes a casket, coffin or box in which to bury the dead and who renders service like or similar to that usually rendered by an undertaker, shall for the purposes of this Act (Rule 34a -55a, P.C., art. 781a) be deemed an undertaker. He shall obtain the required personal and statistical particulars from the person best qualified to supply them, over the signature and address of his informant. He shall then present the certificate to the attending physician, if any, or to the health officer, justice of peace, or coroner, as directed by the local registrar, for the medical certificate of the cause of death and other particulars necessary to complete the record, as specified in Sections 7 (Rule 40a) and 8

(Rule 41a). And he shall then state the facts required relative to the date and place of burial or removal, over his signature and with his address, and present the completed certificate to the local registrar in order to obtain a permit for burial, removal or other disposition of the body. The undertaker or person acting as such shall deliver the burial permit to the person in charge of the place of burial, before interring or otherwise disposing of the body; or shall attach the removal permit to the box containing the corpse, when shipped by any transportation company; said permit to accompany the corpse to its destination, where, if within the State of Texas, it shall be delivered to the person in charge of the place of burial.

"Every person, firm, or corporation selling a casket, coffin or box for burial, shall keep a record showing the name of the purchaser, purchaser's postoffice address, name of deceased, date of death, and place of death of deceased, which record shall be open to inspection of the state registrar at all times. On the first day of each month the person, firm or corporation, selling caskets, coffins or burial boxes, shall report to the state registrar each sale for the preceding month on a blank provided for that purpose; provided, however, that no person, firm, or corporation selling caskets, coffins or burial boxes to dealers or undertakers only shall be required to keep such record nor shall such report be required from undertakers when they have direct charge of the disposition of a dead body.

"Every person, firm, or corporation selling a casket, coffin, or burial box, at retail, and not having charge of the disposition of the body, shall inclose within the casket, coffin or burial box a notice furnished by the state registrar calling attention to the requirements of the law, a blank certificate of death, and the rules and regulations of the State Department of Health, concerning the burial or other disposition of a dead body." (Underscoring ours)

The above quoted section plainly requires the filing of a certificate of death "prior to any disposition of the body."

There are several related sections we might quote, but we shall conclude the statutory references, with the exception of Section 23 relating to reports of violations of the act, by quoting Section 6 (Rule 39a, Report of Stillborn.) and Section 8 (Rule 41a. Death without medical attendance.)

Section 6 reads as follows:

"That a stillborn child shall be registered as a birth and also as a death, and separate certificates of both the birth and the death shall be filed with the local registrar, in the usual form and manner, the certificate of birth to contain in place of the name of the child, the word 'stillborn'; provided, that a certificate of birth and a certificate of death shall not be required for a child that has not advanced to the fifth month of uterogestation. The medical certificate of the cause of death shall be signed by the attending physician, if any, and shall state the cause of death as 'stillborn', with the cause of the stillbirth, if known, whether a premature birth, and, if born prematurely, the period of uterogestation, in months, if known; and a burial or removal permit of the prescribed form shall be required. Midwives shall not sign certificates of death for stillborn children; but such cases and stillbirths occurring without attendance of either physician or midwife, shall be treated as deaths without medical attendance, as provided in Section 8 of this Act. (Rule 41a.)

Section 8 provides:

"That in case of any death occurring without medical attendance, it shall be the duty of the undertaker or person acting as such to notify the local registrar of such death, and when so notified the registrar shall, prior to the issuance of the permit, inform the local health

> officer and refer the case to him for immediate investigation and certification; provided that when the local health officer is not a physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts; provided, further, that if the registrar or the local health officer, as the case may be, has reason to believe that the death may have been due to unlawful act or neglect, or otherwise is one properly referable to the coroner, he shall then refer the case to the coroner or other proper officer for his investigation and certification. And the coroner or other proper officer whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing death, if from external causes, (1) the means of death; and (2) whether (probably) accidental, suicidal, or homicidal, and shall, in any case, furnish such information as may be required by the state registrar in order properly to classify the death."

Section 23, above referred to, is Rule 55a dealing with the reports of violations. It places the responsibility of enforcement upon the local registrars and stipulates that they call attention of the county attorney to all violations. It reads as follows:

> "That each local registrar is hereby charged with the strict and thorough enforcement of the provisions of this Act (Rules 34a-55a; P. C. art. 781a) in his registration district, under the supervision and direction of the state registrar. And he shall make an immediate report to the state registrar of any violation of this law coming to his knowledge, by observation or upon complaint of any person, or otherwise.
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> "The state registrar is hereby charged with the thorough and efficient execution of the provisions of this act (Rules 34a-55a; P. C., art. 781a) in every part of the state, and is hereby

granted supervisory power over local registrars, deputy local registrars, and subregistrars, to the end that all of its requirements shall be uniformly complied with. The state registrar, either personally or by an accredited representative, shall have authority to investigate cases of irregularity or violation of law, and all registrars shall aid him, upon request, in such investigations. When he shall deem it necessary, he shall report cases of violation of any of the provisions of this Act (Rules 34a-55a; P. C., art. 781a) to the county attorney, with a statement of the facts and circumstances; and when any such case is reported to him by the state registrar, the county attorney shall forthwith initiate and promptly follow up the necessary court proceedings against the person or corporation responsible for the alleged violation of law. And upon request of the state registrar, the attorney general shall assist in the enforcement of the provision of this Act. (Rule 34a-55a; P. C., art. 781a.)"

