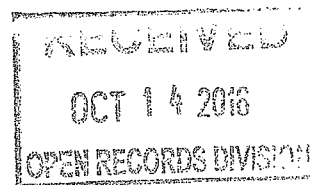


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October 12, 2016



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RQ-0135-KP

Honorable Ken Paxton
Attorney General of Texas
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for Opinion Interpreting Texas Health and Safety Code § 574.0085(a)

Dear Attorney General Paxton:

Pursuant to Section 402.043 of the Texas Government Code, this Office requests that you issue an opinion interpreting the meaning of "the county judge" as that term is used in Section 574.0085(a) of the Texas Health and Safety Code.

SUMMARY OF REQUEST

Bexar County has two statutory probate courts: Probate Court No. 1 and Probate Court No. 2. *See* Tex. Gov't Code § 25.0171(c). All mental health matters are docketed in Probate Court No. 1, which has primary responsibility for mental health proceedings. Tex. Gov't Code § 25.0173(n) & (o). Probate Court No. 1 is currently served by an associate judge whose primary responsibility is to oversee mental health proceedings. At the request of the then-presiding judge of Probate Court No. 1, Bexar County Commissioners Court ("Commissioners Court") created the associate judge position in early 2007 and shortly thereafter approved the appointment of a

named individual to the position. The associate judge position was created pursuant to Chapter 54 (now Chapter 54A) of the Texas Government Code, which broadly authorizes the associate judge to preside over any type of proceeding over which the probate court has jurisdiction. *See* Tex. Gov't Code § 54A.207.

On August 15, 2016, Commissioners Court notified the presiding judge of Probate Court No. 1 that it intended to eliminate the associate judge position originally created under Chapter 54 of the Texas Government Code, and replace it with an associate judge position more-appropriately created under Section 574.0085 of the Texas Health and Safety Code, which specifically governs associate judges that oversee mental health proceedings. Pursuant to Section 574.0085(a), once the associate judge position has been created, "the county judge" has the authority to appoint an individual to the associate judge position. While the statutory language appears clear on its face, there is some disagreement in Bexar County regarding the meaning of "the county judge." One interpretation is that "the county judge" means the County Judge of Bexar County, while an alternative interpretation is that "the county judge" means the presiding judge of Probate Court No. 1. Accordingly, this Office requests your opinion on the meaning of "the county judge" as that term is used in Section 574.0085(a), and whether the authority to appoint an individual to the associate judge position will belong to the County Judge of Bexar County or the presiding judge of Probate Court No. 1.

QUESTION PRESENTED

Who has the authority to appoint an associate judge under Section 574.0085(a) of the Texas Health and Safety Code? More specifically, what is the meaning of "the county judge" as that term is used in Section 574.0085(a) of the Texas Health and Safety Code? Does it give the

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authority to appoint an associate judge to the County Judge of the particular county or to the presiding judge of the court that would be served by the associate judge?

ARGUMENT AND AUTHORITIES

Mental illness proceedings like those docketed in Probate Court No. 1 are governed by Chapter 574 of the Texas Health and Safety Code. Section 574.0085(a) provides that “[t]he county judge may appoint a full-time or a part-time associate judge to preside over the proceedings for court-ordered mental health services if the commissioners court of a county in which the court has jurisdiction authorizes the employment of an associate judge.” Tex. Health & Safety Code § 574.0085(a). The term “the county judge” is not defined in Chapter 574 of the Texas Health and Safety Code, and there is no case law directly addressing its meaning. Accordingly, the issue is one of statutory interpretation.

Interpreting “the county judge” to Mean the County Judge of a Particular County

The seminal rule of statutory construction is to presume that the Legislature meant what it said. *State v. Vasilas*, 187 S.W.3d 486, 489 (Tex. Crim. App. 2006). When determining the meaning of a statute, courts focus on the literal text and give effect to the plain meaning of the text unless the plain meaning is ambiguous, contradictory, inconsistent, unjust, or uncertain, or the application of the plain language would lead to absurd consequences that the Legislature could not possibly have intended. *Ex parte Noyola*, 215 S.W.3d 862, 866 (Tex. Crim. App. 2007); *Badgett v. State*, 42 S.W.3d 136, 138 (Tex. Crim. App. 2001); *Brown & Root v. Durland*, 84 S.W.2d 1073, 1075 (Tex. 1935); *Tyler v. Texas Employers' Ins. Ass'n*, 288 S.W. 409, 410 (Tex. 1926); *Kirk v. Morley Bros.*, 127 S.W. 1109, 1112 (Tex. Civ. App. 1910).

