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May 11, 2022

The Honorable Lawrence J. Hogan, Jr.  
Governor of Maryland  
State House  
100 State Circle  
Annapolis, Maryland 21401

***Re: Senate Bill 17, “Child Custody - Cases Involving Child Abuse or Domestic Violence - Training for Judges”***

Dear Governor Hogan:

We have reviewed Senate Bill 17, “Child Custody - Cases Involving Child Abuse or Domestic Violence - Training for Judges” for constitutionality and legal sufficiency. In our view the bill is not clearly unconstitutional and is more likely to survive a court challenge if interpreted as merely directory rather than mandatory.<sup>1</sup> We write to explain our reasoning.

Senate Bill 17 creates a new section in the Family Law Article (“FL”), § 9-101.3, which states in part that “[t]he Maryland Judiciary, in consultation with domestic violence and child abuse organizations, shall develop and update as appropriate a training program for judges and magistrates presiding over child custody cases involving child abuse or domestic violence.” The bill goes on to list thirteen specific topics to be included in the training program and “any other relevant subject.” New FL § 9-101.3(c). Additionally, the bill provides:

The Maryland Judiciary shall adopt procedures, including the uniform screening of initial pleadings, to identify child custody

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<sup>1</sup> We apply a “not clearly unconstitutional” standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

cases that may involve child abuse or domestic violence as soon as possible to ensure that only judges who have received training under this section are assigned those cases.

New FL § 9-101.3(d). A final provision adds that “[w]ithin a judge’s first year of presiding over child custody cases involving child abuse or domestic violence, the judge shall receive at least 20 hours of initial training approved by the Maryland Judiciary that meets the requirements of subsection (c) of this section.” New FL § 9-101.3(e).

We considered whether the Court of Appeals would conclude that Senate Bill 17 violates the separation of powers clause of Article 8 of the Maryland Declaration of Rights by impermissibly encroaching on the powers vested in the Judiciary. Article 8 of the Maryland Declaration of Rights establishes the requirement of the separation of powers among the branches of government. It provides:

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

The Court of Appeals has never interpreted Article 8 to “require absolute separation or strict lines of demarcation among the three branches of government.” *State v. Falcon*, 451 Md. 138, 160-61 (2017) (internal quotation marks omitted). “[T]he restrictive powers of the legislative, executive, and judicial branches of government are not ‘wholly separate and unmixed.’” *McCullough v. Glendening*, 347 Md. 272, 283-84 (1997) (quoting *Crane v. Meginnis*, 1 G. & J. 463, 476 (1829)). The “separation of powers doctrine may constitutionally encompass a sensible degree of elasticity, provided that constitutional elasticity is not stretched to a point where, in effect, there no longer exists a separation of governmental power.” *Falcon*, 451 Md. at 161 (internal quotation marks and alterations omitted).

We have previously recognized the limitations imposed on the three branches under the separation of powers requirement as “one branch may not *usurp* the *essential* functions and powers of another branch . . . , may not act to *destroy* the *essential* functions and powers of another branch . . . , and may not *delegate* its *essential* functions and powers to another branch . . . .” 63 *Opinions of the Attorney General* 305, 310 (1978) (emphasis in original) (citations omitted).

[T]he authority of each branch is absolute only within the powers which the Constitution assigns it. Beyond this core area there is a twilight in which the branches may have concurrent authority and, e.g., the legislative branch may act “to the extent that it has legislative authority and does not encounter an express constitutional limitation or intrude upon the core powers held by another branch.”

*Id.* (citations omitted).

The General Assembly has plenary power to enact any law for any purpose of civil government, subject only to the limitations of the State and federal constitutions. *Richards Furniture Corp. v. Board of County Commissioners*, 233 Md. 249, 257 (1963); *Maryland Committee v. Tawes*, 228 Md. 412, 439 (1962). “As the legislative body of a sovereign State, ‘the General Assembly [inherently] possesses all legislative power and authority, except in such instance, and to such extent as the Constitutions of the State and the United States have imposed limitations and restrictions thereon.’” 62 *Opinions of the Attorney General* 275, 278 (1977) (quoting *Kenneweg v. Allegany County Commissioners*, 102 Md. 119, 123 (1905)).

Article IV of the Maryland Constitution vests exclusive judicial power in the Judiciary. This exclusive judicial power is one area in which neither the Legislative Branch nor the Executive Branch may act. Such exclusive judicial power includes hearing and adjudication of cases; interpretation and application of statutes; and the power to enforce compliance with such statutes. *Mayor and City Council of Baltimore v. Foster & Kleiser*, 46 Md. App. 163, 171 (1980). *See also Attorney General v. Johnson*, 282 Md. 274, 286 (1978) (holding that “the essence of judicial power is the final authority to render and enforce a judgment”).

The Court of Appeals has not addressed the specific question of whether the General Assembly can mandate training for judges. The Court has, however, held that the General Assembly may establish minimum learning criteria for lawyers. *Attorney General v. Waldron*, 289 Md. 683, 699 (1981). In that case, the Court set out that the regulation of the practice of law, the admission of new members, and the disciplining of attorneys who fail to conform to the standards of professional conduct are all “essentially judicial in nature, and, accordingly, are encompassed in the constitutional grant of judicial authority to the courts of this State.” *Id.* at 692. At the same time, the Court acknowledged that the

separation of powers doctrine allows for some “limited exertion of legislative authority” with respect to certain aspects of the legal profession. *Id.* at 699.

