FILE # ML-46577-10
I.D. # 46577

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August 25, 2010

RQ-0915-GA

Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-12548

Re: Request for Opinion regarding
TEX. HEALTH & SAFETY CODE § 773.008 (2)

Dear General Abbott:

Tarrant County authorities, including the Tarrant County Sheriff, the local probate courts and their staff, and the local mental health authorities, are attempting to find the most efficient but legal methods to insure appropriate medical treatment for local jail detainees who are uncooperative in taking medications. They are particularly concerned about detainees with chronic physical conditions which pose a substantial risk of sudden deterioration if left untreated. (For example, some diabetics who won't take their medication pose an unpredictable risk of deterioration which can ultimately result in organ damage or death). These prisoners are frequently uncooperative in taking medication due to mental illnesses which may or may not satisfy legal standards for civil or criminal incompetency under various legal standards. Local officials are also concerned with those uncooperative individuals who might need other critical medical care, but who might not be appropriate candidates for appointment of a guardian.

In exploring possible strategies to address these issues, local authorities have been made aware that officials in at least one other county have been utilizing court orders for emergency medical treatment under the authority of Section 773.008 (2) of the Texas Health and Safety Code when presented with these kinds of situations. Some have suggested that an order under this statute could be a less restrictive alternative to guardianship.

There is no caselaw construing this statutory provision, nor any meaningful legislative history which might assist in its construction. It has never been addressed in any Opinion of the Attorney General. On its face, it refers to the power of certain courts to order emergency medical treatment, but there is some uncertainty as to the nature and object of this reference.

(1) Does this section independently authorize any court of record to "order" emergency medical care, or does it merely refer to other statutes which grant particular courts, in particular situations, the power to order emergency medical care under other law?

(2) If this section does authorize any court of record to "order" emergency medical care, what procedures should be used in connection with this power, since the statute provides no procedures for assessing the procedural and substantive rights of various affected parties, such as the prisoner, the Sheriff holding the prisoner in custody, or the medical personnel who might be required to perform treatment under an order?

In light of these uncertainties, we write to request your opinion on these questions.

On its face, the statute appears to grant any court of record the power to order imminent emergency medical care to prevent an individual's serious bodily injury or loss of life. TEX. HEALTH & SAFETY CODE § 773.008 (2) (Vernon 2010). Normally, a statute is construed using the plain, ordinary meaning of its words, and it is presumed that every word in a statute has been used for some purpose, and that every word excluded from the statute was also excluded for a purpose. *Walker v. City of Georgetown*, 86 S.W.3d 249, 255 (Tex. App.—Austin 2002, pet. den.) Since the statute does not refer to any other statutes, either specifically or generically by using a phrase like "under other law," it appears to confer a new power, *sui generis*, for any court of record to order emergency medical care for any person, without specifying any procedures to accompany the exercise of such a power.

On the other hand, in construing a codified statute, it is presumed that the legislature intended compliance with the federal and state constitutions, attainment of a just and reasonable result (as opposed to an illegal or absurd one), and accomplishment of a result "feasible of execution." TEX. GOVT. CODE. ANN. § 311.021 (Vernon 2005). Construing §773.008 (2) as authorizing any court of record to order

emergency medical care for any person, rather than as referring to more fully developed statutory procedures found elsewhere in the law which allow courts to order such medical care, raises a host of constitutional and practical issues which tend to make application of the plain language of the statute impractical and problematic at best, and possibly unconstitutional at its worst.

The United States Supreme Court has explicitly held that a competent adult has a liberty interest in refusing unwanted medical treatment; this interest is protected by the Due Process clause of the Fourteenth Amendment. *Cruzan v. Director, Missouri Department of Health*, 1497 U.S. 261, 278 (1990). It has also stated that incompetent persons possess similar constitutional rights, while recognizing that there are additional or different issues involved in forced medication of the incompetent, since the incompetent cannot exercise their rights directly, but must operate through some type of surrogate. *Id.* at 279-280.

