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ATTORNEY GENERAL OPINION NO. 91- 161

Ben Coates
Executive Director
Kansas Sentencing Commission
Jayhawk Tower
700 Jackson Street, Suite 501
Topeka, Kansas 66603-3731

Re: Constitution of the State of Kansas--Executive--Executive Power of Governor; Community Correctional Services; Parole; Probation

Constitution of the State of Kansas--Judicial--Judicial Power; Community Correctional Services; Parole; Probation

Synopsis: The distribution of powers by a state constitution among the governmental departments is a question for the state itself. Under the Kansas constitution, the functions of parole and probation may be conferred upon either the executive or judicial branch of government. Those powers conferred upon the secretary of corrections by the community corrections act are executive or administrative in nature and may not be transferred to or exercised by the judiciary. Cited herein: K.S.A. 21-4601; K.S.A. 1990 Supp. 21-4603, as amended by L. 1991, ch. 89, § 4; K.S.A. 21-4611; 22-3707; 75-5290; 75-5291; 75-5292; 75-5294; 75-5296; 75-52,103; 75-52,105; 75-52,110; K.S.A. 1990 Supp. 75-52,111; 75-52,114; Kan. Const., Art. 1, §§ 1, 7; Kan. Const., Art. 3, § 1.

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Dear Mr. Coates:

As executive director of the Kansas sentencing commission, you request our opinion regarding: (1) whether the constitutions of the United States and the state of Kansas would permit placing the function of probation in the executive branch of government for the state of Kansas; and (2) whether the constitutions would permit the placement in one branch of state government -- either executive or judicial -- the functions of probation, community corrections and parole.

Neither the United States constitution nor the Kansas constitution expressly provides for separation of powers. State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 59 (1984). The governments, both state and federal, are divided into three departments, each of which is given the powers and functions appropriate to it. Id. Because of the establishment of the three branches of government, the courts have assumed the applicability of the doctrine of separation of powers among the three branches of government -- legislative, executive and judicial. Leek v. Theis, 217 Kan. 784, 804 (1975); 16 Am.Jur.2d Constitutional Law § 294 (1979). The very structure of the three-branch system of government gives rise to the doctrine. State ex rel. Stephan, 236 Kan. at 59. The separation of powers doctrine is designed to avoid a dangerous concentration of power and to allow respective powers to be assigned to the department best fitted to exercise them. Leek, 217 Kan. at 805.

How power is to be distributed by a state constitution among its governmental departments is commonly, if not always, a question for the state itself. Van Sickle v. Shanahan, 212 Kan. 426, 450 (1973).

> "'[T]he authority [of the guarantee clause of the United States Constitution] extends no further than a guaranty [sic] of a republican form of government, which supposes a preexisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. Whenever the states may choose to submit other republican forms, they have a right to do so, and to claim the federal guarantee for the latter. The

> only restriction imposed upon them is, that they shall not exchange republican for anti-republican constitutions; . . .' (Federalist No. 43.)" Van Sickle, 212 Kan. at 450. (Emphasis in original.)

It is only where the whole power of one department is exercised by the same hands which possess the whole power of another department that the fundamental principles of a free constitution are subverted. Van Sickle, 212 Kan. at 451. Whether the legislative, executive and judicial powers of a state are to be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another branch of government, is for the determination of the state. Parcell v. State of Kansas, 468 F.Supp. 1274 (D. Kan. 1979).

The several departments of government are not kept wholly separate and unmixed by any of the state constitutions. 16 Am.Jur.2d Constitutional Law § 301. While the Kansas constitution establishes three branches of government, it was never intended that an entire and complete separation be maintained. See In re Sims, 54 Kan. 1 (1894). There may also be situations where a particular power cannot be affirmed to be either executive, legislative, or judicial, and if such power is not by the constitution unequivocally entrusted to either the executive or judicial departments, the mode of its exercise and the agency must necessarily be determined by the legislature. 16 Am.Jur.2d Constitutional Law § 301. All governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions. Leek, 217 Kan. at 797.

