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The Legislature Cannot Delegate to the Judiciary the Power to Fix Court Reporter's Fees Absent Sufficient Standards or Guidelines.

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would lead, therefore, to a complete denial of the ex-wife's claim to a portion of her ex-husband's military retirement pay.

The preemption question has not yet been considered by a federal court construing the consent statute in light of the 1977 clarification statute. Those federal courts which have considered the consent statute have concluded that enforcement of a state divorce decree, under the statute, is a state right over which the federal courts have no jurisdiction.[54]

United States v. Stelter exemplifies the Texas trend toward advancing the ex-wife's position by providing her with an effective means of securing her court awarded portion of the federal retirement pay. The clarification statute, however, denies her this remedy by excluding community property settlements from the federal consent statute. Because Texas is the only community property state without permanent alimony, the statute discriminates against Texas residents. It is possible, however, that military retirement pay will be excluded from the terms of the clarification statute should the United States Supreme Court decide that the state community property law classification conflicts with the federal courts' classification of such benefits as gratuities. For the present, however, the 1977 clarification statute seems to deny a Texas divorcee the right to bring suit against the federal government under the federal consent statute. This removes the effective means provided by *Stelter* for recovering the divorcee's court awarded share of military retirement pay.

Howard E. Strackbein

CONSTITUTIONAL LAW—Delegation of Authority—The Legislature Cannot Delegate to the Judiciary the Power to Fix Court Reporter's Fees Absent Sufficient Standards or Guidelines

In re Johnson,
554 S.W.2d 775 (Tex. Civ. App.—Corpus Christi 1977, writ filed).

The city of Ingleside perfected its appeal to the court of civil appeals

54. Marin v. Hatfield, 546 F.2d 1230, 1231 (5th Cir. 1977) (any right under the consent statute is a state right); Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 165 (S.D. Tex. 1976) (court balanced construction of statute to give full effect to its underlying purpose against preservation of state's right to administer matters properly within its domain); *see* Morrison v. Morrison, 408 F. Supp. 315, 318 (N.D. Tex. 1976) (actions for garnishment as enforcement of child support obligations properly belong in state court).

following an adverse trial court judgment in an action in quantum meruit.[1] Martin A. Johnson, the official court reporter for the 156th Judicial District, prepared a statement of facts to be used in the city's appeal.[2] The city of Ingleside, by written notice, objected to the fees charged by the court reporter pursuant to article 2324 of the Civil Statutes.[3] Johnson then requested a hearing before the trial judge in order to have his fee approved as reasonable. The city responded contending that article 2324 was unconstitutional and arguing that Johnson's fee was unreasonable. The trial judge approved the court reporter's fee as reasonable. An appeal was then perfected by the city to the Corpus Christi Court of Civil Appeals. Held—*Reversed and remanded.* Article 2324 of the Civil Statutes violates article II, section 1 and article III, section 44 of the Texas Constitution by delegating to the judiciary the legislature's exclusive compensation setting function without establishing sufficient standards.[4]

Article II, section 1 of the Texas Constitution divides governmental powers into three separate and equal branches: legislative, executive, and judi-

1. The original case action was brought by T.R. Stewart for labor and materials used in the remodeling of a city building. City of Ingleside v. Stewart, 554 S.W.2d 939, 942 (Tex. Civ. App.—Corpus Christi 1977, writ filed) (appeal from original case action).

2. Prior to the time the appeal was submitted, the city brought an original mandamus proceeding in the court of civil appeals to require the court reporter to deliver the statement of facts. The court reporter had refused to deliver the statement of facts until his fee had been paid in full and in advance. The court of civil appeals issued the writ of mandamus. *See* City of Ingleside v. Johnson, 537 S.W.2d 145, 154 (Tex. Civ. App.—Corpus Christi 1976, no writ).

3. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-1977) provides in part:

> When any party to any suit reported by any such reporter shall desire a transcript of the evidence in said suit, such party may apply for same by written demand, and the reporter shall make up such transcript and shall receive as compensation therefor a reasonable amount, subject to the approval of the judge of the court if objection is made thereto, taking into consideration the difficulty and technicality of the material to be transcribed and the time within which the transcript is requested to be prepared. . . . Provided, however, that the Supreme Court of Texas under its rulemaking authority shall provide for the duties and fees of court reporters in all civil judicial proceedings, except as provided by law.

4. *In re* Johnson, 554 S.W.2d 775, 781 (Tex. Civ. App.—Corpus Christi 1977, writ filed). Article 2324 was also held to be "subject to unequal application" in violation of TEX. CONST. art. III, § 56 because the charges made were dependent upon each court reporter's personal fee schedule and each trial court's idea of a "reasonable amount." The court refused to address the due process issue, and also abstained from ruling on the authority granted to the supreme court by either article 2324 or article 1731a. This abstention was in deference to the supreme court which had not yet exercised the authority so granted. *In re* Johnson, 554 S.W.2d 775, 783-85 (Tex. Civ. App.—Corpus Christi 1977, writ filed). The court stated that an official court reporter could be considered a business affecting the public interest and as such the compensation received for transcribing the record could constitute a form of ratemaking of fees or charges for a professional service. If considered ratemaking, it is a function belonging exclusively to the legislature. *Id.* at 784. The court also held that there was insufficient evidence to support the trial judge's ruling as to the reasonableness of the fee charged. *Id.* at 786-88.

cial.[5] No branch may exercise any power exclusively reserved for the others.[6] Exclusive legislative powers, therefore, may not be delegated by the legislature absent express constitutional authority.[7] The legislature is permitted to delegate judicial duties to the courts,[8] but not legislative functions[9] such as ratemaking.[10]

Although inherent exclusive powers of general legislation may not be delegated, many powers possessed by the legislature are delegable.[11] The legislature may delegate to another body powers that it cannot itself "practically and efficiently exercise."[12] It may also delegate the power to make rules implementing complete laws that have been enacted.[13] In such circumstances, the policy and principles applicable to the law must be expressed by the lawmakers.[14] The authority to determine the facts and conditions upon which the policy and principles are to operate may then be delegated.[15] If the statute suffices to regulate legislative matters, the

5. TEX. CONST. art. II, § 1 (separation of powers clause).

6. *Id.*

7. Texas Nat'l Guard Armory Bd. v. McCraw, 132 Tex. 613, 627, 126 S.W.2d 627, 635 (1939); Trimmier v. Carlton, 116 Tex. 572, 590-91, 296 S.W. 1070, 1079 (1927); *see* Daniel v. Tyrrell & Garth Inv. Co., 127 Tex. 213, 220, 93 S.W.2d 372, 375 (1936); TEX. CONST. art. II, § 1.

8. *See* Jones v. Alexander, 122 Tex. 328, 335-36, 59 S.W.2d 1080, 1082 (1933); *Ex parte* Davis, 85 Tex. Crim. 218, 219, 211 S.W. 456, 457 (1919); Lacy v. Lacy, 122 S.W.2d 1104, 1105 (Tex. Civ. App.—Dallas 1938, no writ); TEX. CONST. art. V, § 1.

9. *See* Daniel v. Tyrrell & Garth Inv. Co., 127 Tex. 213, 220, 93 S.W.2d 372, 375-76 (1936); Southwestern Bell Tel. Co. v. State, 523 S.W.2d 67, 69 (Tex. Civ. App.—Austin), *modified and aff'd*, 526 S.W.2d 526 (Tex. 1975); TEX. CONST. art. II, § 1.

10. State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 529 (Tex. 1975); Lone Star Gas Co. v. State, 137 Tex. 279, 302, 153 S.W.2d 681, 693, *mandamus denied sub. nom. Ex parte* Texas, 315 U.S. 8 (1941); Daniel v. Tyrrell & Garth Inv. Co., 127 Tex. 213, 220, 93 S.W.2d 372, 375-76 (1936). Ratemaking for a business affecting the public interest is a legislative power which may be delegated to an agency, board, or commission. The rates charged are subject to judicial review. Courts declaring rates unreasonable or illegal, however, cannot set the rate. State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 529 (Tex. 1975); Daniel v. Tyrrell & Garth Inv. Co., 127 Tex. 213, 220, 93 S.W.2d 372, 375-76 (1936).