In another case, the Supreme Court has held that a mentally ill prisoner possesses a liberty interest in avoiding forced medication with psychotropic drugs, even when he is in prison. *Washington v. Harper*, 494 U.S. 210, 221-222 (1990). Before a State can infringe on this liberty interest, it must have a legitimate state interest which outweighs the prisoner's liberty interest. *Id.* at 223-225. Once it is determined that substantive due process allows the State to compel medication in a particular situation, procedural due process requires sufficient procedures to ensure that the decision to medicate is neither arbitrary nor erroneous. *Id.* at 228. The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in a particular case. *Id.* at 229. In the *Washington* case, the court held that a nonjudicial review process (subject to ultimate judicial review on appeal) which called for notice to the prisoner, the right to be present at an adversarial hearing, the right to present and cross-examine witnesses, and the right for the prisoner to be advised by a lay advisor who understood psychiatric issues was sufficient to satisfy procedural due process. *Id.* at 231-236.

Other courts have recognized that the federal constitutional right to refuse medical treatment may extend to life-saving treatment. *See, e.g.*, PATIENT'S RIGHT TO REFUSE TREATMENT ALLEGEDLY NECESSARY TO SUSTAIN LIFE, 93 A.L.R. 3d 67 (1979); *Stouffer v. Reid*, 993 A.2d 104 (Md. 2010). Such cases can involve an additional constitutional layer when the patient or his surrogate decisionmaker assert religious grounds for refusing treatment. *See* 93 A.L.R. 3d 67 at § 3[d].

A recent case from Maryland involved the decision of a competent jail inmate to voluntarily refuse life sustaining kidney dialysis treatment. *Stouffer*, 993 A.2d at 106. Absent any evidence that the prisoner was a direct threat to the safety and well being of others or that he was protesting any prison policies or attempting to manipulate an official, the Maryland Court of Appeals held that government officials had not shown a valid penological interest in compelling his submission to treatment. *Id.* at 120.

Compelled medical treatment also constitutes a Fourth Amendment seizure. *Cruzan*, 497 U.S. at 278. While such seizures are sometimes permissible on an *ex parte* basis to address important governmental interests, such occasions require substantial procedural protections in order to be constitutional. For example, a peace officer requires probable cause to arrest, as well as a warrant based upon a written affidavit stating probable cause (or exigent circumstances). After arrest, continued detention is allowed only after a neutral and detached magistrate has found probable cause within a reasonable time.

Texas Health and Safety Code § 773.008 (2) provides no procedural mechanisms to assess, address, or weigh any of the constitutional rights and requirements mentioned above. Nor does it contain any procedures to address the rights of the Sheriff to exercise his normal discretion in managing the correctional needs of his jail or the rights of medical personnel to enter into a doctor-patient relationship voluntarily.

But a number of Texas statutes do contain detailed procedures for courts to address these kinds of questions before ordering medical treatment for certain classes of individuals. *See*, e.g., the following statutes: court ordered psychoactive medications for certain criminally incompetent defendants (TEX. CODE OF CRIMINAL PROC. ANN. art. 46B.086 (Vernon Supp. 2009)); court ordered administration of psychoactive medications (TEX. HEALTH AND SAFETY CODE ANN. § 574.106 (Vernon 2010)); court ordered medication under an Emergency Order for Protective Services (TEX. HUM. REC. CODE ANN. §48.208 (Vernon Supp. 2009)); court ordered medical care for a foster child (TEX. FAM. CODE ANN. § 266.010 (d)(Vernon Supp. 2009)); court ordered commitment of a person under a guardianship to an inpatient psychiatric treatment facility (TEX. PROB. CODE ANN. § 770 (b) (Vernon Supp. 2009)). In light of the constitutional necessity for various determinations and procedures, none of which are provided for in Health and Safety Code § 773.008 (2), it seems logically compelling that § 773.008 (2) should be construed as referring to the various other statutes which provide for court-ordered medical treatment rather than as creating an independent, stand-alone right for any

court of record to order emergency medical treatment. Under this reading, § 773.008 (2) refers only to situations arising under other law in which a court order for medical treatment acts as a legitimate substitute for actual patient consent. This interpretation would also comport with the caption and remaining substance of §773.008, which do not mention court orders for emergency care, but which list various situations in which consent for emergency care is not required.

If, however, you determine that Health and Safety Code § 773.008 (2) creates or recognizes a stand-alone procedure, we seek your guidance regarding:

(1) What is that procedure?
(2) Is counsel required to be appointed for the proposed patient?
(3) Can the order directly compel anyone to provide medical treatment, or would the order merely serve as a surrogate or substitute for the patient's actual consent?
(4) Does the statute empower the court to make someone, such as the Sheriff, a surrogate decision maker for the patient without following normal guardianship procedures?

With these comments, we respectfully request your opinion regarding application of this statute.

Sincerely,

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JS/dl