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May 18, 2009

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: Senate Bill 905 and House Bill 634

Dear Governor O'Malley:

We have reviewed Senate Bill 905 and House Bill 634, identical bills that would expand the jurisdiction of the orphans' court but only in those jurisdictions and at those times that a lawyer is serving as the presiding judge. We are concerned that this arrangement might be determined to unconstitutionally modify the qualifications for judges of the orphans' court. Nonetheless, because there is no clear precedential authority that requires us to conclude that the bill is "clearly unconstitutional," under the standards that we apply to bill review, we cannot go so far as to recommend that you veto the bills.

Although the orphans' courts are created by the Maryland Constitution, their jurisdiction is purely statutory. MD. CONST., Art. III, §40 ("They shall have all the powers now vested in the Orphans' Courts of the State, subject to such change as the Legislature may proscribe"); MD. ANN. CODE, ESTATES & TRUSTS ("ET"), §13-106(b) ("the orphans' court, under the pretext of incidental power or constructive authority, may not exercise jurisdiction not expressly conferred by law").

One of the affirmative statutory grants of jurisdiction to the orphans' court is ET §13-702(a), which grants the authority to appoint a guardian of the person of an unmarried minor only in situations where "neither parent is serving as guardian" and no guardian has been appointed by will as is allowed by ET §13-701. We believe that the phrase "neither parent is serving as guardian" is restricted to circumstances "in which

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there is no surviving parent who is legally responsible for the minor, either because both parents are deceased or the surviving parent is no longer legally responsible for the minor" because the parental rights have been terminated by a circuit court. 77 *Opinions of the Attorney General* 41, 44 & n.2 (1992).¹ These bills seek to change that outcome and allow orphans' courts to appoint a guardian for a minor (1) who possesses no estates of property and, (2) whose parents are alive and remain legally responsible for the minor. We understand that this change is sought because proceeding in the orphans' court may be faster and less expensive than pursuing the same remedy in the circuit courts.

The constitutional qualifications for orphans' court judges are set forth in Article IV, §40 of the State Constitution and may not be increased by statute. See *Humphreys v. Walls*, 169 Md. 292 (1935); *Thomas v. Owens*, 4 Md. 189 (1853). Those constitutional qualifications are that the judges must be "citizens of the State and residents, for the twelve months proceeding [their election, in] the City or County for which they may be elected." Md. Const., Art. III, §40. The Maryland Constitution does not require that the judges of the orphans' courts be lawyers. MD. CONST., Art. IV, §40; *Kadan v. Board of Supervisors of Elections of Baltimore County*, 273 Md. 406 (1974) (holding that it is not necessary for a judge of the orphans' court to be a member of the bar). In fact, informal investigation reveals that currently only seven of the twenty-two jurisdictions in Maryland that have orphans' courts have orphans' court judges who are lawyers: Anne Arundel (1); Baltimore City (3); Baltimore County (3); Howard (2); Prince George's (3); Queen Anne's (2); and Wicomico (1).

Perhaps concerned about allowing the lay judiciary of the orphans' courts to exercise this increased jurisdiction—which could encompass the equivalent of a decision to terminate parental rights—the legislature granted this authority only "if the presiding judge of the orphans' court is a member of the bar." Thus, the grant of this increased jurisdiction is dependent on whether there is, at the time a case is decided, a lawyer sitting as the presiding judge on the orphans' court of that county. Thus, we are concerned that these bills, in effect, add a new qualification requirement—not coincidentally, a qualification requirement that was previously determined to be

¹ This precise legal issue is before the Court of Appeals of Maryland in *In re: Adoption/Guardianship of Tracy K.* (No. 139, Sept. Term 2007). On June 11, 2008, the Court issued a *per curiam* order affirming the decision of the Orphans' Court for Prince George's County, "[f]or reasons to be stated later in an opinion to be filed." *In re: Adoption/Guardianship of Tracy K.*, 405 Md. 82 (2008) (*per curiam* order). Because the opinion has not yet been filed, we do not know if the Court of Appeals has adopted precisely the same reasoning set forth in 77 *Opinions of the Attorney General* 41 (Mar. 20, 1992).

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unconstitutional²—before an orphan's court may exercise its full statutory jurisdiction. In this way, the Legislature has modified the jurisdictional scope of the orphans' court (which it may), but has indirectly attempted to modify the constitutional qualifications of office (which it may not). We are particularly concerned that, if allowed to legislate in this manner, future legislation might strip non-lawyer orphans' court judges of important jurisdictional powers and, thereby, subvert the constitutional rule permitting non-lawyers to serve as judges of the orphans' court. In our view, legislation stripping the jurisdictional power of non-lawyer judges would not be constitutional; therefore, we have grave concerns about legislation enlarging the jurisdiction of the orphans' court while limiting exercise of that expanded jurisdiction only to orphans' court judges who also happen to also be lawyers.

Despite these concerns, we have found no reported court decisions that we consider analogous. In fact, we have been unable to identify an analogous situation in which a legislature grants a court additional jurisdiction based on a non-mandatory qualification attained by one of its members. In the absence of such authority, we cannot say that the bill is "clearly unconstitutional."³

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Joseph C. Bryce
Karl Aro

² *Kadan v. Board of Supervisors of Elections of Baltimore County*, 273 Md. 406 (1974).

³ "[T]his Office applies a 'not clearly unconstitutional' standard in reviewing bills passed by the General Assembly prior to their approval or veto by the Governor. This standard of review reflects the presumption of constitutionality to which statutes are entitled and the Attorney General's constitutional responsibility to defend enactments of the Legislature, while also satisfying the duty to provide the Governor with our best legal advice." 93 *Opinions of the Attorney General* 154, 161, n.12 (2008).