11. *See, e.g.*, Trapp v. Shell Oil Co., 145 Tex. 323, 344-45, 198 S.W.2d 424, 438 (1946) (delegation to Railroad Commission); Housing Auth. v. Higginbotham, 135 Tex. 158, 172, 143 S.W.2d 79, 87 (1940) (delegation of power to determine necessity of taking particular land under eminent domain); Commissioners Court v. Martin, 471 S.W.2d 100, 106 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.) (delegation of authority to set probation officers' salaries).

12. Trapp v. Shell Oil Co., 145 Tex. 323, 344, 198 S.W.2d 424, 438 (1946); Housing Auth. v. Higginbotham, 135 Tex. 158, 171, 143 S.W.2d 79, 87 (1940); Texas Nat'l Guard Armory Bd. v. McCraw, 132 Tex. 613, 627, 126 S.W.2d 627, 635 (1939).

13. Housing Auth. v. Higginbotham, 135 Tex. 158, 171, 143 S.W.2d 79, 87 (1940); Trimmier v. Carlton, 116 Tex. 572, 591, 296 S.W.1070, 1079 (1927).

14. *See* Housing Auth. v. Higginbotham, 135 Tex. 158, 172, 143 S.W.2d 79, 87 (1940); Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

15. *See* Trapp v. Shell Oil Co., 145 Tex. 323, 344-45, 198 S.W.2d 424, 438 (1946); Housing

details necessary for the actual "application, operation, and enforcement" of the statute may be delegated.[16]

Texas law dictates that a delegating statute contain sufficient standards.[17] The constitutional test regarding legislative delegation of authority is whether "sufficient standards" have been provided to guide the power conferred.[18] The delegation is valid and the authority conferred is not deemed legislative if sufficient guidelines have been provided.[19] General standards are permissible, as long as they are "capable of reasonable application."[20]

The duty to provide for compensation of public officers rests solely with the legislature.[21] It is well settled, however, that the responsibility of establishing the exact amount of compensation may be constitutionally delegated.[22] Although the courts have required sufficient standards in order for such delegation to be valid,[23] no particular set of standards has been pre-

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Auth. v. Higginbotham, 135 Tex. 158, 172, 143 S.W.2d 79, 87 (1940); Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

16. *Ex parte* Naylor, 157 Tex. Crim. 355, 358-59, 249 S.W.2d 607, 609 (1952); Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

17. *E.g.*, Southwestern Sav. & Loan Ass'n v. Falkner, 160 Tex. 417, 422, 331 S.W.2d 917, 921 (1960); Housing Auth. v. Higginbotham, 135 Tex. 158, 172, 143 S.W.2d 79, 87 (1940); Moody v. City of University Park, 278 S.W.2d 912, 921 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

Foreign jurisdictions are not uniform in their treatment of statutes delegating to the judiciary the authority to set compensation of public officers. In Warren v. Marion County, 353 P.2d 257, 261 (Or. 1960), *noted in* 14 STAN. L. REV. 372 (1962) such a delegation was upheld absent standards. In State v. County Court, 78 S.E.2d 569 (W. Va. 1953) a statute authorizing the judiciary to appoint probation personnel and fix their compensation within minimum and maximum amounts was declared an unconstitutional delegation of legislative power. *Id.* at 577. Effect has been given to statutes which delegate to the judiciary the authority to set compensation, subject to the approval of certain designated bodies. *See* Birdsall v. Pima County, 475 P.2d 250, 252 (Ariz. 1970); Smith v. Miller, 384 P.2d 738, 741-42 (Colo. 1963); Bass v. County of Saline, 106 N.W.2d 860, 864 (Neb. 1960).

18. Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); Moody v. City of University Park, 278 S.W.2d 912, 921 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

19. Moody v. City of University Park, 278 S.W.2d 912, 921-22 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

20. *See* Housing Auth. v. Higginbotham, 135 Tex. 158, 172, 143 S.W.2d 79, 87 (1940); Moody v. City of University Park, 278 S.W.2d 912, 922 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

21. TEX. CONST. art. III, § 44 provides in part: "The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution. . . ." *Id.*

22. Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); *see* Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ).

23. *See* Commissioners Court v. Martin, 417 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App.—Fort

scribed. While some Texas courts have found minimum and maximum limitations on the amounts of compensation sufficient to uphold the authority delegated,[24] it has also been held that such limitations are not constitutionally mandated.[25]

An official court reporter's annual salary is expressed, by judicial district, in articles 2326-2326o.[26] This statute has been upheld as properly delegating authority to the judiciary of the power to set court reporters' compensation.[27] Additionally, the legislature has provided that an official court reporter's salary may be increased by a maximum of ten per cent per annum.[28] The court reporter may supplement his salary by receiving compensation for transcribing and preparing trial records under article 2324.[29]

In *In re Johnson*[30] the Corpus Christi Court of Civil Appeals considered whether article 2324 constituted an unlawful delegation of the exclusive legislative power to prescribe the fees, duties and compensation of public officers.[31] Central to the resolution of this issue was the sufficiency of the standards provided in article 2324. The court recognized that a delegating statute must establish sufficient guidelines to prevent arbitrary and unequal application of the fees charged by court reporters.[32] General standards, if capable of reasonable application, would be sufficient, provided

Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ).

24. *See* Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ).

25. Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

26. TEX. REV. CIV. STAT. ANN. arts. 2326-2326o (Vernon 1971 & Supp. 1976-1977). These statutes utilize minimum and maximum limitations.

27. Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.).

28. TEX. REV. CIV. STAT. ANN. art. 3912k, § 3(c) (Vernon Supp. 1976-1977). This provision allows the annual compensation to be increased in excess of ten per cent with the approval of the commissioners court of each county in the judicial district. *Id.*

29. *Id.* art. 2324 (Vernon Supp. 1976-1977).

30. 554 S.W.2d 775 (Tex. Civ. App.—Corpus Christi 1977, writ filed).

31. The court stated that an official court reporter is an officer of the state as provided under TEX. CONST. art. III, § 44. *In re* Johnson, 554 S.W.2d 775, 780 (Tex. Civ. App.—Corpus Christi 1977, writ filed); *see* Butcher v. Tinkle, 183 S.W.2d 227, 230 (Tex. Civ. App.—Beaumont 1944, writ ref'd w.o.m.); Dunn v. Allen, 63 S.W.2d 857, 858 (Tex. Civ. App.—Dallas 1933, no writ). *But see* Lightfoot v. Lane, 104 Tex. 447, 449, 140 S.W. 89, 90 (1911) (court reporter is employee of state and not officer within article 4854, § 14 (construing Pickle v. Finley, 91 Tex. 484, 44 S.W. 480 (1898)); Harris County v. Hunt, 388 S.W.2d 459, 467 (Tex. Civ. App.—Houston 1965, no writ) (court reporter not officer within meaning of TEX. CONST. art. XVI, § 61); Tom Green County v. Proffitt, 195 S.W.2d 845, 847 (Tex. Civ. App.—Austin 1946, no writ) ("court reporter or stenographer is not a public officer within the meaning of the Constitution"); Robertson v. Ellis County, 84 S.W. 1097, 1098-99 (Tex. Civ. App. 1905, no writ) (court reporter not officer within TEX. CONST. art. XVI, § 30).

