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The Honorable Robert "Chuck" Chambers
Speaker, West Virginia House of Delegates
Office of the Speaker, State Capitol
Charleston, West Virginia 25305

Dear Mr. Speaker:

You have requested an opinion of this office regarding language included in Committee substitute for Senate Bill No. 35, the budget bill for fiscal year 1990-91. Specifically, you have asked for our opinion regarding the legality of the inclusion of the following language in the appropriation for the Division of Human Services:

Funds appropriated through the Medical Services line item of account no. 4050 may not be expended to pay the cost of an abortion unless: 1) a duly licensed attending physician determines in his or her best clinical judgment that an abortion is medically necessary because a) a continuation of the pregnancy would either endanger the life of the pregnant woman or could cause permanent, catastrophic, physical injuries to the woman; or b) prenatal tests indicate that the child would probably be born with grave, permanent and irremediable mental and/or physical defects; or 2) the pregnancy resulted from sexual assault or incest and the sexual assault was reported to law enforcement authorities or the incest was reported to the department of health and human resources prior to the performance of the abortion.

The question presented is "whether this language limiting the expenditure of appropriations is properly included in an appropriations bill such as Committee Substitute for Senate Bill 35." In our opinion, the answer to this question is no.

West Virginia Code § 9-4-2 (1990) establishes a special fund known as the "department [division] of human services medical services fund, hereinafter referred to as the fund." Section 9-4-2 further provides, in pertinent part:

Recipients of those classes of welfare assistance as are specified by the department, consistent with applicable federal laws, rules and regulations, shall be entitled to have costs of necessary medical services paid out of the fund, in the manner and amounts, to the extent, and for the period determined from time to time to be feasible by the commissioner pursuant to rules, regulations and standards established by him. . . .

West Virginia Code § 9-1-2 (i) (1990) defines the term "medical services" as:

[M]edical, surgical, dental and nursing services, and other remedial services recognized by law, in the home, office, hospital, clinic and any other suitable place, provided or prescribed by persons permitted or authorized by law to give such services; such services to include drugs and medical supplies, appliances, laboratory, diagnostic and therapeutic services, nursing home and convalescent care and such other medical services and supplies as may be prescribed by such persons.

West Virginia Code § 9-4-2 (1990) grants authority to the Commissioner of the Division of Human Services to expend public funds for medical services to qualified recipients, and the West Virginia Legislature has not amended W. Va. Code § 9-1-2 (i) (1990) to exclude abortions from those services. Where the Legislature has intended to impose such restrictions, it has clearly done so through general legislation.

For example, W. Va. Code § 16-2B-1 (1985) provides for assistance from the state Department [now Division] of Health to local boards of health in the operation of family planning and child spacing clinics, "to the extent of funds appropriated by the legislature and any federal funds made available for such purpose." For fiscal year 1990-91, state and federal funds appropriated and available for such clinics are found in Account No. 4190, the "Consolidated Medical Service Fund," administered by the Division of Health.

However, W. Va. Code § 16-2B-2 (1985), authorizing the establishment and operation of such clinics by the local boards of health, also provides, "that the procedure of abortion shall not be considered an approved method of family planning and child spacing within the intent of this section and is expressly excluded from the programs herein authorized." Arguably, this latter provision restricts only the activities of the local boards of health, and not the spending authority of the state Division of Health. In any event, we find no provision of general law similarly restricting expenditures from the Medical Services Fund by the Division of Human Services.

"Ordinarily, general legislation in appropriations acts renders such legislation void." O'Connor v. Margolin, ___ W. Va. ___, 296 S.E.2d 892, 898 (1982). In an opinion of the Attorney General dated December 9, 1953, we said:

[F]or two reasons, inclusion of general legislation in appropriations acts renders such legislation void in West Virginia.

First: The Budget Amendment [W.Va. Const. art. VI, § 51] lists those items to be included in the budget, none of which is an item of general legislation, and impliedly restricts inclusions to those items listed.

Second: An inclusion of general legislation in an appropriations act calls into full force the provisions of Article VI, Section 30 of the West Virginia Constitution, such provisions rendering items of general legislation in the act, not embraced in the title, nor subject to being so embraced, and constituting a second object of the act, void and of no effect.

45 Op. Att'y Gen. 543, 546 (1953); O'Connor, 296 S.E.2d at 899, n. 6. In O'Connor, the West Virginia Supreme Court of Appeals said that W. Va. Const. art. VI, § 51 [commonly known as the "Modern Budget Amendment"], does not provide for the amendment of substantive legislation through the budget process. Rather, statutory amendments must conform to the provisions of W. Va. Const. art VI, § 30, which provides in part:

No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so

much thereof, as shall not be so expressed, and no law shall be revived, or amended, by reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act.

It has been held that the limitation imposed by W. Va. Const. art. VI, § 30, does not apply to budget bills, which of necessity embrace more than one object because they contain appropriations for all government operations for a fiscal year. State ex rel. Brotherton v. Blankenship, 158 W. Va. 390, 403, 214 S.E.2d 467, 477 (1975); State ex rel. Key v. Bond, 94 W. Va. 255, 273, 118 S.E. 276, 284 (1923). However, an amendment to W. Va. Code § 9-4-2 (1990) to restrict the expenditure of medical services funds by the Division of Human Services, by a budget bill, "would constitute a major change in substantive law and, as such, would be subject to that constitutional provision." O'Connor, 296 S.E.2d at 899.

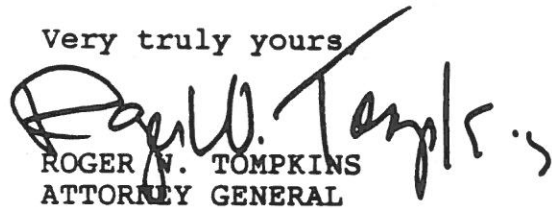
Moreover, in comparing the provisions of W. Va. Const. art. VI, §§ 28-31, with W. Va. Const. art. VI, § 51, the Court has said that, "[i]t is fundamental to our constitutional law and we affirm that the Legislature cannot amend general substantive statutes with budgetary language." Dadisman v. Moore, ___ W. Va. ___, 384 S.E.2d 816, 825 (1988); cf. Hechler v. McCuskey, ___ W. Va. ___, 365 S.E.2d 793, 797 (1987).

As you know, the budget bill is adopted for a single year only, usually under the pressure of the end of the session. On the other hand, substantive legislation becomes a permanent part of the Code, requiring formal action for subsequent amendment or repeal. The provisions of the Constitution discussed above prevent the State's general laws from getting lost in the separate and distinct process intended for the budget. This promotes an open, informed, and accountable legislative process, which is what the people of West Virginia had in mind when they adopted the State Constitution.

The authority granted to the Division of Human Services under W. Va. Code § 9-4-2 (1990) is a matter of general substantive law. The abortion funding limitation inserted into the budget bill for fiscal year 1990-91 in no way affects the amount of the medical services appropriation but, instead, purports to prohibit expenditures for certain types of medical procedures, and thus is also a matter of general substantive law. It is, therefore, our opinion that the provision is void under the constitutional limitation discussed above.

In conclusion, it is our opinion that the aforesaid limitation in S. B. 35, as enacted, restricting expenditures by the Division of Human Services from the Medical Services Fund, is void and of no effect in limiting such expenditures. We do not question the validity of the appropriation itself, which may be spent in accordance with W. Va. Code § 9-4-2 (1990).

Very truly yours,


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ATTORNEY GENERAL


DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

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