Maryland’s judiciary in the past generally has been able to harmonize its obligations with enactment by the General Assembly of a *restricted class* of statutes relating to the legal profession, passed by the Legislature pursuant to its interest in promoting the health, safety and welfare of the people of this State. This harmony heretofore has been possible because the legislation has been calculated to, and did, augment the ability of the courts to carry out their constitutional responsibilities; *at the most, there was but a minimal intrusion.*

*Id.* at 698 (emphasis added) (citations omitted).

In *Waldron*, the Court indicated that “the General Assembly may establish minimum criteria for the learning for lawyers and character of persons admitted to the bar of this State.” *Id.* at 699. The Court added, however, that “[e]ven when legislating the minimum requisites to the practice of law, the power of the General Assembly is not unlimited; the Legislature may not constitutionally place restrictions on the practice so onerous or burdensome that they impinge on the ability of the judicial branch to carry out its duties.” *Id.* at 700. *See also 73 Opinions of the Attorney General* 92, 96 (1988) (advising that the legislature may regulate the Judiciary in areas that are not core judicial functions but also recognizing, “[t]o be sure, budget and fiscal policies may not be applied to the courts in a way that prevents the courts from carrying out their judicial function”).

The regulation of judges, like the regulation of lawyers, is a judicial function. One might reason, therefore, that the legislature’s imposition of “training” for judges would be a valid area of regulation. Yet imposing judicial training—both in specified substance and number of hours—as a precondition to presiding over certain child custody cases goes beyond establishing learning criteria for lawyers. The State Constitution provides that the Chief Judge of the Court of Appeals is the administrative head of the State’s judicial system. Art. IV, §18(b)(1). As the administrative head, the Chief Judge has inherent power to oversee all State judges and the lower courts on which they serve. Further, we have previously recognized that “the division of work among several judges is the performance of a strictly judicial duty.” *61 Opinions of the Attorney General* 291, 298 (1976) (advising that legislation requiring judges to sit for a term on a proposed new housing court would restrict the broad constitutional authority of the judiciary). That opinion went on to clarify,

however, that “a statutory provision, *directory in nature*, calling for a set term for a judge assigned to the proposed Housing Court would not interfere with the judicial discretion conferred” in the Constitution. *Id.* (emphasis in original).

Applying the foregoing reasoning, if Senate Bill 17 were read as prohibiting a judge from hearing child custody cases involving child abuse or domestic violence until the judge completes 20 hours of the specified training, we predict that the Court of Appeals would find it unlawfully encroaches on the Judiciary’s express and inherent powers under Article IV. On the other hand, if Senate Bill 17 is found to be directory and does not mandate judicial training, it is less likely the Court would find a violation of separation of powers. We note in this regard that Senate Bill 17 specifies no consequences for failure to take the training.<sup>2</sup> See *Maryland State Bar Ass’n v. Frank*, 272 Md. 528, 533 (1974) (holding that statute requiring bar association or state’s attorney on judge’s order to prosecute charges of professional misconduct not more than sixty days from the date of order was directory rather than mandatory because “it [was] of some significance ... that the language of the statute provide[d] no penalty for failure to act within the time prescribed”); *Tucker v. State*, 89 Md. App. 295, 298 (1991) (“[I]f the command is ‘mandatory,’ some fairly drastic sanction must be imposed upon a finding of noncompliance, whereas if the command is ‘directory, noncompliance will result in some lesser penalty, or perhaps no penalty at all.”).

In conclusion, based on the relevant constitutional provisions and the case law interpreting those provisions, it is our view that if the Court of Appeals reads Senate Bill 17 as a legislative mandate that judges complete a particular training program before they preside over certain child custody cases, there is a risk that the Court would conclude such mandate improperly intrudes on the constitutional grant of judicial authority and violates the principle of separation of powers in Article 8 of the Maryland Declaration of Rights. If, however, the Court adopts the view that the legislation is merely directory and does not

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<sup>2</sup> As introduced, Senate Bill 17 would have required the Judiciary to report the name of a judge who does not comply with the training requirements to the Commission on Judicial Disabilities. This provision was amended out of the bill after separation of powers concerns were raised by the Maryland Judicial Conference, among others. The Chair of the Judiciary indicated during the voting session on the bill that this provision and another about limiting assignment of custody cases were amended because they raised constitutional issues. See *Director, Patuxent Inst. v. Cash*, 269 Md. 331, 344 (1973) (“[I]t is well settled that the use of the words ‘shall’ or ‘may’ [is] not controlling, in determining whether a particular provision is mandatory or directory .... The question of construction turns upon the intention of the Legislature as gathered from the nature of the subject matter and the purposes to be accomplished”).

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mandate judicial training, the Court is unlikely to conclude that Senate Bill 17 violates separation of powers.

Sincerely,

A handwritten signature in blue ink, reading "Brian E. Frosh", enclosed in a thin black rectangular border.

Brian E. Frosh  
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith  
Keiffer J. Mitchell, Jr.  
Victoria L. Gruber