32. *In re* Johnson, 554 S.W.2d 775, 782 (Tex. Civ. App.—Corpus Christi 1977, writ filed).

the limits of the authority conferred were expressed.[33] Under this criteria, the standards expressed in article 2324 were held to be "entirely too subjective to preclude arbitrary and unequal fees from being charged."[34] The statute, therefore, was declared to be unconstitutional.[35]

The court reasoned that under article 2324 absolute discretion was given to the court reporter and the trial judge in setting the fees, subject only to the "difficulty and technicality of the material and the time within which the transcript was requested to be prepared."[36] Furthermore, the reporter was given legislative authority to set whatever fee was obtainable, provided no objection was made to the fee charged.[37] When an appellant objected to the fee, the only legislative guideline provided was "reasonableness."[38] Under the circumstances, the court felt that "reasonableness" was not a sufficient standard to guide the trial judge's discretion[39] and stated that the legislature must establish some objective standards by which the costs can be determined before the duty of fixing the charges may be delegated.[40] Without such standards, the law becomes unconstitutional.[41]

Texas courts have infrequently addressed statutes delegating the authority to set compensation for public officers.[42] *In re Johnson* is the first case to declare such a delegating statute unconstitutional due to insufficient standards.[43] While the consensus is that sufficient standards or guide-

33. *Id.* at 782.

34. *Id.* at 782. The court noted that article 2324 allowed appellants to be charged different fees for comparable transcripts depending upon which court and county were involved. *Id.* at 784. Testimony indicated a range in charges from $1.60 per page to $2.00 per page in local district courts for comparable transcripts. *Id.* at 784. The court expressed concern with the official court reporter system in Texas, noting that over one-half of the court's appeals in 1976 involved at least a one month delay due to the court reporter's failure to prepare the record within the time specified by law. *Id.* at 785-86.

35. *Id.* at 783. The court held paragraph 3 of article 2324 to be unconstitutional and reinstated paragraph 3 of the 1961 amendment to article 2324. *Id.* at 787.

36. *Id.* at 782. The court stated that these subjective standards had no relationship to the court reporter's actual cost and that the "time requirements" were unclear. *Id.* at 782.

37. *Id.* at 782.

38. *Id.* at 782.

39. *Id.* at 782. The constitution requires more guidance in the delegation of authority to set court reporters' fees than the term "reasonableness," which is subject to each judge's different interpretation. *See id.* at 782.

40. *Id.* at 783.

41. *Id.* at 783.

42. *See* Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ). These cases have addressed the delegation of compensation setting authority.

43. *In re* Johnson, 554 S.W.2d 775 (Tex. Civ. App.—Corpus Christi 1977, writ filed). Earlier cases considering the issue consistently upheld the statutes. *See* cases cited note 42 *supra*.

lines are required in delegating statutes,[44] what constitutes a sufficient standard has not been clearly defined. In holding article 2324 to be an unconstitutional delegation of legislative authority, *In re Johnson* reaffirmed the constitutional mandate that delegating statutes limit and guide the authority granted through standards capable of reasonable application.

Past decisions have upheld the delegation of authority to set the compensation of public officers within certain limits.[45] In *Wichita County v. Griffin*[46] the Fort Worth Court of Civil Appeals upheld a statute delegating to district judges the authority to fix court reporters' salaries within prescribed limits.[47] The court felt that such a delegation was constitutional when the limits of authority granted were expressed in the delegating statute.[48] Again, in *Burkhart v. Brazos River Harbor Navigation District,*[49] a statute delegating authority to navigation commissioners to set the compensation of tax assessors was upheld with a maximum limitation.[50] The *Burkhart* court reasoned that because of the limitation, the statute delegated only administrative and ministerial duties, and not legislative authority.[51] These cases indicate the necessity of adequate standards in statutes delegating compensation setting functions in Texas. Had the limits of authority not been expressed in the statutes, the cases indicate that the authority delegated may have been legislative and thus unlawful.[52]

The *Johnson* decision is significant in light of *Commissioners Court v. Martin.*[53] In *Martin* the Amarillo Court of Civil Appeals upheld a statute delegating to district judges the authority, "with the advice and consent of the commissioners court," to employ and fix the salaries of probation officers.[54] The delegating statute expressed the desired caseload for proba-

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44. *See* cases cited note 17 *supra.*

45. *See* Wichita County v. Griffin, 284 S.W.2d 253, 255-56 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ). *But see* Commissioners Court v. Martin, 471 S.W.2d 100, 106 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

46. 284 S.W.2d 253 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.).

