IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 21, 2014 Session

S. W., BY HEATHER WARREN AND THOMAS C. WARREN, AS HIS NATURAL PARENTS AND NEXT FRIENDS v. BAPTIST MEMORIAL HOSPITAL, ET AL.

Appeal from the Circuit Court for Shelby County
No. CT00338012 Robert L. Childers, Judge

No. W2014-00621-COA-R10-CV- Filed February 27, 2015

This is a healthcare liability action. The trial court granted Defendants' motion for a qualified protective order pursuant to Tennessee Code Annotated § 29-26-121(f)(1), but set-forth several conditions, including: 1) a court reporter must be present at the ex parte interviews with Plaintiff's treating healthcare providers and record all questions and answers; 2) all answers during the interviews must be under oath; 3) the interview transcripts shall be filed under seal and with permission of the trial court, and after showing of good cause, Plaintiff may access the transcripts for the purpose of determining whether a violation of privacy under HIPAA occurred during the interviews; and 4) Defendants should not attempt to elicit or discuss protected health information which is not relevant to the issues in this lawsuit. The order also provided "[t]his does not restrict the Defendants or their attorneys from discussing non-substantive matters unrelated to the patient's protected health information." The trial court denied Defendants' joint motion for interlocutory appeal of the order and Defendants filed an application for extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. We granted the appeal for the sole purpose of determining whether, under section 29-26-121(f), the trial court erred by adding the four conditions noted above to its order. We reverse in part, affirm in part, and remand for further proceedings.

Tenn . R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Reversed in Part; Affirmed in Part; and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J.,W.S. and RICHARD H. DINKINS, filed separate concurring opinions.

Michael L. Robb, Marcy D. Magee and Kenneth M. Walker II, Memphis, Tennessee, for the appellants, Pediatrics East, P. C. & Robert Higginbotham, M.D.

Michael McLaren, Jana Lamana, Memphis, Tennessee, for the appellants, Dr. Parvey and Diagnostic Imaging Professional Corporation.

Emily Landry and Julia Kavanagh, Memphis, Tennessee, for the appellants, Methodist Healthcare-Memphis Hospitals.

Katherine M. Anderson, and Karen Koplon, Memphis, Tennessee, for the appellants, Dr. Gilmore and Pediatric Emergency Specialists.

Richard Glassman, Robert Cox, and Lauran G. Stimac, Memphis Tennessee, for the appellees,S.W. by Heather Warren and Thomas C. Warren.

OPINION

This extraordinary appeal arises from a healthcare liability action filed by S.W., by Heather Warren and Thomas C. Warren, as his natural parents and next friends ("the Warrens") in the Shelby County Circuit Court in August 2012. In their complaint, as amended in October 2012, the Warrens alleged that Defendants, Baptist Memorial Hospital ("Baptist Hospital"); Methodist Health Care Memphis Hospitals (Le Bonheur Children's Hospital) ("Methodist Le Bonheur"); Pediatrics East, Inc. ("Pediatrics East"); Dr. Melissa Binder Adams ("Dr. Adams"); Dr. Susan K. Welch ("Dr. Welch"); Dr. Robert Thomas Higginbotham ("Dr. Higginbotham"); Dr. Louis S. Parvey ("Dr. Parvey"); Diagnostic Imaging Professional Corporation ("Diagnostic Imaging"); Dr. Barry Gilmore ("Dr. Gilmore"); Pediatrics Emergency Specialists Professional Corporation ("Pediatric Emergency Specialists"); Dr. Miquel Humberto Rodriguez ("Dr Rodriguez"); and Team Health, Inc. ("Team Health"), failed to timely and properly diagnose a craniopharyngioma tumor in the minor child, S.W. They further alleged that the tumor resultantly ruptured, causing permanent injury to S.W. Dr. Adams, Dr. Welch, Dr. Rodriguez, Baptist Hospital, and Team Health were voluntarily dismissed in February 2013. Plaintiff Thomas C. Warren was voluntarily dismissed on March 1, 2013.