The constitution is the common source of the power and authority of every court, and all questions concerning jurisdiction of a court must be determined by that instrument, with the exception of certain inherent powers which of right belong to all courts. 16 Am.Jur.2d Constitutional Law § 707. Section 1 of article 3 of the Kansas constitution states:

> "The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and

> all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state."

Judicial power is not capable of a precise definition sufficient for all conceivable cases. 16 Am.Jur.2d Constitutional Law § 307. It has been held to be the power to hear and determine a cause and the rights of the parties to a controversy, and to render a binding judgment or decree based on present or past facts under existing law. State v. Mitchell, 234 Kan. 185, 194 (1983). The constitution, by implication, confers upon the judiciary every particular power necessary for the exercise or performance of the judicial power. Id. Such inherent powers can neither be taken away nor abridged by the legislature. 20 Am.Jur.2d Courts § 78 (1965). The power a court possesses only by virtue of a statutory grant, however, is not an inherent power. Id.

The power to grant probation is dependent upon statutory provisions. State v. Dubish, 236 Kan. 848, 851 (1985). See K.S.A. 21-4601 et seq. Probation is an act of grace and the power to grant that act is provided by the legislature to the court. Dubish, 236 Kan. at 851. See K.S.A. 1990 Supp. 21-4603, as amended by L. 1991, ch. 89, § 4. Probation is separate and distinct from sentence. State v. Moon, 15 Kan.App.2d 4, 9 (1990); Dubish, 236 Kan. at 851. The power to grant probation, therefore, is not an exclusive function of the judiciary, and the exercise of the power is not inherently a judicial function. Within constitutional limits the legislature, as representative of the people, can vest the power in its discretion. Leek, 217 Kan. at 802. Due to statutory provision, the power to grant probation is a judicial function. However, because the power to grant probation is by constitution neither an exclusive function of the judiciary nor inherently a judicial function, the legislature may transfer the authority to grant probation from the judiciary to the executive branch of government.

In determining whether the functions of probation, community corrections and parole may be exercised by one branch of government, it must be determined whether any of the functions are the exclusive function of a particular branch of government.

As noted above, probation is not an exclusive function of the judiciary. The legislature possesses the authority to confer

the power to grant probation upon either the executive or judicial branch of government.

Section 7 of article 1 of the Kansas constitution states "[t]he pardoning power shall be vested in the governor, under regulations and restrictions prescribed by law." The pardoning power vested in the governor includes the power to parole imprisoned convicts, or to commute their sentences. Lynn v. Schneck, 139 Kan. 138, 140 (1934). However, the matter of parole following the imposition of sentence is purely a legislative function. 59 Am.Jur.2d Pardon and Parole § 78 (1987). Any power to grant parole is dependent upon statute. Id. The authority to grant parole presently exists in the Kansas parole board. See K.S.A. 22-3707 et seq. The district court having jurisdiction of the offender may parole any misdemeanant sentenced to confinement in the county jail. K.S.A. 21-4611. That authority, though, may be conferred by the legislature on either the executive or the judiciary.

The community corrections act is set forth at K.S.A. 75-5290 et seq. Pursuant to the act, each county in the state must establish a corrections advisory board, enter into an agreement with a group of cooperating counties to establish a regional corrections advisory board, or contract for correctional services with a county or group of cooperating counties. K.S.A. 75-52,110. Each corrections advisory board is obligated to adopt a comprehensive plan for the development, implementation, operation and improvement of correctional services described in K.S.A. 75-5291. Id. (Such services include restitution programs, victims services programs, preventive or diversionary correctional programs, and community corrections centers and facilities. K.S.A. 75-5291.) The comprehensive plans are received by the board of county commissioners and then submitted to the secretary of corrections. K.S.A. 75-5292. The secretary of corrections is authorized to perform a number of duties under the act including: adopt rules and regulations necessary for the implementation and administration of the act (K.S.A. 75-5294); provide consultation and technical assistance to corrections advisory boards (K.S.A. 75-5294); approve comprehensive plans (K.S.A. 75-5296); establish operating standards of the correctional services (K.S.A. 75-5296); examine books, records, facilities and programs for purposes of recommending changes and improvements (K.S.A. 75-5296); suspend all or a portion of grants awarded to a county or group of cooperating counties when it is determined that the recipient is not in substantial compliance with the minimum operating standards

