STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 30, 2018

Opinion No. 18-33

Establishment of a Business Court or Business Docket

Question 1

Consistent with the Tennessee Constitution, may the Legislature or Supreme Court create a business court?

Opinion 1

The Tennessee Constitution gives the Legislature the exclusive authority to create inferior courts, including a business court.

Question 2

May the Supreme Court create a business docket in an inferior court?

Opinion 2

Yes, within the limits established by the Tennessee Constitution.

Question 3

If the Legislature creates a business court or the Supreme Court establishes a business docket, must a judge assigned to the business court or to the business docket be elected or may the Legislature or Supreme Court appoint a judge?

Opinion 3

The judges must be elected in accordance with the Tennessee Constitution.

ANALYSIS

1. Pursuant to its exclusive constitutional authority to create inferior courts, the Legislature may create a business court. Because the Tennessee Constitution reserves to the Legislature the exclusive authority to create inferior courts, the Tennessee Supreme Court is not authorized to create a business court.

The judicial power of Tennessee is constitutionally vested in the Supreme Court and "in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish." Tenn. Const. art. VI, § 1. The effect of this constitutional provision is to confer exclusive authority on the Legislature to create and establish inferior courts in Tennessee. See

State ex rel. Ward v. Murrell, 169 Tenn. 688, 90 S.W.2d 945, 946 (1936); *McCulley v. State*, 102 Tenn. 509, 53 S.W. 134, 140-44 (1899); Tenn. Att'y Gen. Op. 07-120 (Aug. 13, 2007) (article VI, section 1 "confers exclusive authority on the Legislature to create and establish inferior courts in Tennessee"). It follows that only the Legislature—and not the Supreme Court—is authorized to create inferior courts, including a business court.

The constitutional authority vested in the Legislature to establish inferior courts includes the authority to determine the jurisdiction of those courts and to allocate the judicial power among them. *See Ward*, 90 S.W.2d at 946; *see also Gouge v. McInturff*, 90 SW.2d 753, 753 (Tenn. 1935) (article VI, section 1, confers on the Legislature the power to prescribe and define the jurisdiction of those inferior courts that it establishes). Under the Constitution, "[t]he Legislature has discretion to create new courts, to transfer to one court jurisdiction formerly exercised by another court, to determine how many and what kind of courts are required for the administration of justice, and to fix the limit of their jurisdiction." Tenn. Att'y Gen. Op. 17-08 (Feb. 8, 2017).

It is thus "well-settled that the Legislature has the power not only to create inferior Courts under the constitutional provision but to diminish or to enlarge or to transfer their jurisdiction in the interest of efficiency and economy." *Duncan v. Rhea County*, 287 S.W.2d 26, 30 (Tenn. 1955). Accordingly, "[t]he power of the Legislature to establish special courts, under Section 1, Article 6 of the Constitution, is well established." *White v. Garner*, 192 Tenn. 429, 241 S.W.2d 518, 520 (1951).

Pursuant to this well-established authority, the Legislature may create a special business court and direct that cases otherwise within the jurisdiction of existing inferior courts be transferred to this new court. *See Spurgeon v. Worley*, 169 Tenn. 697, 90 S.W.2d 948, 949 (1936) ("The broad power conferred by article 6, § 1, upon the Legislature to establish courts necessarily conveys power to define their jurisdiction and to transfer jurisdiction from existing courts . . . to the newly created court. Without such power[,] a special court could serve no purpose.").

2. Although the Tennessee Supreme Court may not create a business court, it does, as the "supreme judicial tribunal of the state," have "broad inherent authority over the Tennessee judicial system," *In re Bell*, 344 S.W.3d 304, 313 (Tenn. 2011) (internal quotation marks omitted), pursuant to which it may create a business docket or direct a particular category of claims—such as commercial claims—to a specific court that has been established by the Legislature.

The inherent authority of the Supreme Court includes "general supervisory control over all the inferior courts of the state." Tenn. Code Ann. § 16-3-501, *see also* Tenn. Att'y Gen. Op. 87-02 (Jan. 7, 1987) (recognizing that the "supervisory authority over the Tennessee judicial system is a part of the inherent power of the Tennessee Supreme Court").

