STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 13, 2017

Opinion No. 17-29

Statutory Construction Legislation

Question 1

Does Senate Bill 1085/House Bill 1111, 110th Gen. Assem. (2017), violate any provision of the United States Constitution or the Constitution of Tennessee?

Opinion 1

It is possible, but unlikely, that this proposed legislation could be viewed as a violation of the separation-of-powers doctrine embodied in the Tennessee Constitution.

Question 2

If a Tennessee court construed words such as "husband," "wife," "father," or "mother" by their ordinary meaning as required by Senate Bill 1085/House Bill 1111 if it were to become law, would that construction be counter to the holding of the United States Supreme Court in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015)?

Opinion 2

Statutes that are related to marriage or to the terms, conditions, benefits, or obligations of marriage could, in some instances, be in conflict with the holding in Obergefell if gender-specific words in those statutes were construed according to the proposed legislation. But not every statute that has gender-specific terms would necessarily conflict with Obergefell if it were construed according to the proposed legislation.

We note, however, that if the proposed legislation were to become law, it may not necessarily result in a judicial construction of statutes that preserves the literal meaning of gender-specific words. The Tennessee Legislature has already expressed its intent that gender-specific words are to be construed as gender-inclusive when they appear in the Tennessee Code. The proposed legislation could, in some instances, be in direct conflict with Tenn. Code Ann. § 1-3-104(b) which instructs that "[w]ords importing the masculine gender include the feminine and neuter, except when the contrary intention is manifest." Any conflict between this existing statute and the proposed legislation would be resolved to allow the specific to control the more general statute. Thus, in construing certain statutes with gender-limiting words, a court would likely apply the very specific gender-inclusive requirements of Tenn. Code Ann. § 1-3-104(b) rather than the very general "ordinary meaning" requirements of the proposed legislation.

ANALYSIS

Senate Bill 1085/ House Bill 1111, 110th Gen. Assem. (2017), would amend Tenn. Code Ann. § 1-3-105, which provides definitions of 37 words and phrases "as used in this code," to add the following subsection:

> (b) As used in this code, undefined words shall be given their natural and ordinary meaning, without forced or subtle construction that would limit or extend the meaning of the language, except when a contrary intention is clearly manifest.

If enacted into law, this would be a virtually verbatim codification of one of the most basic canons of statutory construction, the "ordinary-meaning canon," which has been long and consistently applied by courts in Tennessee. *See, e.g., Carson Creek Vacation Resorts v. Department of Revenue*, 865 S.W.2d 1, 3-4 (Tenn. 1993).

The Tennessee Constitution contemplates a balance of powers among the three branches of government and, to that end, incorporates a separation-of-powers doctrine. Article II, section 1, divides the "powers of the Government . . . into three distinct departments: the Legislative, Executive, and Judicial." Article II, section 2, prohibits "persons belonging to one of these departments" from exercising "any of the powers properly belonging to either of the others." It is the general rule that the power to make, order, and repeal the laws belongs to the legislative branch; the power to interpret and apply the law belongs to the judicial branch; and the power to administer and enforce the law belongs to the executive branch. *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975).

Based on this general view of the division of power, a claim might be made that the proposed legislation violates the separation-of-powers doctrine because it could be read as an attempt to control how the judicial branch is to exercise its power to interpret the law. But the success of such a claim is highly unlikely. First, "[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." *Lynch v. City of Jellico*, 205 S.W.3d 384, 393 (Tenn. 2006). The proposed legislation is more appropriately read as an expression of the Legislature's general intent about the language it uses than as a mandate to the courts. And, since courts are charged in the first instance with construing statutes in accordance with the *intent* of the Legislature, *Mangrum v. Owens*, 917 S.W.2d 244, 246 (Tenn.Ct.App.1995), an expression of legislative intent assists, but does not interfere with, the adjudicative function of the courts. Second, the Tennessee Supreme Court, in which resides the power to promulgate rules of procedure for the courts, will generally consent even to rules of procedure that are promulgated by the Legislature if they "(1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court." *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001). Since the proposed legislation is nothing more than a codification of a rule of statutory construction already adopted by the judiciary, separation of powers should not be an impediment to that codification.