In August and October 2013, the remaining Defendants (hereinafter, collectively, "Defendants") filed motions for qualified protective orders pursuant to Tennessee Code Annotated § 29-26-121(f)(1). In their motions, Defendants sought permission to conduct *ex parte* interviews with, collectively, twenty-four of S.W.'s treating healthcare providers. The Warrens opposed the motions and asserted that Tennessee Code Annotated § 29-26-121(f) unconstitutionally violates the separation of powers doctrine. They also asserted that the

section is preempted by and in conflict with the Health Insurance Portability and Accountability Act ("HIPAA"). Although the Warrens did not specifically assert that the healthcare providers whom Defendants sought to interview did not possess relevant information for purposes of the statute, they contended that Defendants' "proposed order [did] not seek relevant information under Tennessee Code § 29-26-121 or the Tennessee Rules of Civil Procedure." Defendants answered and generally denied allegations of negligence. The State of Tennessee filed a motion to intervene as a matter of right to defend the constitutionality of the statute and the trial court granted the State's motion in March 2013.

The trial court heard Defendants' motions for qualified protective orders in March 2013. By order entered on November 14, 2013, the trial court held that Tennessee Code Annotated § 29-26-121(f) is not unconstitutional, that it does not violate the separation of powers doctrine, and that it is not preempted by or in conflict with HIPAA. The trial court granted Defendants' motions for a qualified protective order permitting them to conduct *ex parte* interviews with twenty-three of S.W.'s treating physicians pursuant to section 29-26-121(f)(1). However, the trial court subjected the interviews to several conditions, including:

> 1. Participation in the *ex parte* interview by the treating physicians/caregivers is strictly voluntary. Nothing in this Order is intended to imply that the treating physicians/caregivers are required to participate in the *ex parte* interview.
>
> 2. All Protected Health Information obtained during the *ex parte* interview shall be used only in conjunction with this particular lawsuit and shall not be disseminated to any third parties other than the defense attorneys' staff members, vendors, clients, and experts.
>
> 3. All Protected Health Information obtained during the *ex parte* interview shall be destroyed at the conclusion of this lawsuit.
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> 4. Defense attorneys may conduct no *ex parte* interview with treating physicians/caregivers until February 1, 2014.
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> 5. A court reporter must be present at the *ex parte* interview and record all questions and answers during the interview.
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> 6. The answers during the interview must be given under oath.
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> 7. Only one attorney for each named defendant may be present for the

interview.

8. No defendant party may be present during the interview.

9. The interview transcripts shall be filed under seal. With permission from the Court, the plaintiff may access the transcripts for the purpose of determining whether a violation of privacy under HIPAA occurred during the interview.

Defendants filed a joint motion for permission to seek an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. Following a hearing in January 2014, the trial court denied the motion. It amended its order, however, to permit *ex parte* interviews with twenty-four of S.W.'s treating healthcare providers subject to the following conditions:

1. Participation in the *ex parte* interview by the treating physicians/caregivers is strictly voluntary. Nothing in this Order is intended to imply that the treating physicians/caregivers are required to participate in the *ex parte* interview.

2. Relevant Protected Health Information may be elicited directly or indirectly from a healthcare provider during the *ex parte* interview. Defendants should not attempt to elicit or discuss Protected Health Information which is not relevant to the issues in this lawsuit. This does not restrict the Defendants or their attorneys from discussing non-substantive matters unrelated to the patient's Protected Health Information.

3. All protected Health Information obtained during the *ex parte* interview shall be used only in conjunction with this particular lawsuit and shall not be disseminated to any third parties other than the defense attorneys' staff members, vendors, clients, and experts.

4. All Protected Health Information obtained during the *ex parte* interview shall be destroyed at the conclusion of this lawsuit.

5. Defense attorneys may conduct no *ex parte* interview with treating physicians/caregivers until March 1, 2014.

6. A court reporter must be present at the *ex parte* interview and record all questions and answers during the interview.