The penalties for violations of the provisions of Article 4477 are contained in Article 781a of Vernon's Annotated Criminal Code, which reads as follows:

"Violations of provisions as to vital statistics. That any person, who for himself or as an officer, agent, or employee of any other person, or of any corporation or partnership, (a) shall inter, cremate, or otherwise finally dispose of the dead body of a human being, or permit the same to be done, or shall remove said body from the primary registration district in which the death occurred or the body was found, without the authority of a burial or removal permit issued by the local registrar of the district in which the death occurred or in which the body was found; or (b) shall refuse or fail to furnish correctly any information in his possession, or shall furnish false information affecting any certificate or record, required by this Act; or (c) shall willfully alter, otherwise than is provided by Section 18 of this Act, or shall falsify any certificate of birth or death, or any record established by this Act; or (d)

> being required by this Act to fill out a certificate of birth or death and file the same with the local registrar, or deliver it, upon request, to any person charged with the duty of filing the same, shall fail, neglect, or refuse to perform such duty in the manner required by this Act; or (e) being a local registrar, deputy registrar, or subregistrar, shall fail, neglect, or refuse to perform his duty as required by this Act and by the instructions, and direction of the state registrar thereunder, shall be deemed guilty of a misdemeanor and upon conviction thereof shall for the first offense be fined not less than five dollars ($5.00) nor more than fifty dollars ($50.00), and for each subsequent offense not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00), or be imprisoned in the county jail not more than sixty days, or be both fined and imprisoned."

It is our opinion that the above statute applies, and contains penalties for both failure to file a certificate of death "prior to any disposition of the body" and a birth certificate "within five days after date of each birth."

After considering all the various provisions of the Sanitary Code, above quoted, and the penalties imposed for their violation, we have come to the conclusion that the statute is mandatory in respect to the filing of certificates of death "prior to any disposition of the body" in accordance with Section 9 of Article 4477 and a certificate of birth "within five days after the date of each birth" (in accordance with the provisions of Section 12 of Article 4477). We believe the nature, object, and legislative intent of the statute, as well as the consequences which would result from a contrary interpretation, support this construction. The essence of the object sought to be obtained is uniform and prompt registration of births and deaths in this State. It is accomplished by the things directed to be done in Sections 9 and 12. Basicly we are confronted with the matter of public policy. Furthermore, the statutes clearly fix the result and pehalty following a failure to execute the required acts.

> See Gomez v. Timon, 128 S. W. 656
> See Ferris Press Brick Co. v. Hawkins, 160 S.W. 80

See Hudgins v. Mooresville Consolidated School District, 278 S. W. 769; 312 Mo. 1
See Ousley v. Powell (Mo. App.) 12 S. W. (2d) 102
See Horsefall v. School District, 128 S. W. 23; 143 Mo. App. 54.

Since it is our opinion that the statute is mandatory to the effect that registration of deaths and births be filed within the statutory time limit, and since article 4477 contains no provision for the registering of a certificate of death after disposition of the body and a certificate of birth after five days, we are constrained to hold that all records of deaths and births not made according to the provisions of Section 9 and Section 12 would necessarily have to be made under the provision of Section 2 of House Bill No. 614, Acts of the 46th Legislature, which amends Section 18 -- Rule 51a -- of Article 4477, Revised Civil Statutes. The part of Section 2, which concerns us, reads as follows:

> "And provided further, that any citizen of the State of Texas wishing to file the record of any birth or death, not previously registered, may submit to the Probate Court in the county where the birth or death occurred, a record of that birth or death written on the adopted forms of birth and death certificates. The certificate shall be substantiated by the affidavit of the medical attendant present at the time of the birth, or in case of death, the affidavit of the physician last in attendance upon the deceased, or the undertaker who buried the body. When the affidavit of the medical attendant or undertaker cannot be secured, the certificate shall be supported by the affidavit of some person who was acquainted with the facts surrounding the birth or death, at the time the birth or death occurred, with a second affidavit of some person who is acquainted with the facts surrounding the birth or death, and who is not related to the individual by blood or marriage. The Probate Court shall require such other information or evidence as may be deemed necessary to establish the citizenship of the individual filing the certificate, and the truthfulness of the statements made in that record. The Clerk of the said Court shall forward the certificate to the State Bureau of Vital

> Statistics with an order from the Court to the State Registrar that the record be, or be not, accepted. The State Registrar is authorized to accept the certificate when verified in the above manner, and shall issue certified copies of such records as provided for in Section 21 of this Act. Such certified copies shall be prima facie evidence in all Courts and places of the facts stated thereon. The State Bureau of Vital Statistics shall furnish the forms upon which such records are filed, and no other form shall be used for that purpose."

