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CLERK'S CERTIFICATE

THE STATE OF TEXAS §
 §
COUNTY OF DALLAS §

I, **FELICIA PITRE**, Clerk of the 193rd Judicial District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the **ORDER IN RE: APPOINTMENT OF ATTORNEYS & GUARDIANS AD LITEM and MEDIATORS – TEX. GOV CODE Chapter 37**, as the same appears on record in my office in Volume *C2015* Page *17*

_____, Minutes of the 193rd Judicial District Court of Dallas County, Texas.

GIVEN UNDER MY HAND AND SEAL OF said Court, at office in Dallas, Texas this *15th* day of September, 2015

**FELICIA PITRE
DISTRICT CLERK
DALLASCOUNTY, TEXAS**

By: 
DEPUTY

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IN RE: APPOINTMENT OF ATTORNEYS & GUARDIANS AD LITEM and MEDIATORS - TEX. GOV. CODE Chapter 37	§ § § § §	IN THE DISTRICT COURT 193rd JUDICIAL DISTRICT DALLAS COUNTY, TEXAS
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STANDING ORDER

The Enactment of Tex Gov. Code Chapter 37

On June 19, 2015, Governor Greg Abbott signed into law a bill - S.B. 1876 (84R) - which added to the Texas Government Code Chapter 37, concerning the appointment of Guardians & Attorneys ad Litem as well as Mediators. In short, the modifications in SB 1876 require that Judges establish and maintain a "list & wheel" system for the appointment of Guardians & Attorneys ad Litem and Mediators. Government Code § 37.004 requires that Courts appoint Guardians & Attorneys ad Litem and Mediators as follows:

- (a) Except as provided by Subsections (c) and (d), in each case in which the appointment of an attorney ad litem, guardian ad litem, or guardian is necessary, a court using a rotation system shall appoint the person whose name appears first on the applicable list maintained by the court as required by Section 37.003.
- (b) In each case in which the appointment of a mediator is necessary because the parties to the case are unable to agree on a mediator, a court using a rotation system shall appoint the person whose name appears first on the mediator list maintained by the court as required under Section 37.003.
- (c) The court may appoint a person included on the applicable list whose name does not appear first on the list, or a person who meets statutory or other requirements to serve and who is not included on the list, if the appointment of that person as attorney ad litem, guardian ad litem, or guardian is agreed on by the parties and approved by the court.
- (d) On finding good cause, the court may appoint a person included on the applicable list whose name does not appear first on the list, or a person who meets statutory or other requirements to serve on the case and who is not included on the list, if the appointment of that person as attorney ad litem, guardian ad litem, mediator, or guardian is required on a complex matter because the person:
 - (1) possesses relevant specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter of the case;

- (2) has relevant prior involvement with the parties or case; or
- (3) is in a relevant geographic location.
- (e) A person who is not appointed in the order in which the person's name appears on the applicable list shall remain next in order on the list.
- (f) After a person has been appointed as an attorney ad litem, guardian ad litem, mediator, or guardian from the applicable list, the court shall place that person's name at the end of the list.

The Constitutional Principal of Separation of Powers

Article II § 1 of the Texas Constitution enumerates what constitutes a violation of the Separation of Powers Clause:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; *and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.*

Tex. Const., Art. II § 1 (emphasis added).

Texas courts have recognized that “[t]he separation of powers clause may be violated in two ways: (1) one branch of government assumes or is delegated a power that is more properly attached to another branch, or (2) one branch unduly interferes with another branch to the extent that the other branch cannot effectively exercise its constitutional powers.” *Johnson ex rel. MAll Holdings, Inc. v. Jackson Walker, L.L.P.*, 247 S.W.3d 765, 777 (Tex. App.—Dallas 2008) (citing *State v. Williams*, 938 S.W.2d 456, 458 (Tex. Crim. App. 1997)). “The first type of violation has to do with a usurpation of one branch’s powers by another branch. The second type has to do with the frustration or delay of one branch’s powers by another branch.” *Rushing v. State*, 50 S.W.3d 715, 724 (Tex. App.—Waco 2001) (citing *Rose v. State*, 752 S.W.2d 529, 532 (Tex. Crim. App. 1987)).

