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September 29, 2000

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OPINION COMMITTEE

FILE # ml-41701-00

I.D. # 41701

The Honorable John Cornyn
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for Attorney General's Opinion Regarding the Definition of
"Presiding Judge" for a Probable Cause Hearing during Mental Illness
Proceedings in Harris County.

RQ-0296-jc

Dear General Cornyn:

In Harris County, two statutory probate courts have responsibility for mental illness proceedings, Probate Court No. 3 and Probate Court No. 4. The Texas Government Code states in Section 25.1034, in pertinent part, that:

(b) The Probate Court No. 3 of Harris County has primary responsibility for mental illness proceedings and for all administration related to mental illness proceedings, including budget preparation, staff management, and the adoption of administrative policy. The Probate Court No. 4 of Harris County has secondary responsibility for mental illness proceedings.

The Texas Health and Safety Code states in Section 574.025 that shortly after an individual is apprehended and taken involuntarily into the mental health system, that individual is entitled to a probable cause hearing. Section 574.025 also addresses who will conduct the probable cause hearings. Section 574.025 provides, in pertinent part, that:

(c) The [probable cause] hearing shall be held before a magistrate or, at the discretion of the presiding judge, before a master appointed by the presiding judge.

(Words and brackets added)

There are several possible definitions of the term "presiding judge" as it is used in Section 574.025 (c) of the Texas Health and Safety Code. The first possible definition of "presiding judge" includes each of the judges who conduct final mental health hearings in Harris County, the judges of Probate Courts No. 3 and No. 4. This definition is the interpretation that was given by Harris County Attorney Michael P. Fleming in his Opinion letter dated April 20, 2000 which is enclosed.

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The Opinion letter states, in pertinent part, that:

Probable cause hearings may be conducted by a magistrate or by a master appointed by the presiding judge of the court.

The Harris County Attorney's interpretation is consistent with the Texas legal practice of referring to the judge sitting on the bench at the time as the "presiding judge."

Judge Rory R. Olsen of Harris County Probate Court No. 3 argues that a problem exists with the Harris County Attorney's definition of "presiding judge." Judge Olson contends that if the judge who presided over the final disposition of the case was not the judge who made the appointment of the magistrate or master for the probable cause hearing then the validity of the appointment could be retroactively revoked. Judge Olson asserts that the Harris County Attorney's Opinion would require an individual, the judge who conducts the final mental health hearing, whose identity will not be known until a later date to make a current appointment of a magistrate or master to conduct the probable cause hearing. Judge Olson further believes that if the Harris County Attorney's definition is correct, then the death, disability, temporary illness, resignation, removal, or retirement of either of the two judges in Harris County during the time period after a proposed patient has had his/her probable cause hearing but before his/her final mental health hearing has occurred could render a patient's commitment invalid because his/her right to a probable cause hearing was violated.

The second possible definition of "presiding judge" that is applicable to the issue at hand is that the judge of Probate Court No. 3 is the only "presiding judge" as that term is used in Section 574.025(c) of the Texas Health and Safety Code. Judge Olsen interprets Section 25.1034 of the Texas Government Code to support such a definition of the term "presiding judge." Judge Olsen points to the language used in Section 25.1034(b) which makes reference to Probate Court No. 3 as having "primary responsibility" and Probate Court No. 4 as having "secondary responsibility" to emphasize his interpretation that "presiding judge" signifies only the judge of Probate Court No. 3. Judge Olsen also contends that when Probate Court No. 4 was created in 1985 during the 69th Legislature by House Bill 711 the language of Section 25.1034(b) of the Texas Government Code was added with the intention of making the judge of Probate Court No. 3 the administrative judge over the mental health system in Harris County. Acts 1985, 69th Leg., ch. 878.

The third possible definition of "presiding judge" that is relevant is the definition given by Section 25.0022 of the Texas Government Code. Section 25.0022 states, in pertinent part, that:

(b) the judges of the statutory probate courts shall elect from their number a presiding judge of the statutory probate courts.

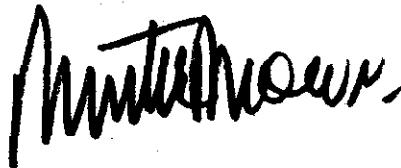
The powers and duties of the presiding judge of the statutory probate courts are detailed in Section 25.0022. While the statewide presiding judge of the statutory probate courts is by definition a "presiding judge", it can be argued that the Legislature did not intend to make the statewide presiding judge responsible for the administration of probable cause hearings.

Based on the foregoing, I respectfully submit the following for your opinion:

Does the term "presiding judge" as it is used in Section 574.025(c) of the Texas Health and Safety Code include the judges of both Harris County Probate Courts No. 3 and No. 4; only the judge of Probate Court No. 3; or the statewide presiding judge of statutory probate courts as expressed in Section 25.0022 of the Texas Government Code?

Your prompt opinion on this issue would be greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Antoine", written in a cursive style.

JEB:te