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Opinion No. 01-133

Constitutionality of Section 10 of Public Chapter 327 Of Public Acts of 2001

## QUESTION

Does Section 10 of Public Chapter 327 of Public Acts of 2001 violate Article XI, Section 8 of the Tennessee Constitution?

## OPINION

Yes. Section 10 of Public Chapter 327 of Public Acts of 2001 clearly violates Article XI, Section 8 of the Tennessee Constitution.

## ANALYSIS

Article XI, Section 8 of the Tennessee Constitution provides, in pertinent part:

> **General laws only to be passed. —** The 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; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

Although a statute may suspend a general law, Article XI, Section 8 is implicated only when a statute contravenes a general law, which has mandatory statewide application. Moreover, the legislature may make distinctions based on classification, and Article XI, Section 8 is not violated unless it creates classifications which are capricious, unreasonable, or arbitrary. *Civil Service Merit Board v. Burson,* 816 S. W. 2d 725, 730 (Tenn. 1991). All classifications which do not affect a fundamental right, or discriminate as to a suspect class, generally are subject to the rational basis test. *Harrison v. Schrader,* 569 S. W. 2d 822, 825-826 (Tenn. 1978). Under the rational basis test, the question to be addressed is "whether the classifications have a reasonable relationship to a legitimate state interest." *Doe v. Norris,* 751 S. W. 2d

834, 841 (Tenn. 1988). The classification will be upheld "if any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable," *Harrison,* 569 S. W. 2d at 826. In *Riggs v. Burson,* 941 S. W. 2d 44, 52-54 (Tenn. 1997), the court held that a statute which restricted the location of heliports within nine miles of the Great Smoky Mountains National Park, in an effort to achieve legitimate interests related to the public safety, health, and welfare, constituted a reasonably conceivable set of facts to justify the classification within the statute, and was rationally related to several legitimate legislative interests, so as not to violate Article XI, Section 8. Conversely, in *Tennessee Small School Systems v. McWherter,* 851 S. W. 2d 139, 153-156 (Tenn. 1993), the court rejected the assertion that there exists local control of the public schools, in counties with relatively low total assessed property value and very little business activity. Holding that the proof failed to satisfy the "rational basis" test, the court found no "legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated." The court explained the standard to be applied under Article XI, Section 8:

> And if the classification is made under Article XI, Section 8, every one who is in, or may come into, the situation and circumstances which constitute the reasons for and basis of the classification, must be entitled to the rights, privileges, immunities, and exemptions conferred by the statute, or it will be partial and void.

*Id.,* 851 S. W. 2d at 153.

Against this background, we consider Section 10 of Public Chapter 327 of Public Acts of 2001, which provides:

> Any physician who practices pain management shall also be able to hire physician assistants to assist them in their practice. Any of these assistants shall be a licensed physician assistant according to the requirements in Section 63-19-105 (a) *except for any person who meets the following requirements:*
>
> (a) Is 65 years of age or older;
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> (b) Was granted a degree in pre-medical studies in 1960;
>
> (c) Was granted a Master of Science Degree from the University of Tennessee in 1990;
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> (d) Was an instructor and assistant professor during the time period 1977-97 at East Tennessee State University in Surgical Technology;
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> (e) Was an instructor in surgical techniques and instruments to medical students and surgical residents at the Quillen College of Medicine at East Tennessee State University;

> (f) Met the standards and qualifications of the American Association of Physician Assistants in March of 1976 and was rated as "physicians assistant -- SP-2";
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> (g) Satisfactorily completed the postgraduate course "clinical skills for physicians' assistants V" in September 1977 from the Hahnemann Medical College and Hospital in Philadelphia, Pennsylvania;
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> (h) Held an "assistants renewal certificate" issued by the Virginia Board of Medicine from July 1, 1977 to June 30, 1978; and
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> (i) Was recognized as a "Certified Surgical Assistant" by the National Surgical Assistant Association in May of 1987.
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> Such person *shall be issued a license within sixty (60) days upon submission of evidence to the board of medical examiners that such person met all of the above criteria.* Provided however, that such person shall only work under the supervision of one physician who is in the sole practice of pain management and rehabilitation medicine. Such person's duties shall only include helping the physician examine patients in the physician's office, doing diagnostic EMGs, ordering appropriate lab and x-ray studies, seeing the physician's hospital patients on hospital rounds and writing orders to be countersigned by such physician, but, at no time shall this person be allowed to prescribe medicine. Such person shall also have the ability to work under a physician, who is in the sole practice of pain management and rehabilitation medicine, *while performing extensive medical missionary trips in underprivileged countries.* Any continuing education requirements for a person meeting the above criteria shall not be waived.
> (Emphasis added.)