In this case, the plain language gives “the county judge” the authority to appoint an associate judge once Commissioners Court has created an associate judge position. On its face, this statute does not appear ambiguous, as the County Judge for any particular county has been commonly referred to as the County Judge for over a century. Such references are present in the Texas Constitution, which provides that “[t]he County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.” Tex. Const. Art. V, § 18. Based on this common understanding of “the county judge,” the most literal interpretation of “the county judge” appears to be the County Judge of the particular county. And given the Legislature’s clear involvement of Commissioners Court in the creation of the associate judge position under Section 574.0085, this plain language interpretation makes sense and does not render the statute contradictory, inconsistent, unjust, uncertain, or absurd.

In fact, interpreting “the county judge” to mean anything other than the County Judge of the particular county appears to lead to a contradictory and inconsistent result. This is because Section 574.0085 only contemplates a single party having the authority to appoint associate judges. If the Legislature intended that the judge who would be served by the associate judge would have the power to appoint the associate judge, the Legislature would likely have also included a mechanism for judges to share that power when an associate judge would serve more than one judge.

This point is particularly compelling when you consider the provision for terminating an associate judge under Section 574.0085, and when you consider provisions addressing both the

appointment and termination of associate judges in the Texas Government Code and the Texas Family Code. For example, Section 574.0085(d) provides:

An associate judge who serves a single court serves at the will of the judge of that court. The services of an associate judge who serves more than two courts may be terminated by a majority vote of all the judges of the courts the associate judge serves. The services of an associate judge who serves two courts may be terminated by either of the judges of the courts the associate judge serves.

Tex. Health & Safety Code § 574.0085(d). This clearly gives the authority to terminate an associate judge to the judge that is served by the associate judge, and, contemplating that an associate judge may serve more than one judge, the Legislature also provided a mechanism to share this termination power among all judges served by an associate judge. If the Legislature had also intended to give the authority to appoint an associate judge to the judge that is served by the associate judge, the Legislature would likely have also provided a mechanism to share this appointment power among all judges served by an associate judge. However, the Legislature did not. Instead of contemplating the possibility of multiple “county judges” sharing the power to appoint an associate judge, the Legislature appears to have instead contemplated a situation where only one party may appoint an associate judge: the County Judge of the particular county.

This point is even more compelling when you consider the associate judge provisions found in the Texas Government Code and the Texas Family Code. Both of those Codes clearly give the power to appoint an associate judge to the judge that will be served by the associate judge, and both of those Codes also provide a mechanism for sharing the appointment power when the associate judge will serve more than one judge. Tex. Gov’t Code § 54A.203(d); Tex. Family Code § 201.001(d). If, under Section 574.0085, the Legislature intended to give the appointment power to the judge that would be served by the associate judge, one would expect

the Legislature to also include a mechanism for sharing that power, as it did in the Government Code and the Family Code. When construing a statute, a court will presume that every word of the statute has been included or excluded for a reason. *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006). And when the Legislature includes a right or remedy in one part of a code and omits it in another, that may be precisely what the Legislature intended. *Brown v. De La Cruz*, 156 S.W.3d 560, 568 (Tex. 2004). Taking into account that the Legislature included provisions for sharing the appointment power in both the Government Code and the Family Code, but did not include such provisions in the Health and Safety Code, it appears appropriate to presume that the Legislature did so intentionally because it intended for only one party to have the power to appoint an associate judge under Section 574.0085: the County Judge of the particular county.

Also compelling is the manner in which the Legislature has used “the county judge” in other portions of the Health and Safety Code, and the meaning that has been afforded to it in those instances. For example, Chapter 579, which establishes a mental health jail diversion pilot program specific to Harris County, defines “the county judge” to be “the county judge of Harris County.” Tex. Health & Safety Code § 579.001(2). Section 574.008(b) also uses the term “the county judge” in providing that, under certain circumstances, “[t]he county judge shall transfer the case” Tex. Health & Safety Code § 574.008(b). While “the county judge” is not defined in Chapter 574, its use in Section 574.008(b) has been interpreted to mean the County Judge of the particular county. In a case from the 4th Court of Appeals addressing other issues, it was the County Judge of Kerr County who was “the county judge” for purposes of transferring a case under Section 574.008(b). See *In re L.L.*, 821 S.W.2d 247 (Tex. App. San Antonio 1991,

writ denied). When a particular statute has been judicially construed and the Legislature does not amend it, courts will presume that the Legislature intended that the same construction should continue to apply. *Busby v. State*, 990 S.W.2d 263, 267 (Tex. Crim. App. 1999). *In re L.L.* was decided twenty five years ago, and the Legislature has not changed Section 574.008(b) in response to *In re L.L.*'s interpretation of "the county judge." Accordingly, it appears that we must presume that the Legislature's use of "the county judge" in Section 574.008(b) is intended to mean the County Judge of the particular county. And if that is the meaning afforded to "the county judge" under Section 574.008(b), there does not appear to be any reason why the same meaning would not be afforded to "the county judge" as it is used in Section 574.0085(a).