(K.S.A. 75-5296); audit and determine the amount of the expenditures for correctional services of each county (K.S.A. 75-52,103); and determine the amount of grant to be awarded to qualified counties or group of cooperating counties (K.S.A. 75-52,105 and K.S.A. 1990 Supp. 75-52,111). Decisions of the secretary of corrections may be appealed to the state community corrections board. See K.S.A. 75-52,114. The powers conferred upon the secretary of corrections by the community corrections act are those powers generally exercised by an administrative agency. Administrative agencies are part of the executive branch of government. 16 Am.Jur.2d Constitutional Law § 310; 20 Am.Jur.2d Courts § 2.

In determining whether those powers conferred upon the secretary of corrections under the community corrections act may be exercised by the judiciary, it must be remembered that even the primary function of any of the three departments may be exercised by any other governmental department or agency so long as (1) the exercise thereof is incidental or subsidiary to a function or power otherwise properly exercised by such department or agency, and (2) the department to which the function so exercised is primary retains some sort of ultimate control over its exercise. 16 Am.Jur.2d Constitutional Law § 299. The court should consider: (a) the essential nature of the power being exercised; (b) the degree of control by one department over another; (c) the objective sought to be attained by the legislature; and (d) the practical result of the blending of powers as shown by actual experience over a period of time. State ex rel. Stephan, 236 Kan. at 60.

As stated above, the powers conferred upon the secretary of corrections by the community corrections act are those powers generally exercised by an administrative agency. It has consistently been held in this state that the power to adopt rules and regulations is essentially executive or administrative in nature. State ex rel. Stephan, 236 Kan. at 60.

Exercise by the judiciary of those powers conferred upon the secretary of corrections would result in extensive control by the judiciary over community correctional services. Control by the executive would be limited to those functions performed by the state community corrections board. The board is authorized to hear appeals on decisions regarding: grants for expenses of a corrections advisory board which does not have an approved comprehensive plan; the determination of grant amounts for community correctional services programs; and the organization of new community correctional service programs

and their plans for services. K.S.A. 75-52,114. The board also has authority to review minimum operating standards and performance evaluation standards established for community correctional services programs. Id. Three of the five members comprising the state community corrections board are appointed by the governor; the remaining members are appointed by the chief justice of the Kansas supreme court. Id. If the judiciary was authorized to exercise those powers presently conferred upon the secretary of corrections, a reversal of the roles generally understood to be executive and judicial would result. While the degree of control over community correction services programs by the judiciary would not be absolute and total, the degree of control would be such that the executive would effectively be precluded from exercising powers inherently conferred upon the executive by section 3 of article 1 of the Kansas constitution. Because community correctional services are not reasonably incidental to performance of judicial functions, the judiciary would not be entitled to perform the functions presently conferred on the secretary of corrections. See 16 Am.Jur.2d Constitutional Law § 313. The legislature may have a legitimate objective for conferring those powers presently exercised by the secretary of corrections upon the judiciary. However, such objective will not override the usurpation of executive power by the judiciary. The power conferred upon the secretary of corrections by the community corrections act may not be transferred to and exercised by the judiciary.

In review, the distribution of powers by a state constitution among the governmental departments is a question for the state itself. Under the Kansas constitution, the functions of parole and probation may be conferred upon either the executive or judicial branch of government. Those powers conferred upon the secretary of corrections by the community corrections act are executive or administrative in nature and, therefore, may not be transferred to or exercised by the judiciary. As all three functions - probation, community corrections and parole -- may legitimately be performed by the executive branch of government, concentration of those functions in the executive does not result in an unconstitutional usurpation of power.

Very truly yours,

Robert T. Stephan

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