

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
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September 1, 2004

Opinion No. 04-142

State Agency Rule-Making Authority and the Right to Counsel in Child Support Contempt Cases

**QUESTIONS**

1. May a state agency use its rule-making authority to authorize the expenditure of state dollars not appropriated by the legislature?
2. May a state agency use its rule-making authority to require the expenditure of county dollars for a state-mandated program where the state legislature has not provided for it in the budget?
3. Does a state agency through its rule-making authority have the right to promulgate a rule that requires the judicial branch to include specific language or specific attachments to its court orders?
4. At what point in hearings to establish or enforce a child support obligation does a defendant have a right to counsel?

**OPINIONS**

1. No. A state agency may not make an expenditure of funds from the state treasury which has not been appropriated by the legislature. A statutory grant of rule-making authority which is not itself an appropriation may not be used to circumvent this constitutional and statutory restriction.
2. Yes. A state agency may use its rule-making authority to promulgate regulations that have the effect of imposing new costs on county governments in order to comply with a state-mandated program, even though the state legislature has not provided any funds for the program in the state budget.
3. Yes. A state agency may promulgate a rule, pursuant to an appropriate legislative grant of rule-making authority, that requires the judicial branch to include specific language or specific attachments to its court orders.

4. An indigent defendant in an action to enforce a child support obligation has a right to counsel when there is a threat of incarceration within the meaning of Tennessee Supreme Court Rule 13(d).

## ANALYSIS

### I.

A state agency may not spend public funds without an appropriation from the legislature. There are both state statutory and constitutional provisions that restrict the expenditure of public funds without appropriation from the legislature. Tenn. Code Ann. § 9-4-601(a) provides that “[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law.” The first paragraph of Article II, Section 24, of the Constitution of Tennessee provides that “[n]o public money shall be expended except pursuant to appropriations made by law.” The third paragraph of Article II, Section 24, provides that “[a]ny law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.”<sup>1</sup>

When construing a constitutional provision, a court must give effect to the intent of the people who adopted it. *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983); *Hatcher v. Bell*, 521 S.W.2d 799 (Tenn. 1974). “[I]f the language used is clear and unambiguous, the meaning and intent of the provision is to be ascertained from the instrument itself by construing the language as it is written.” *Hatcher v. Bell*, 521 S.W.2d at 803. The terms used must be given their ordinary and inherent meaning. *Gaskin v. Collins*, *supra*. The proceedings of the Constitutional Convention which adopted the provision, while not controlling, are relevant if an ambiguity exists. *Shelby County v. Hale*, 200 Tenn. 503, 292 S.W.2d 745 (1956); *McCulley v. State*, 102 Tenn. 509, 53 S.W. 134 (1899). Collectively, these provisions were intended to prevent deficit spending and to force the legislature to fund any new programs that it implements. *Journal and Debates of the 1977 Limited Constitutional Convention*, 1112-13 (Report of the Limitations on State Spending Committee, remarks by Mr. Burson). This Office has previously interpreted these restrictions as generally preventing the State from spending money without an appropriation, whether the money was generated by the State’s own taxing powers or received from other sources, such as the federal government. Op. Tenn. Att’y. Gen. 00-083 (May 4, 2000). This Office has previously indicated that the third paragraph of Article II, Section 24, does not apply if funding is not necessary in the first year after the act’s passage, or if the law is implemented with an agency’s existing appropriated funds. Ops. Tenn. Att’y. Gen. 00-083 (May 4, 2000); 97-67 (May 12, 1997); 88-87 (April 19, 1988).

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<sup>1</sup>This provision has the effect of invalidating any noncompliant legislation. While it is clearly applicable to acts of the legislature, its literal language does not appear to apply to administrative rules and regulations. Nevertheless, the legislature could not use a statutory grant of rule-making authority to delegate authority to the executive branch to do what this provision prohibits the legislative branch from doing. Nor could a state agency force the legislature or the treasury to violate these restrictions by enacting rules that obligate the state to spend funds at a level beyond that which the legislature appropriates or the level of the State’s revenues and reserves.

Because these restrictions are both statutory and constitutional, a state agency cannot use a legislative grant of rule-making authority to circumvent them.

## II.

A state agency may use its rule-making authority to promulgate regulations that have the effect of causing the expenditure of county dollars for a state-mandated program even though the state legislature has not provided for it in the budget. Article II, Section 24, of the Constitution of Tennessee contains a measure of fiscal protection for the counties which prohibits the State from shifting all of the costs of a particular state-mandated program to local governments. The fourth paragraph of Article II, Section 24, provides that “[n]o law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.” According to the Court of Appeals, “the Legislature is constitutionally empowered to elect what the share of the State shall be in the subject expenses.” *Morris v. Snodgrass*, 886 S.W.2d 761, 763 (Tenn. Ct. App. 1994). In fact, the Tennessee Supreme Court has recognized that “Article II, Section 24, the State Spending Clause, gives the General Assembly the widest discretion in assigning the relative shares of responsibility of the state and local governments for funding state mandated services.” *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993). Nevertheless, Article II, Section 24, does not apply to administrative rules or regulations because they do not constitute a “law of general application” within the meaning of this provision. Op. Tenn. Att’y. Gen. No. 87-195 (December 18, 1987). Thus, this provision does not prohibit state agencies from promulgating rules which have the effect of increasing expenditures for local governments.<sup>2</sup>

