S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

September 4, 2013

Opinion No. 13-70

Private Act Requirement that General Sessions Court Use Services of County Probation Office

QUESTIONS

1. Would a private act mandating that a general sessions court use only the services of a county probation office to supervise an eligible defendant placed on probation conflict with the general law under Tenn. Code Ann. § 40-35-302 and therefore be invalid under the Tennessee Constitution?

2. Would such a private act raise any other constitutional concerns?

OPINIONS

1. No.

2. No.

ANALYSIS

1. Misdemeanor sentencing is generally governed by Tenn. Code Ann. § 40-35-302. This statute provides in part that a defendant convicted of a misdemeanor offense and then placed on probation shall not be placed under the supervision of the Tennessee board of probation and parole. Tenn. Code Ann. § 40-35-302(f)(1). This provision clarifies that this prohibition is not intended to "restrict the use, where necessary, of any county probationary service or private probation company established for the purpose of supervising defendants convicted of misdemeanors." *Id.* The statute also sets forth the qualifications for a private entity that provides probation supervisory services. *See* Tenn. Code Ann. § 40-35-302(g)(1).[1] This Office has previously opined that these provisions collectively do not restrict a general sessions court's discretion to choose which qualified entity will supervise a probationer. Tenn. Att'y Gen. Op. 09-33, at 2 (Mar. 23, 2009); Tenn. Att'y Gen. Op. 99-029 (Feb. 17, 1999). *See also* Tenn. Att'y Gen. Op. 08-175, at 2 (Nov. 18, 2008) ("[T]his Office adheres to the opinion that judges have wide discretion to determine which qualified entity will supervise a defendant," provided that the determination is made impartially and on the basis of merit).

[1] Certain counties defined by population bracket are exempt from these requirements. Tenn. Code Ann. § 40-35-302(g)(2).

Nonetheless, Tenn. Code Ann. § 40-35-302 contains no language that *mandates* a general sessions court to consider all qualified entities when determining which entity will supervise a probationer. Rather, the statute merely states at Tenn. Code Ann. § 40-35-302(f)(1) that this subsection is not intended to restrict the exercise of such discretion by a general sessions judge. *See* Tenn. Code Ann. § 40-35-302(f)(1). Thus, this statute does not prevent the General Assembly, by private act, from requiring general sessions courts in a particular county to select only a county probation office to supervise an eligible defendant placed on probation. *See Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 714 (Tenn. 2012) (quoting *State v. Strobe*, 232 S.W.3d 1, 9 (Tenn. 2007)) (recognizing that courts in construing statutes will determine legislative intent from "the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend . . . the statute's meaning").

Accordingly, this Office perceives no constitutional barrier to the General Assembly's enactment of such a private act under Article XI, Section 8 of the Tennessee Constitution, which provides "[t]he Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land." Tenn. Const. art. XI, § 8. To violate this constitutional provision, a private act must contravene a general law that has mandatory statewide application. *Knox County ex rel. Kessel v. Lenoir City*, 837 S.W.2d 382, 383 (Tenn. 1992). If a private act does contravene a general law, the private act will be invalid unless a reasonable basis exists for the classification created by the private act. *Brentwood Liquors Corp. of Williamson County v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 76-77 (Tenn. Ct. App. 2001). *See* Tenn. Att'y Gen. Op. 13-20, at 3-4 (May 23, 2013); Tenn. Att'y Gen. Op. 09-12, at 3 (Feb. 5, 2009); Tenn. Att'y Gen. Op. 81-219 (Apr. 6, 1981).

As previously discussed, no conflict exists between Tenn. Code Ann. § 40-35-302, which merely states that its provisions do not preclude a general sessions court from appointing any qualified entity to supervise a probationer, and the adoption of a private act that would limit such selection in a particular county to the county probation office. *See Smith County v. Enoch*, No. M1999-00063-COA-R3-CV, 2003 WL 535914 at *3-4 (Feb. 26, 2003) (stating that if "Article XI § 8 is implicated, a challenged private act must do more than differ with the general law, it must flatly contravene a generally applicable statewide statute"). Moreover, even if such a conflict existed, arguably a reasonable basis would exist for the private act's classification—namely, to ensure the maximum utilization of the county-funded probation office and to control the budget for probation supervision services by eliminating any payments to private contractors.

2. The enactment of such a private act also does not implicate the separation of powers doctrine of the Tennessee Constitution, which states that no person or persons belonging to the legislative, executive or judicial department "shall exercise any of the power properly belonging to either of the others, except in the cases herein directed or permitted." Tenn. Const. art. II, § 2.[2]

[2] The three departments of Tennessee government are the "Legislative, Executive, and Judicial." Tenn. Const. art. II, § 1.

Although the doctrine of separation of powers is a fundamental principle of American constitutional government, courts nonetheless have long recognized the difficulty of preserving perfectly the theoretical lines of demarcation between the executive, legislative, and judicial branches of government. *See Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975). While it is the province and duty of the judicial department to interpret the law, it is equally the exclusive province of the legislature to formulate policies, mandate programs, and establish their relative priority. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).

A private act mandating that general sessions courts in a particular county refer all probationers to the county probation office for supervision would not violate the separation of powers doctrine, since it would not interfere with any adjudicative function of the general sessions court or otherwise impact its ability to perform judicial functions. The Tennessee Supreme Court has recently reiterated that "[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government." *Mansell v. Bridgestone Firestone North American Tire, LLC*, No. M2012-02394-WC-R3-WC, at 9 (Tenn. Aug. 20, 2013) (quoting *Underwood*, 529 S.W.2d at 47). In applying this test, this Office has previously opined that a statute redirecting the collection and distribution of child support payments from the clerks of court to the department of human services did not impermissibly encroach upon the judicial branch of government, but merely altered the entity which would perform a ministerial function. Tenn. Att'y Gen. Op. 00-012, at 1-2 (Jan. 24, 2000). This same analysis should insulate the private act at issue from any separation of powers challenge. It is well settled that the power to define what shall constitute a criminal offense and to assess punishment for a particular crime is vested in the General Assembly. *State v. Burdin*, 924 S.W.2d 82, 86 (Tenn. 1996). *See also Charles Massengill v. State*, No. 01C01-9605-CR-00191, 1997 WL 254229, at *2 (Tenn. Crim. App., May 16, 1997) (stating that "[i]nherent within the legislature's function to establish punishment is its authority to promulgate law devising and establishing a statutory scheme for parole").

This Office finds no other constitutional barrier to the adoption of the private act in question.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

BENJAMIN A. WHITEHOUSE
Assistant Attorney General

Requested by:

The Honorable Kent Williams
State Representative
G2 War Memorial Building
Nashville, Tennessee 37243