Our first concern is that, indeed, Section 10 of Public Chapter 327 of Public Acts of 2001, contravenes the general law which has mandatory statewide application, Tenn. Code Ann. §§ 63-19-101, *et seq.*, for the benefit of a particular individual. It is unreasonable to suppose that the constellation of extremely specific background and personal history particulars, described in Section 10, which an individual must demonstrate before qualifying for the exemption from the requirements of Tenn. Code Ann. § 63-19-105 (a), applies to more than one individual. We think it would be manifestly impossible for any other individual to succeed in qualifying for a physician assistant license under the exemption created by Section 10, partly because all but one of the criteria are specific as to date: an individual who was granted a degree in pre-medical studies in 1959, for example, or in 1961, would fail to meet criterion (b) of Section 10.

Perhaps more important, other individuals cannot now bring themselves within the provisions of Section 10, since it is impossible to accomplish in the present tasks which, by definition, are required to have been accomplished in the past. For example, under Section 10, unless an individual already had

obtained a degree in pre-medical studies in 1960, no recent degree in pre-medical studies would suffice. This strikes us as being wholly arbitrary, and neither the language of Section 10 itself, nor the underlying legislative history, in any way disabuses us. We think, therefore, that Section 10 does not admit any other individual, "by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law." Since there is no question here of any fundamental right, the rational basis test must be applied. If within the classification found in Section 10, there exists any rational basis, however remote, in furtherance of any legitimate legislative interest, it has eluded our notice.

Earlier, we referred to prior opinions of this office which construe Article XI, Section 8, in light of various fact situations. In Tenn. Op. Atty. Gen. No. 96-107 (August 20, 1996), we considered the constitutional validity of Chapter 895, 1996 Public Acts (now codified at Tenn. Code Ann. § 62-3-132), which amended the barber licensing law to permit a person, who had continuously engaged in the practice of barbering for twenty-five years immediately preceding January 1, 1995, under certain additional conditions, to engage in barbering without the necessity of undergoing the usual statutory licensing procedures. In analyzing whether any rational basis might support the barber license exemption statute, this office found it reasonable to presume that an individual who had been practicing barbering for twenty-five years is sufficiently knowledgeable and qualified so as to be exempt from formal licensing and educational requirements. Further, we considered that the legislature could have a rational basis for limiting the exemption to very small barbering establishments that have been maintained in a single location for an extended period of time. However, we questioned what relevance an individual's parent's long-time career as a barber has on that individual's qualifications as a barber; why the parent must have practiced for twenty-five years before January 1, 1980; and what rational basis could exist for exempting such individual from annual inspections which monitor compliance with sanitary and health requirements, for which other barber shops are inspected. We opined that, although the language of Article XI, Section 8 has been construed broadly to reach many situations, the barber license exemption statute appears to violate its direct and clear language.

Certainly, the potential risks to the public which are inherent in the practice of the profession of physician assistance far outweigh the potential risks to the public from engaging in the practice of barbering, such that the two endeavors hardly are analogous. Nevertheless, our analysis of the licensing exemption created by Section 10 of Public Chapter 327 of Public Acts of 2001, is not entirely dissimilar from our analysis of Chapter 895, 1996 Public Acts. In both analyses, we conclude that the license exemption scheme peculiar to each lacks any rational basis and violates the direct and clear language of Article XI, Section 8. Yet here, unlike the barbering exemption statute, any assertion that there is a rational basis to exempt the individual contemplated by Section 10 from the usual physician assistant licensing and educational requirements, due to long-standing and continuous experience, falls short. A close review of the specific criteria in Section 10 reveals neither any recent clinical experience as a physician assistant, nor any continuous experience in that capacity. In fact, not only would the individual contemplated by Section 10 fail to qualify for regular licensure under Tenn. Code Ann. § 63-19-105 (a) (1), (2), it further appears that the individual contemplated by Section 10 also would fail to qualify for reciprocal licensure under Tenn. Code Ann. § 63-19-105 (4) (b) (1). Last, it is somewhat unclear to us, from reading the qualifications set

forth in Section 10, whether the individual contemplated by Section 10 ever could have qualified to have been grandfathered under Tenn. Code Ann.§ 63-19-105 (a) (3). Regardless, even if such individual, at one time, were to have qualified to be grandfathered into physician assistant licensure under Tenn. Code Ann. § 63-19-105 (a) (3), such individual no longer so qualifies, having missed the statutory deadline of July 1, 1991, by more than a decade.[1]