There are also several instances in Section 574.0085 where the statute is clearly referring to the judge that is served by the associate judge, but does not use the term "the county judge." Instead, the statute uses terms such as "the judge of that court," "the judges of the courts the associate judge serves," and "the referring court." Tex. Health & Safety Code §§ 574.0085(d), (e), (g), (h), (i), & (j). Courts presume that statutory language is selected and used with care and deliberation, and that every word or phrase is used intentionally with meaning and purpose. *Tex. Lottery Comm'n v. First State Bank of Dequeen*, 325 S.W.3d 628, 635 (Tex. 2010); *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010). If we are to presume that the Legislature used care and deliberation in selecting its words, and that every word or phrase was selected intentionally with meaning and purpose, the fact that the Legislature did not ever use the term "the county judge" when clearly referring to the judge that would be served by the associate judge appears to indicate that "the county judge" does not mean the judge that would be served by the associate judge. Instead, the Legislature's limited use of "the county judge" appears to indicate that it has

the special meaning of the County Judge of the particular county. If the Legislature intended for “the county judge” to mean the judge that would be served by the associate judge, it would likely have used “the county judge” in all references to the judge that would be served by the associate judge.

Interpreting “the county judge” to Mean the Judge Served by the Associate Judge

While the points discussed above provide compelling reasons for interpreting “the county judge” to mean the County Judge of the particular county, there are other points that support interpreting “the county judge” to mean the judge that will be served by the associate judge.

First, “the county judge” may refer to the County Judge of a particular county when the County Judge oversees mental health proceedings, but in counties like Bexar County, where a statutory court has been given primary responsibility to oversee mental health proceedings, “the county judge” might reasonably refer by extension to the judge of the statutory court that oversees mental health proceedings. While this position is reasonable, its biggest vulnerability is that had the Legislature intended the statute to function in this manner, it likely could have much more clearly expressed its intent to do so by using different terms than those it ultimately chose to use. For example, the Legislature could have used “the county judge” consistently throughout Section 574.0085 when referring to the judge that would be served by the associate judge, or, in the alternative, the Legislature could have used “the judge of a court having jurisdiction of a proceeding under this Chapter” or “the judge of the court the associate judge would serve” in Section 574.0085(a) instead of using “the county judge.” The Legislature’s use of “the county judge” in one part of Section 574.0085 and not in another appears to indicate that it intended to refer to different parties with each reference.

Second, Section 574.0085 of the Texas Health and Safety Code uses the words “county judge” in subsections (a), (b), (k), and (l). Subsections (a), (b), (k), and (l) refer respectively to “the county judge” for purposes of appointment power, “a retired county judge, statutory or constitutional” for purposes of service qualification, “a county judge” for purposes of establishing immunity, and “the county judge” for purposes of establishing judicial conduct requirements. It would not be unreasonable for the county judge that can appoint the associate judge to be the same judge that can terminate the associate judge, define qualifications, define immunity, and define judicial conduct requirements, so that all portions of the statute would be uniform in construction and not bifurcated. On the other hand, bifurcating powers and having different reference points for different requirements does not create any conflict within the statute and is often used by design. For example, giving the power to appoint to the County Judge and the power to terminate to the judge that would be served by the associate judge provides each party with an important check on the other and ensures that associate judges will be chosen with care and by agreement, and not by the unilateral actions of a single party. The County Judge would have the power to appoint the associate judge, and if the judge that would be served by the associate judge is unhappy with the County Judge’s appointment, the judge can exercise its veto power by terminating the associate judge. The foundations of our state and federal governments are based on the same principle of checks and balances, and it is reasonable to conclude that the Legislature intended Section 574.0085(a) to also function with checks and balances.

CONCLUSION

Because the improper appointment of an associate judge under Section 574.0085 of the Texas Health and Safety Code would have serious legal consequences for all cases the associate judge presides over, this Office seeks an opinion fully and finally resolving this matter.

Thank you for your assistance on this matter,

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