47. *Id.* at 256.

48. *Id.* at 256.

49. 42 S.W.2d 96 (Tex. Civ. App.—Galveston 1931, no writ).

50. *Id.* at 100.

51. *Id.* at 100.

52. *See* Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ).

53. 471 S.W.2d 100 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

54. *See id.* at 106; TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1976-1977). The statutory phrase "with the advise and consent of the Commissioners Court" is not a standard, but a safeguard. The district judges should seek the advice of the Commissioners Court so that the judges may have the information necessary to determine a proper probation program. The "consent" required is to budget, appropriate and pay the expenditures established by the judges so long as the expenditures are necessary and reasonable to

tion officers, the requisite qualifications for the office, and the source of probation funds.[55] After recognizing the necessity for sufficient standards, the court declared that the constitution does not require minimum or maximum limits to be enumerated in the law.[56] The court then upheld the standards expressed as sufficient to guide the discretion conferred upon the district judges.[57]

The Amarillo court in *Martin* reasoned that probation compensation must vary in the different judicial districts because of differing requirements on probation officers.[58] Since the legislature could not practically and efficiently exercise the power of setting the compensation, the court felt that the power had been wisely delegated.[59]

Although several distinctions may be made between *Johnson* and *Martin*, each case involved the same basic issues.[60] Both courts were confronted with statutes delegating to the judiciary the authority to set the compensation of public officers. In addition, both cases dealt with the sufficiency of standards expressed in statutes delegating compensation setting functions. The same rules of law were used by both courts to reach opposing decisions.[61] These contrary holdings appear to result from differ-

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discharge the essential business of the court. Commissioners Court v. Martin, 471 S.W.2d 100, 107-08 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

In any dispute regarding the necessity and reasonableness of the expenditures of the probation program, the court held that the Commissioners Court bears the burden of proof to show that the judges' actions are so unreasonable, arbitrary or capricious as to be an abuse of discretion. *Id.* at 108. Additionally, Commissioners Court v. District Judge, 22nd Judicial District, 506 S.W.2d 630 (Tex. Civ. App—Austin 1974, writ ref'd n.r.e.) held that the statutory phrase "advise and consent of the Commissioners Court" did not confer upon the commissioners veto power, nor did the Commissioners Court have authority to prepare its own budget in lieu of the budget prepared by the district judges. *Id.* at 635.

55. Commissioners Court v. Martin, 471 S.W.2d 100, 106 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); *see* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1976-1977).

56. Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); *see* Wichita County v. Griffin, 284 S.W.2d 253, 256 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ).

57. Commissioners Court v. Martin, 471 S.W.2d 100, 106 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

58. *Id.* at 105.

59. *Id.* at 105-06.

60. *Johnson* concerned the delegation of authority to set court reporters' fees. *See In re* Johnson, 554 S.W.2d 775, 778 (Tex. Civ. App.—Corpus Christi 1977, writ filed). The statute delegated the authority to set the fee to the court reporter subject to approval of the fee by the district judge only if it had been objected to. TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-1977). The statute in *Martin* concerned delegation of authority to set the salary of probation officers. Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.). The authority was delegated directly to the district judges. TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1976-1977).

61. *Compare In re* Johnson, 554 S.W.2d 775, 780-81 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) *with* Commissioners Court v. Martin, 471 S.W.2d 100, 105 (Tex. Civ.

ing interpretations of the term "sufficient standards."