7. The answers during the interview must be given under oath.

8. The interview transcript shall be filed under seal. With permission from the Court and after showing good cause the plaintiff may access the transcripts for the purpose of determining whether a violation of privacy under HIPAA occurred during the interview.[1]

Defendants filed a joint application for extraordinary appeal to this Court pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. We granted their application on May 13, 2014. We reverse in part, affirm in part, and remand for further proceedings.

Issue Presented

The issue certified for extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure is:

> Whether the trial judge has the authority to add the following conditions to a Qualified Protective Order granted pursuant to Tennessee Code Annotated § 29-26-121(f):
>
> 1. A court reporter must be present at the *ex-parte* interview and record all questions and answers during the *ex-parte* interview;
>
> 2. All answers during the interview must be under oath;
>
> 3. The interview transcript shall be filed under seal. With permission of the Court, and after showing good cause, Plaintiff may access the transcript for the purpose of determining whether a violation of privacy under HIPAA occurred during the interview; and,
>
> 4. Relevant Protected Health Information may be elicited directly or indirectly from a healthcare provider during the *ex parte* interview. Defendants should not attempt to elicit or discuss Protected Health Information which is not relevant to the issues in this lawsuit. This does not restrict the Defendants or their attorneys from discussing non-substantive matters unrelated to the patient's Protected Health Information.

[1]Slightly re-numbered from the trial court's order for clarity.

Discussion

The issue certified for appeal in this case is identical to the issue certified for extraordinary appeal in *Hayslett v. Methodist Healthcare, a Tennessee corporation d/b/a "Methodist Hospital North" and Methodist Healthcare Memphis Hospitals, a Tennessee corporation, and Mohamad Moughrabieh, M.D.*, No. W-2014-00625-COA-R10-CV, 2015 WL 277114 (Tenn. Ct. App. Jan. 20, 2015). Like the plaintiff/appellee in *Hayslett*, the Warrens contend that the issue presented by this appeal is a procedural discovery matter and that the abuse of discretion standard of review accordingly is applicable to this case. Defendants, on the other hand, contend that the issue is one of statutory construction and that the applicable standard of review accordingly is *de novo*, with no presumption of correctness afforded to the determination of the trial court. As in *Hayslett*, the question presented by this appeal is whether, under Tennessee Code Annotated § 29-26-121(f)(1), the trial court had the authority to add those conditions added to the qualified protective order in this case. This issue is one of statutory construction. The interpretation of a statute presents a question of law. *Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, 433 S.W.3d 512, 516 (Tenn. 2014). Our review accordingly is *de novo*, with no presumption of correctness afforded to the decision of the trial court. *Id.* at 517.

In *Hayslett*, we determined Tennessee Code Annotated § 29-26-121(f)(1) is ambiguous with respect to the extent of the trial court's authority to impose limitations or conditions on a qualified protective order entered pursuant to the section. Hayslett, 2015 WL 277114, at *5. We thoroughly examined the historical background, evolution, and purpose of the section in *Hayslett*, and it is unnecessary to repeat that examination here. As we stated in *Hayslett*, section 29-26-121(f)(1) authorizes *ex parte* investigatory interviews by defense counsel with a plaintiff's treating healthcare providers in abrogation of the Tennessee Supreme Court's holdings in *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002) and *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006). *Id.* at *9. It does not however, provide "unfettered" access to plaintiff's medical information nor does it "effectuate a blanket waiver of confidentiality in healthcare information by the plaintiff." *Id.* at *10. Contrary to Defendants' contention otherwise, the qualified protective order permitted by section 29-26-121(f)(1) is not a coaching "mechanism to prepare potential witnesses for questioning either in formal discovery or at trial." *Id.* at *14. Rather, its purpose is to facilitate early evaluation of the substantive merits of plaintiff's claim and early resolution of the action. *Id.* The section permits *ex parte* interviews of the plaintiff's healthcare providers outside the formalities of the discovery process as set-forth in Rule 26 of the Tennessee Rules of Civil Procedure, abrogating the prohibition against such interviews developed by the supreme court in *Givens* and *Alsip*. *Id.* at *12. As we held in *Hayslett*, "[t]he opportunity granted by the subsection is a limited one; it is limited to interviewing a plaintiff's treating healthcare providers to obtain information - specifically, the plaintiff's

relevant protected health information that is in the direct knowledge and control of the plaintiff's treating healthcare providers." *Id.* at *14. (citing *see Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 558 (Tenn. 2013)). We accordingly turn to whether, under Tennessee Code Annotated § 29-26-121(f)(1), the trial court had the authority to impose the restrictions and conditions that it imposed on the qualified protective order in this case.