That supervisory authority is necessary "to ensure the harmonious, efficient[,] and uniform operation of the judicial system of the state." Tenn. Code Ann. § 16-3-501. Within the scope of the Supreme Court's supervisory powers is the authority (1) to "[d]esignate and assign temporarily any judge or chancellor to hold or sit as a member of any court, of comparable dignity or equal or higher level, for any good and sufficient reason"; (2) to "[t]ake affirmative and appropriate action to correct and alleviate any imbalance in caseloads among the various judicial districts of the state"; and (3) to "[t]ake affirmative and appropriate action to correct or alleviate any condition or

situation adversely affecting the administration of justice within the state." Tenn. Code Ann. § 16-3-502(3)(A), (D), (E). These and other supervisory powers granted to the Supreme Court "constitute a broad conference of full, plenary and discretionary power upon the [S]upreme [C]ourt." *Id.* § 16-3-504; *see also* Tenn. Att'y Gen. Op. 18-14 (Mar. 23, 2018).

Accordingly, pursuant to its broad inherent constitutional and statutory authority over the state judicial system, the Supreme Court may implement a business docket in—or direct particular commercial claims to—a specific court that has been established by the Legislature, to, for example, "correct or alleviate any condition or situation adversely affecting the administration of justice within the state," Tenn. Code Ann. § 16-3-502(3)(E), or for any other reason permitted by the Constitution and applicable statutes.[1] There are, however, some statutory and constitutional limitations on the exercise of the Court's inherent authority. For example, the Supreme Court could not alter the jurisdiction of inferior courts because that authority rests exclusively with the Legislature under article VI, section 1.

3. If the Legislature creates a business court or the Supreme Court establishes a business docket, a judge of the business court or a judge assigned to the business docket must be elected in accordance with the requirements and procedures of the Tennessee Constitution and applicable law.

The Tennessee Constitution mandates that "the Judges of the Circuit and Chancery Courts, and of the other inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned." Tenn. Const. art. VI, § 4. This provision "preserves 'an independent judiciary free of the political caprice and whims of other government branches.'" Tenn. Att'y Gen. Op. 18-14 (Mar. 23, 2018) (quoting *State ex rel. Town of Carthage v. Barrett*, 840 S.W.2d 895, 899 (Tenn. 1992)). Thus, a judge of a business court created by the Legislature and a judge designated by the Supreme Court to preside over a business docket must be elected. Neither the Legislature nor the Supreme Court may appoint a judge to a business court.[2] Pursuant to its supervisory authority, the Supreme Court may assign elected judges or special judges to

[1] The Tennessee Supreme Court has, in fact, exercised this authority in establishing and continuing its "Business Court Docket Pilot Project," which "provide[s] expedited resolution of business matters by a judge who is experienced in handling complex business and commercial disputes." Order Continuing the Davidson County Business Court Docket Pilot Project – Phase 2, at 1, No. ADM2017-00638 (Tenn. Dec. 22, 2017). Under this program, any party in a business case that meets the criteria established by the Supreme Court may request the case be transferred to the business docket. *See id.* at 3-4.

[2] The law does provide for appointment of unelected judges—on a temporary basis and in a limited capacity— in certain circumstances when it is impossible or impracticable for an elected judge to preside over a particular case or set of cases. The Legislature has authority under article VI, section 11 of the Tennessee Constitution to "make provisions that special Judges may be appointed, to hold any Courts the Judge of which shall be unable or fail to attend or sit; or to hear any cause in which the Judge may be incompetent." *See In re Valentine*, 79 S.W.3d 539, 545 (Tenn. 2002). The Legislature has exercised that authority to "enact[] several statutes relating to the appointment of special/substitute judges," *Ferrell v. Cigna Prop. & Cas. Ins. Co.*, 33 S.W.3d 731, 736 (Tenn. 2000), including statutes that allow the Governor or Supreme Court to appoint a judge to serve out the remaining term of a judicial vacancy or to serve in other temporary and limited capacities, e.g. as a special or senior judge. *See* Tenn. Att'y Gen. Op. 18-14 (Mar. 23, 2018) (collecting these statutes).

preside over a business docket or particular cases that are part of the business docket in the limited circumstances permitted by the Constitution and applicable statutes.

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