## III.

Pursuant to an appropriate legislative grant of rule-making authority, a state agency may promulgate a rule that requires the judicial branch to include specific language in its court orders or specific attachments to its court orders. With respect to child support orders, Tenn. Code Ann. § 36-5-101(e)(1)(a) (Supp. 2003) already requires trial courts to include certain factual findings in their orders when they deviate from the Tennessee Child Support Guidelines, including “the amount of support that would have been ordered under the child support guidelines and a justification for the variance from the guidelines.” The legislature’s grant of rule-making authority for the promulgation of child support guidelines is set forth in Tenn. Code Ann. §§ 36-5-101(e)(2) (Supp. 2003) and 71-1-132(a)(1). The Tennessee Supreme Court has recently held that the legislature’s delegation of rule-making authority to the Department of Human Services to promulgate child support guidelines was constitutional. *Gallaher v. Elam*, 104 S.W.3d 455, 465 (Tenn. 2003). Clearly, it is also broad

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<sup>2</sup> Furthermore, Article II, Sec. 24, has been construed to apply only to laws of general application which directly or expressly require counties and cities to make expenditures. See *Swafford v. City of Chattanooga*, 743 S.W.2d 174, 178 (Tenn. Ct. App. 1987); Op. Tenn. Att’y. Gen. No. 87-79 (April 30, 1987); Op. Tenn. Att’y. Gen. No. 80-148 (March 11, 1980), at 2. Any legislative cost shifting in this instance would appear to be “too indirect and speculative to trigger the state-share mechanism of Article II, Section 24.” *Knox County v. City of Knoxville*, 1987 WL 31640, \*6 (Tenn. Ct. App.)

enough to permit the Department to require that child support guidelines worksheets be attached to judicial child support orders. Whether such a requirement in an administrative rule is permissible under the doctrine of separation of powers between the legislative and judicial branches requires further analysis.

As the Tennessee Supreme Court stated in *Gallaher*:

The separation of powers doctrine, as set forth in article II, sections 1 and 2 of the Tennessee Constitution, "is a fundamental principle of American constitutional government." *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn.1975). Article II, section 1 of the Tennessee Constitution provides: "The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial." Article II, section 2 requires that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." However, we have observed that the doctrine of separation of powers is not absolute. *See State v. King*, 973 S.W.2d 586, 588 (Tenn.1998). Instead, the functions of the three branches of government often overlap. *See id.*

*Gallaher v. Elam*, 104 S.W.3d at 463.

In *Underwood v. State*, 529 S.W.2d 45 (Tenn. 1975), the Tennessee Supreme Court upheld the constitutionality of the statutes providing for the expungement of criminal records. In so doing, the Court formulated the test to guide any determination of separation of powers issues between the legislative and judicial branches of government. According to the Court, "[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." 529 S.W.2d at 47. In this instance, neither the executive branch nor the legislature are dictating to a court what its judgment must be, nor are they frustrating or interfering with an adjudicative function of the courts. It appears that they are merely standardizing the information that must be included in child support orders. This does not constitute an impermissible encroachment upon the judicial branch of government or a violation of the separation of powers provisions of the Tennessee Constitution.

#### IV.

An indigent defendant in an action to enforce a child support obligation through contempt of court proceedings has a right to counsel if the defendant is in jeopardy of incarceration. Tennessee Supreme Court Rule 13(d)(1)(B) (amended July 1, 2004). Rule 13(d)(1)(B) provides that:

[i]n the following cases, and in all other cases required by law, the court or appointing authority shall advise any party without counsel

of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.

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(B) Contempt of court proceedings in which the defendant is in jeopardy of incarceration;

Pursuant to state and federal law, a party seeking to establish, modify or enforce a child support obligation may apply for services from the state's Title IV-D agency, which in Tennessee is the Department of Human Services. *See* 42 U.S.C. § 654(4), (6); 42 U.S.C. § 666(a)(10); Tenn. Code Ann. § 71-3-124(a) and (c). The Department is required to provide such services to "[e]ach applicant or recipient who receives or authorizes payment of public or temporary assistance pursuant to Title IV-A or IV-E of the Social Security Act or any successor program providing temporary assistance or foster care or adoption assistance." Tenn. Code Ann. § 71-3-124(a). The Department is also required to provide similar services to individuals who file an application and who are not otherwise eligible for support services. Tenn. Code Ann. § 71-3-124(c). Generally, these provisions require child support services to be provided to minor children who are owed a duty of support and to their custodial parents or caretakers. Finally, even non-custodial parents may apply for and receive child support services to obtain a modification of their child support obligations in appropriate cases. Tenn. Code Ann. § 36-5-103(f)(1) (2001). In each instance, the services provided may include the assistance of a Title IV-D attorney who has an attorney-client relationship only with the State. This Office is unaware of any other statutory or constitutional requirement that counsel be provided to parents in child support cases.

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