The Trial Court's Additional Restrictions

In their brief, Defendants assert that section 29-26-121(f)(1) prohibits trial courts from imposing any restriction or condition on a qualified protective other than those expressly set-forth by the section. They assert that the section "was enacted to give healthcare liability defendants the same access to plaintiffs' treating healthcare providers as plaintiffs have enjoyed for many years[.]" They submit that the text of the section "does not provide for the restrictive conditions added by the trial court[,]" and contend that, if the legislature intended to permit the trial court to add additional restrictions, it would have provided for those restrictions in the section. Defendants assert that the legislature intended, as a matter of public policy, to allow defendants unfettered access to the plaintiff's healthcare provider that is "equal [to the] access" enjoyed by the plaintiff. They submit that, if the express conditions set-forth in the statute are met, defendants are permitted by the statute to conduct *ex parte*, informal interviews with a plaintiff's healthcare providers to the same extent as the plaintiff. Defendants argument, as we perceive it, is that any restriction or condition not expressly permitted by the section is expressly disallowed.

The Warrens, on the other hand, assert that the qualified protective order authorized by the section is a procedural discovery order. They assert that the parameters of the order accordingly are within the discretion of the trial court to the same extent as a discovery order entered pursuant to Rule 26 of the Tennessee Rules of Civil Procedure. They contend that the trial court accordingly has wide discretion to impose conditions on any order issued pursuant to the section and that the order cannot be set aside absent an abuse of discretion. The Warrens assert that, "[w]hen a discovery request implicates a privacy interest, it is common for the trial court to balance the need for the truth against the privacy interest at stake in order to appropriately tailor how discovery proceeds." The Warrens assert that S.W. has a privacy interest in his healthcare information that is protected by both federal and Tennessee law and that the trial court appropriately balanced his privacy interest against Defendants' need for discovery. They contend that Defendants have offered no argument or authority to demonstrate that the trial court abused its discretion in this case.[2] They further

[2]We observe that the parties' briefs were filed and oral argument was heard in this matter before our opinion in Hayslett was filed.

submit that Defendants have failed to cite to a legal basis to support their assumption that the trial court is limited to the conditions expressly set-forth in section 29-26-121(f)(1).

The Warrens additionally assert that HIPAA and section 29-26-121(f) contradict Defendants' argument that the General Assembly intended to allow defendants the unfettered ability to conduct *ex parte* interviews with a plaintiff's healthcare providers to the same extent as the plaintiff. They contend that the mandatory restrictions contained within the section itself disprove Defendants' argument, and submit that nothing in the section deprives the trial court of its inherent discretion to impose reasonable additional conditions as appropriate under the circumstances. They further argue that plaintiffs and defendants "can never be on equal footing" with respect to discussions with the plaintiff's treating healthcare providers in light of the provider-plaintiff relationship. The Warrens contend that, because the statute requires defendants to obtain a court order to interview a plaintiff's healthcare providers, the court maintains control over the "discovery" process. They submit that the trial court did not abuse its discretion in this case because it fashioned an order permitting orderly discovery by allowing Defendants to informally interview S.W.'s healthcare providers regarding relevant protected information outside the presence of S.W. and his counsel. They assert that, contrary to the arguments forwarded by Defendants, there is no evidence that the conditions imposed by the trial court will have a "chilling" effect or deprive Defendants of any right conferred by section 29-26-121(f)(1).