We construe the phrase "not previously registered" to mean all certificates of births and deaths "not previously registered in accordance with the terms of Sections 9 and 12 of this Act." Since it is mandatory under Sections 9 and 12 for the certificates to be filed within the prescribed time limit, a proper legal registration has failed in the event that the terms of said sections are violated, and a citizen desiring to file such delayed record of death or birth must follow the provisions of Section 2 of House Bill No. 614, above quoted, in respect to records "not previously registered".

It is, therefore, our conclusion that the phrase "not previously registered" would apply to all records and certificates of birth or death not registered in strict compliance with Sections 9 and 12 of Article 4477, Revised Civil Statutes.

As for your second question, the study of the paragraph of Section 2, House Bill No. 614, which is under consideration and quoted above, will reveal that the proceedings for filing a record of any birth or death not previously registered is to be submitted in the Probate Court in the county where the birth or death occurred. It is provided that the Court shall have before it, (1) a certificate of birth or death; (2) an affidavit of the medical attendant present at the time of the birth, or in the case of death, a copy of the affidavit of the physician last in attendance upon the deceased, or the undertaker who buried the body; or in the absence of the foregoing, two affidavits -- one from a person who was acquainted with the facts surrounding the birth or death and the other from a non-relative acquainted with the facts; and (3) "such other information or evidence as may be deemed necessary to establish the

citizenship of the individual filing the certificate, and the truthfulness of the statement made in the record."

It is further provided that the court enter its order and the clerk forward a bona fide certificate with the order of the court to the state registrar.

House Bill No. 614 places this matter of registration of births and deaths "not previously registered" within the jurisdiction of the Probate Courts of the counties in which the births and deaths occurred. It defines the duties of the court and requires an order of the court approving or disapproving the certificate. Since the purpose of the act is to establish records of births and deaths, the presumption is that it was the legislative intent that the various proceedings relative to the registration of births and deaths be recorded in the minutes of the court of jurisdiction. In lieu of any express prohibition in the statutes against the entrance of these proceedings in the probate docket upon the minutes of the court, we are of the opinion that such items should be docketed and entered upon the probate minutes.

A review of the statutes on "record books" of the Probate Court -- Article 3295 to 3301 of the Revised Civil Statutes of 1925 -- will corroborate our statement above to the effect that there is nothing in the statutes that expressly prohibits the entrance on the docket or on the minutes of the Probate Court of matters not set forth therein.

It is our opinion that Article 3295 and 3301 are directory and not exclusive as to the items to be entered upon the docket and in the court's minutes.

Article 3296 of the Revised Civil Statutes of 1925 is broad enough in its language to include the record of registration of births and deaths under House Bill No. 614. It reads as follows:

> "The clerk shall keep a record book, styled 'Probate Minutes', <u>and enter therein in full all the orders, judgments, decrees and proceedings of the court</u>, and record therein all papers of estates required by law to be recorded." (Underscoring ours)

It is interesting in this connection to note that Vernon's Civil Statutes of 1914 (Revised Civil Statutes of 1911) codified Article 3301 as 3217 and contained a paragraph following subdivision 10, which reads as follows:

> "Papers which have been disapproved by the court, and vouchers and all other papers not above enumerated, shall not be recorded."

The fact that the Legislature of Texas eliminated the prohibition against "all other papers not above enumerated" would indicate that it was not the legislative intent that papers to be recorded in the probate court would be limited strictly to those enumerated in Article 3301.

We are in accord with the statement in the case of Chase v. Hathaway, 14 Mass. 222 at p. 226, to the effect that:

> "A court of probate, although not technically a court of record, ought to have a perfect record of all its orders and decrees."

In answer to your second question, it is our opinion that applications for registration of birth and death certificates "not previously registered" in accordance with the terms of House Bill No. 614 should be numbered and entered on the docket of the Probate Court and that all proceedings in connection therewith should be entered in the minutes of the Probate Court.

Trusting that we have fully answered your inquiries, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Dick Stout

Dick Stout
Assistant

APPROVED
OPINION
COMMITTEE
BY RWF
CHAIRMAN

APPROVED AUG 11, 1939

Gerald C. Mann

ATTORNEY GENERAL OF TEXAS

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