Other reasons also undergird our opinion: both the legislative history of Section 10, including discussion of the bill in both the House and the Senate, as well as a close reading of the specific requirements of Section 10 in context of the overall requirements of Tenn. Code Ann. § 63-19-105, as applied to the sole individual to whom it can have reference, solidify our conclusion. Even though "the courts are restricted to the natural and ordinary meaning of the language used by the legislature within the four corners of the statute, unless an ambiguity requires resort elsewhere to ascertain legislative intent," *Austin v. Memphis Publishing Co.*, 655 S. W. 2d 146, 148 (Tenn. 1983), and although a presumption of constitutionality attaches to every statute, here we must seek to ascertain legislative intent. Indeed, because the language in Section 10 is so narrow, it fairly invites inquiry as to whether the classification it establishes is as wholly arbitrary as it appears to be. It does not matter how many, or how few, persons are included in a classification, but the sole test of the constitutionality of any particular classification is that it must be reasonable. *Estrin v. Moss*, 221 Tenn. 657, 665, 430 S. W. 2d 345, 349 (1968). After reviewing the legislative history underlying Section 10, we conclude that it is arbitrary and unreasonable under the case law construing and applying Article XI, Section 8 of the Tennessee Constitution.

During his introduction of Amendment Number 3 to HB 1896 (which later became Section 10 of Public Chapter 327 of Public Acts of 2001),[2] Senator Crowe indicated that the amendment applied to one person in his district, and emphasized that it would be "*limited solely to this constituent.*" (emphasis added). Senator Crowe stated that the physician assistant in question

> meets and qualifies in every way to be a physician's *(sic)* assistant. He didn't know, at the time that we grandfathered people in, that he could be grandfathered in. He was teaching at the college of medicine, he wasn't practicing as a P.A., he and his wife were entering into a new medical equipment business, and as a result, he fell between the cracks. One physician back home has asked for this man to work with him, and his church wants to do missionary work as a physician assistant.

Senator Crowe went on to explain, in response to a question posed by Senator Kurita about this individual's background and why had he not gone to "the regular board":

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[1]We note that Tenn. Code Ann. § 63-19-105 (a) (4) specifically prohibits the board from so licensing a person after July 1, 1991, unless the person meets all the educational background and examination requirements of Tenn. Code Ann. § 63-19-105 (a) (1) and (2).

[2]The full text of the legislative discussion is attached to this opinion.

> We tried to go through the board. They're very narrow-minded in this regard. They will not help him. The law states that you have now, since the grandfathering, you have to graduate from a school that teaches a P.A. procedure. You have to graduate from school. Well, we didn't have a school back then and he didn't know that this was the case, he didn't even know that we had changed the law. So he fell between the cracks, and that's the situation. We've gone through the normal process and has been turned down, and I think in this situation we will be doing the right thing, because he is more than, probably the most qualified P.A. in this state. He taught for twenty years (unintelligible) of medicine and has practiced clinically for years as a P.A. - just didn't know that he had to file to be grandfathered in. That's the only crime this fellow engaged in.[3]

After further questions by Senator Kurita, regarding whether the individual had any criminal background, and by Senator Henry, regarding why the individual did not opt to go to school, and responses from Senator Crowe, the measure passed by voice vote.

At the outset of discussion in the House regarding Amendment Number 3 to HB 1896, Representative Maddux stated that he had had "a couple of members who have asked me for the ability to non-concur in Amendment Number 3." Representative Maddux stated further:

> Amendment Number 3 is a particular situation that has occurred in a district in East Tennessee. *The amendment has been drawn very, very tightly to make sure that it addresses just that one situation.* I will tell you this, that there was a bill that is like this amendment that came to the Health Access Subcommittee that was defeated. The Senate placed this amendment on the bill. There are some members who have a little bit of a problem with that.
> (emphasis added.)