We begin our discussion of the parties' arguments by noting that, like the parties in *Hayslett*, the parties here devoted considerable attention in their briefs and at oral argument to the question of whether the qualified protective order permitted by section 29-26-121(f)(1) constitutes a "discovery" order. As we observed in *Hayslett*, "[a]lthough they enable pre-trial investigation of facts, the *ex parte* interviews permitted by the section clearly do not fall within the parameters of 'discovery' as defined by Rule 26 of the Tennessee Rules of Civil Procedure." *Id.* at *11. Rather, the section authorizes an investigatory procedure that requires a court order. And Tennessee common law "has long-recognized the broad inherent authority of trial courts to control proceedings in their courts." *Id.* at *12 (citing *Hodges v. Attorney Gen.*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000)). As we stated in *Hayslett*:

> To the extent to which the section permits the trial court to exercise its discretion over the scope of *ex parte* interviews conducted under it, we review the trial court's decisions under an abuse of discretion standard. *See Stevens,* 418 S.W.3d at 553 (the trial court's decision to excuse compliance with § 29-26-121(a) is reviewed for an abuse of discretion); *Deuel v. Surgical Clinic, PLLC*, No. M2009-01551-COA-R3-CV, 2010 WL 3237297, at *6 (Tenn. Ct. App. Aug. 16, 2010) (citations omitted) (a trial court's order granting or denying a discovery protective order is reviewed for an abuse of discretion). However, regardless of whether the *ex parte* interviews contemplated by the

> section may be considered "discovery" or "procedural," a trial court abuses its discretion when, *inter alia*, it applies an incorrect legal standard. *Stevens*, 418 S.W.3d at 553. The initial question in this case is not whether the trial court abused its discretion, but the extent and scope of the trial court's authority under the statute.

Id. We accordingly turn to whether the statute affords the trial court the authority to impose the conditions that it included in the qualified protective order entered in this case.

Court Reporter, Oath, and Filing of Transcript

As in *Hayslett*, the trial court in this case ordered that 1) a court reporter be present at the *ex-parte* interviews conducted pursuant to the section and that all interviews be recorded; 2) that the interviews be conducted under oath; and 3) that transcripts of the interviews be filed under seal to enable the Warrens to review them, after good cause shown, for violation of S.W.'s privacy rights under HIPAA. As in *Hayslett*, we agree with Defendants in this case that these conditions transform the *ex parte* investigatory "interviews authorized by the section into quasi-depositions in contravention of the substantive purpose of the section[.]" *Id.*

We noted in *Hayslett* that, notwithstanding the high ethical standards of the Bar, we are not insensitive to the potential for abuse of the *ex parte* interview process by a defendant or defense counsel. However,

> the potential for abuse was addressed by the *Alsip* court, *Alsip*, 197 S.W.3d at 728; the section provides no mechanism for review by the plaintiff; and the section expressly authorizes defendants and their attorneys the "right" to interview relevant healthcare providers "outside the presence of claimant or claimant's counsel" in order to obtain protected health information. As also noted by the court in *Alsip*, a plaintiff's relevant healthcare information is discoverable and treating healthcare providers certainly may be deposed as provided by Rule 26. We presume the General Assembly was aware of the state of the law and the concerns expressed by the court in *Givens* and *Alsip* when it enacted section 29-26-121(f).

Id. at *13 (citing *see Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010)). We also observed in *Hayslett* that

> participation in an *ex parte* interview by a healthcare provider is voluntary and limited to health information that is protected and relevant to the litigation pending before the trial court. The section also provides that any disclosure of protected health information made in response to an order entered under the

> section shall be deemed permissible under Tennessee law, notwithstanding any other Tennessee statute or common law. Tenn. Code Ann. § 29-26-121(f)(2). Nothing in the section prohibits a healthcare provider from refusing to participate in an *ex parte* interview, from refusing to respond to particular questions, from requiring presence of counsel, or from otherwise refusing to discuss his patient's healthcare information other than in a formal deposition.

Id.