The Texas Constitution “explicitly vests the judicial power of the state in the courts.” *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 240 (Tex. Crim. App. 1990) (en banc) *affirming Armadillo Bail Bonds v. State*, 772 S.W.2d 193 (Tex. App.—Dallas 1989); Tex. Const. art. 5, § 1. Specifically, Texas courts have defined “[t]he core of this judicial power [as] embrac[ing] the power (1) to hear evidence; (2) to decide the issues of fact raised by the pleadings; (3) to decide the relevant questions of law; (4) to enter a final judgment on the facts and the law; and (5) to execute the final judgment or sentence.” *Armadillo Bail Bonds*, 802 S.W.2d at 240-41 (citing *Kelley v. State*, 676 S.W.2d 104, 107 (Tex. Crim. App. 1984)). However, “the constitution explicitly grants the Legislature ultimate authority over judicial ‘administration.’” *Id.* (citing *Meshell v. State*, 739 S.W.2d 246, 255 (Tex. Crim. App. 1987); *see also* Tex. Const. art. 5, § 31. Nevertheless, “this authority does not permit the Legislature ‘to infringe upon the substantive power of the Judicial department under the guise of establishing ‘rules of court,’ thus rendering the separation of powers doctrine meaningless.” *Armadillo Bail Bonds*, 802 S.W.2d at 240-41 (citing *Meshell v. State*, 739 S.W.2d at 255). “It is also clear that the legislature may define certain parameters within the

operation of the judicial branch, whether it be to mandate certain penalties; certain procedures, such as the Texas Code of Criminal Procedure; or even rules of evidence.” *Armadillo Bail Bonds*, 772 S.W.2d at 195. “However, the legislature may not interfere with the functions and powers of the judicial branch so as to usurp those functions and powers.” *Id.* Therefore, “[t]he question in each case is whether the legislation in issue is grounded on the Legislature’s own constitutionally assigned power and, if so, whether the legislation nevertheless unduly interferes, or threatens to unduly interfere, with the Judiciary’s effective exercise of *its* constitutionally assigned power.” *Id.* at 241.

Texas courts have struck down laws for violating the Separation of Powers clause when they unduly interfere with a trial court’s exercise of constitutionally granted judicial power. For example, in *Armadillo Bail Bonds v. State* and in *State v. Matyastik*, the Texas Court of Criminal Appeals held that the Legislature unduly interfered with a trial court’s exercise of judicial power when it required courts to refrain from entering a final judgment on a forfeited bail bond for an eighteen month period. 802 S.W.2d at 241; 811 S.W.2d 102 (Tex.Crim.App.1991); *see also*, *State v. Williams*, 938 S.W.2d 456, 458-59 (Tex. Crim. App. 1997) (discussing and applying the rulings in *Armadillo Bail Bonds* and *Matyastik*). The court in *Armadillo Bail Bonds* noted in particular that “the Legislature may not unduly interfere with the judicial function under the guise of establishing rules of court.” 802 S.W.2d at 241. Additionally, the court made clear that “the separation of powers principle necessarily contemplates a zone of judicial power which must be free of legislative interference.” *Id.* Similarly, in *Meshell v. State*, the court stated that a portion of the Speedy Trial Act was unconstitutional because it unduly interfered with the prosecutor’s discretion in preparing criminal cases for trial. 739 S.W.2d 246, 256-57 (Tex. Crim. App. 1987)(similar analysis applied to separation of powers between the legislative and executive branch); *see also Williams*, 938 S.W.2d at 460-61 (discussing *Meshell*).

The Appointment of Counsel is an Inherently Judicial Function


Most significantly, in a case regarding judicial immunity, the Fifth Circuit held that “the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act under Texas law.” *Davis v. Tarrant County*, 565 F.3d 214, 227 (5th Cir. 2009). Just as in *Davis*, the appointment of Attorneys & Guardians ad Litem and Mediators, is an inherently judicial function. Each case involves unique issues and subject matter, and the Court must be free to exercise discretion in order to match the appropriate individual (based, *inter alia*, on the area of expertise) to any given case to ensure the most efficacious handling of the matter. Based on the reasoning of the United States Court of Appeals as articulated in *Davis*, the Legislature may not invade and usurp this “zone of judicial power” under the guise of establishing administrative rules. Therefore, Tex. Gov. Code Chapter 37 is unconstitutional in that it constitutes a violation of the separation of powers principal in that the Legislature is unduly interfering with the power of the Judiciary to appoint Attorneys & Guardians ad Litem and Mediators as it deems fit.

Conclusion

When the undersigned, as with every Judge in the State of Texas, took office, he was required to take an oath to uphold the United States and Texas Constitutions. It is axiomatic as a fundamental constitutional tenant that a Court may not act unconstitutionally. Likewise, in the legal hierarchy, the Constitution takes precedence over statute that conflict therewith.

Because Tex. Gov. Code, Chapter 37 is manifestly unconstitutional, the Court has no choice but to honor his oath of office to uphold the Constitution and not comply with Chapter 37 of the Texas Government Code concerning the appointment of Attorneys & Guardians ad Litem and Mediators.

SIGNED this 31st day of August, 2015.



The Honorable Carl Ginsberg
193rd Judicial District Court