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the United States Supreme Court held that "same-sex couples may exercise the fundamental right to marry," that state laws are "invalid

to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples," and that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." 135 S. Ct. at 2604-05, 2608. The State of Tennessee was a defendant in *Obergefell* and is bound by its holding.

There are many provisions in the Tennessee Code that use the words "husband," "wife," "father," "mother," "woman," "man," or other gender-specific words such as "testator" or "foreman." Construed literally as would be required under the proposed legislation—and depending on the context—some, but certainly not all, such statutes might run afoul of the holding in *Obergefell.* Statutes that are related to marriage or to the terms, conditions, benefits, or obligations of marriage could, in some instances, be in conflict with the holding in *Obergefell* if gender-specific words in those statutes were construed according to the proposed legislation.

But not every statute that has gender-specific terms would necessarily conflict with *Obergefell* if it were construed according to the proposed legislation. Statutes that are wholly unrelated to marriage or the terms, conditions, benefits, or obligations of marriage would not necessarily be in conflict with *Obergefell* if gender-specific words in those statutes were construed literally.

We note, however, that even if the proposed legislation were to become law, it may not necessarily result in a judicial construction of statutes that preserves the literal meaning of gender-specific words. The Tennessee Legislature has already expressed its intent about how gender-specific words are to be construed when they appear in the Tennessee Code—an intent that is to some extent in direct conflict with the proposed legislation. Tennessee Code Annotated § 1-3-104(b) instructs that "[w]ords importing the masculine gender include the feminine and neuter, except when the contrary intention is manifest." Based on that legislative instruction, the Tennessee Supreme Court has found that use of the masculine pronoun "his" was not intended to preclude a married woman from joining her husband in the adoption of a child. *Balch v. Johnson*, 106 Tenn. 249, 255-56, 61 S.W. 289, (Tenn. 1901). Similarly, the feminine "widow" used in a statute allowing damages for wrongful death has been construed to include the masculine gender as well, so that a widower was also entitled to damages under the statute. *Railway Co. v. Lilly,* 18 S.W. 243, 90 Tenn. 563, 568 (Tenn. 1891).

If a statute uses the masculine "he," the proposed legislation would require that pronoun to be read as referring exclusively to male persons and could not be read to include women, unless "a contrary intention is clearly manifest." But the existing law—Tenn. Code Ann. § 1-3-104(b)—would require just the opposite, namely that the "he" be construed to include women, unless "a contrary intention is clearly manifest." Put another way, the proposed legislation and the existing law each "clearly manifest" an intention that is contrary to the other. If the proposed legislation becomes law and a court were asked to resolve this conflict, it would do so by applying another time-honored canon of statutory construction, the "specific-general" canon: "As a matter of statutory construction, a specific statutory provision will control over a more general statutory provision." *In re Harris*, 849 S.W.2d 334, 337 (Tenn. 1993). *See also Washington v. Robertson County,* 29 S.W.3d 466, 475 (Tenn. 2000) (holding that, as a matter of statutory construction, a specific statutory provision, such as the definition of "person" under Tenn. Code Ann. § 4-21-102(14), will control over a more general statutory provision); *Rent-N-Roll v. Highway 64 Car &*

Truck Sales, 359 S.W.3d 183, 188, (Tenn. Ct. App. 2010) (since it is "a well settled rule of statutory interpretation that the specific controls the general," court "cannot disregard the specific language of Tenn. Code Ann. § 47-2A-310, which deals directly with the issues at hand, on the basis of the exceedingly general language in Tenn. Code Ann. § 47-2A-104(1)(a)").

Here, the proposed legislation is exceedingly general, broadly requiring that words be given their ordinary meaning. Section 1-3-104(b), on the other hand, is exceedingly specific, limited to the interpretation of gender-specific terms in statutes. Any conflict between the two provisions would be resolved to allow the specific to control the more general statute. Thus, in construing certain statutes with gender-limiting words, a court would likely apply the very specific gender-inclusive requirements of Tenn. Code Ann. § 1-3-104(b) rather than the very general "ordinary meaning" requirements of the proposed legislation, unless it were clear that the Legislature intended the words at issue to be gender specific.

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