As noted above, it is well-settled in Tennessee that trial courts have the inherent authority to control the proceedings in their courts. *Hodges*, 43 S.W.3d at 921. It is similarly well-settled that, absent a finding of unconstitutionality, including an impermissible encroachment upon the judicial branch in violation of the separation of powers clause of our Constitution, the courts do not have the authority to act in contravention of a statute enacted by the legislature. *Myers v. AMISUB (SFH), Inc.,* 382 S.W.3d 300, 310 (Tenn. 2012) (citing *see Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000) ("[I]t is not for the courts to alter or amend a statute.")); *Barnhill v. Barnhill*, 826 S.W.2d 443, 456 (Tenn. Ct. App. 1991). The requirements imposed by the trial court that: 1) healthcare providers must respond under oath in interviews permitted under subsection 121(f); 2) interviews be held in the presence of a court reporter; and 3) interviews must be recorded and filed under seal transform the *ex parte* interviews authorized by the section into quasi-depositions in contravention of the legislative purpose of the statute. We accordingly hold that the trial court erred by including those provisions in the qualified protective order in this case.

Restricting the Order to Relevant Protected Health Information

We next turn to whether the trial court erred by including in the qualified protective order that

> Relevant Protected Health Information may be elicited directly or indirectly from a healthcare provider during the *ex parte* interview. Defendants should not attempt to elicit or discuss Protected Health Information which is not relevant to the issues in this lawsuit. This does not restrict the Defendants or their attorneys from discussing non-substantive matters unrelated to the patient's Protected Health Information.

An order entered pursuant to the section expressly gives defendants and their counsel "the right to obtain protected health information" through *ex parte* interviews with the plaintiff's treating healthcare providers. Tenn. Code Ann. § 29-26-121(f)(1). Like the defendants in *Hayslett*, Defendants in this case do not contend that a qualified protective order entered under the section permits dissemination of healthcare information that is not relevant to the litigation. Rather, Defendants' argument, as we understand it, is that the section permits Defendants to elicit opinions regarding causation and the standard of care during informal,

ex parte interviews.

As noted, section 29-26-121(f)(1) expressly permits defendants and defense counsel to interview healthcare providers about the plaintiff's relevant protected health information. The section is one element of statutory amendments "designed to enable defendants to ascertain identifying information and relevant healthcare information more expeditiously than otherwise allowed by the formal discovery process in order 'to evaluate the substantive merits of a plaintiff's claim[.]'" *Hayslett*, 2015 WL 277114, at *14 (quoting *Stevens*, 418 S.W.3d at 555). We held in *Hayslett* that the right provided by section 29-26-121(f)(1) is

> limited to interviewing a plaintiff's treating healthcare providers to obtain information — specifically, the plaintiff's relevant protected health information that is in the direct knowledge and control of the plaintiff's treating healthcare providers. It does not extend to opinions regarding whether a defendant healthcare provider's acts or failure to act, as the case may be, caused the injury complained of by plaintiff in the lawsuit, or to the standard of care or standard of practice employed by the defendants.

Id. (internal citation omitted). Because this provision in the trial court's order does no more than reiterate the parameters set-forth in the statute, we affirm the provision.

Holding

In light of the foregoing, we reverse in part, affirm in part, and remand this matter to the trial court for further proceedings consistent with this Opinion. Costs on appeal are taxed one-half to the Plaintiffs/Appellees, S.W. by Heather Warren, and one-half to Defendants/Appellants, Methodist Healthcare Memphis Hospitals (LeBonheur Children's Hospital); Pediatrics East, Inc., P.C.; Dr. Robert Thomas Higginbotham; Dr. Louis S. Parvey; Diagnostic Imaging Professional Corporation; and Pediatrics Emergency Specialists Professional Corporation, and their sureties, for which execution may issue if necessary.

As noted above, this is an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure and is limited to the issues for which the appeal was granted. We accordingly decline to address Defendants' assertion that the statute denies the trial court the authority in any circumstance to impose any condition on a qualified protective order other than as expressly provided by section 29-26-121(f)(1) as beyond the scope of this extraordinary appeal and, therefore, advisory. We similarly do not reach the question of whether section 29-26-121(f) impermissibly encroaches upon the authority of the judicial branch as beyond the scope of the issues certified for extraordinary appeal.

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ARNOLD B. GOLDIN, JUDGE