Nevertheless, with no discussion, the measure passed, 67 votes to 16 votes, with 7 present who abstained from voting.

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[3]We note than Tenn. Code Ann. § 63-1-123, enacted originally in 1947, and re-enacted in 1950 and in 1989, provides, in pertinent part: "(a) Any person, except those expressly exempted from the provisions of this chapter as above set out, who practices the healing arts as in this chapter defined, or any branch thereof, without first complying with all the provisions of this chapter, including the provisions of all laws now in force regulating the practice of the various branches of the healing arts, and any person who violates any of the provisions of this chapter, commits a Class B misdemeanor. (b) Each time any person practices the healing arts, or any branch thereof, without meeting all the requirements of laws now in force, and of this chapter, commits a separate offense....". Moreover, Tenn. Comp. R. & Regs. 0880-3-.03 proscribes unlicensed physician assistant practice; forbids a person who is not licensed from representing himself as a licensed physician assistant, or holding himself out to the public as being so licensed, as violations of Tenn. Code Ann. §§ 63-19-101, *et seq.*; and states that person[s] engaging in the practice as a physician assistant without being credentialed are in violation of Tenn. Code Ann. § 63-19-105.

The primary, and incontrovertible, information we derive from the legislative history is that Section 10 of Public Chapter 327 of Public Acts of 2001 was intended to benefit only one individual, and that by enacting Section 10, the legislature was fully and clearly aware that Section 10 was intended to benefit only one individual. Moreover, by enacting Section 10, essentially the legislature conferred a physician assistant license on such individual, in derogation of the requirements of Tenn. Code Ann. 63-19-105. In 1985, this office opined that although a license may be granted to a reasonably defined class of persons even though a statutory procedure for granting such licenses already exists, the legislature may not, however, grant a license to practice medicine to a particular individual because such action would violate Article XI, Section 8 of the Tennessee Constitution. Tenn. Op. Atty. Gen. No. 87-185 (December 3, 1987). However, in our view, this is precisely what Section 10 does: by enacting it, essentially, the legislature mandates that a physician assistant license be granted to a particular individual. Section 10 effectively removes from the Committee on Physician Assistants, as well as from the Board of Medical Examiners, respectively, all authority or discretion under Tenn. Code Ann. § 63-19-104 and Tenn. Code Ann. § 63-19-105, to review, approve, or reject the license application of the individual contemplated by Section 10.

Two cases, both involving attempts by the legislature to authorize unlicensed individuals to practice a profession without first securing a license to do so, as required by statute, are instructive. In *Lineberger v. State ex rel. Beeler*, 129 S. W. 2d 198 (Tenn. 1939), the court declared unconstitutional and void, under Article XI, Section 8 of the Tennessee Constitution, a bill purporting to authorize a named person to practice law without taking the state bar examination. The court found further that Chapter 180, Public Acts of 1933, was inconsistent with, and suspended, the then-existing laws governing admission to the bar and the practice of the profession of law. Although, in the instant case, no legislator uttered the name of the individual whom Section 10 purports to authorize to practice as a physician assistant without taking the requisite examination, and without the necessary educational background, the inescapable fact is that Section 10 was enacted for the benefit of one individual. Further, Section 10 in effect suspends, and is inconsistent with, existing law concerning licensing physician assistants, and as such, we believe that it falls squarely under the *Lineberger* rationale. Again, In *State ex rel. Board of Dental Examiners v. Allen*, 241 S. W. 2d 505 (Tenn. 1951), the court struck down as unconstitutional under Article XI, Section 8, a statute purporting to empower the Quarterly Court of Carter County to authorize a person who was not a licensed dentist to practice that profession in the Second District of Carter County, so long as there was no licensed dentist residing in that district. There the court stated:

> For all practical purposes the object sought to be accomplished by the statute under consideration here is identical with the object sought by the statute in the Lineberger case, supra, in that the object of each statute was to permit a specified individual to practice in Tennessee without a license a profession which the general law forbids any person from practicing without that license.

*Id.*, 241 S. W. 2d at 506.

For all of the reasons stated above, we conclude that Section 10 of Public Chapter 327 of Public

Acts of 2001 violates Article XI, Section 8 of the Tennessee Constitution.

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