The standards approved in *Martin* did not provide guidance or limitations to aid the district judge in exercising the discretion conferred.[62] They provided no more guidance than the standards held insufficient in *Johnson*.[63] The *Johnson* court stated that the delegating statute "must establish some objective basis" to enable the judge to determine what would be a reasonable charge.[64] Under this rule, the subjective standards in the *Martin* statute would appear to be insufficient.[65] Past cases have upheld statutes delegating authority to set salaries provided the limits of the authority granted were established.[66] *Martin*, in effect, disregarded this requirement and upheld a statute containing no limitations on the granted authority.[67] The result appears to be a difference of opinion in the Texas Courts of Civil Appeals as to the standards which are required in statutes delegating compensation setting authority.

The *Johnson* court indicated that one solution may be to follow the national trend and fix court reporters' rates on a per page basis with a fixed average number of words per page.[68] This approach would establish an objective basis for the district judge to determine the reasonableness of a reporter's fee.[69] The court refrained, however, from adopting these standards, leaving that determination to the legislature.[70]

In declaring the third paragraph of article 2324 unconstitutional, the *Johnson* court reinstated paragraph 3 of the 1961 amendment to article 2324.[71] This prior law contains objective standards which permit court reporters to charge thirty cents per hundred words for preparing the original trial transcript.[72] In today's economy this compensation is wholly inad-

App.—Amarillo 1971, writ ref'd n.r.e.). Unlike *Johnson*, the court in *Martin* upheld the delegation because the legislature could not practically and efficiently set the compensation; this rule does not, however, obviate the necessity of sufficient standards in the delegating statute.

62. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1976-1977).

63. *Compare* TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-1977) *with* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1976-1977).

64. *In re* Johnson, 554 S.W.2d 775, 783 (Tex. Civ. App.—Corpus Christi 1977, writ filed).

65. *Compare id.* at 783 *with* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1976-1977).

66. *See* Wichita County v. Griffin, 284 S.W.2d 253, 255-56 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); Burkhart v. Brazos River Harbor Navigation Dist., 42 S.W.2d 96, 100 (Tex. Civ. App.—Galveston 1931, no writ).

67. *See* Commissioners Court v. Martin, 471 S.W.2d 100, 106 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.); TEX. CODE CRIM. PRO. ANN. art. 42.12, § 10 (Vernon Supp. 1976-1977).

68. *In re* Johnson, 554 S.W.2d 775, 783 (Tex. Civ. App.—Corpus Christi 1977, writ filed).

69. *See id.* at 783.

70. *Id.* at 783; *see* State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 529 (Tex. 1975).

71. *In re* Johnson, 554 S.W.2d 775, 787 (Tex. Civ. App.—Corpus Christi 1977, writ filed); *see* 1961 Tex. Gen. Laws, ch. 290, § 1, at 620.

72. *See* 1961 Tex. Gen. Laws, ch. 290, § 1, at 620.

equate.[73] Until action is taken on court reporters' fees, either by the supreme court or the legislature, reporters in the Thirteenth Supreme Judicial District will be receiving this inadequate compensation under the holding in *Johnson*.

The 1961 amendment to article 2324 also allows court reporters to make a reasonable charge for postage, reproduction of exhibits and other actual expenses.[74] It does so with language practically identical to that declared unconstitutional in *Johnson*.[75] In reinstating the prior law, the *Johnson* court indicated that it considers "reasonableness" a sufficient standard in regard to court reporters' actual expenses.[76]

The Texas Supreme Court, under its constitutional rulemaking authority,[77] has recently acted upon several of the issues addressed in *Johnson* concerning court reporters' fees and statements of facts.[78] In compliance

73. A survey of five official court reporters of civil district courts in San Antonio, Texas indicated that the present rate of compensation is approximately seventy-five to eighty cents per hundred words. All the reporters stated that thirty cents per hundred words is totally inadequate and would not cover the court reporter's overhead costs.

74. *See* 1961 Tex. Gen. Laws, ch. 290, § 1, at 620.

75. *Compare* TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-1977) (paragraph 3), *with* 1961 Tex. Gen. Laws, ch. 290, § 1, at 620.

76. *See In re* Johnson, 554 S.W.2d 775, 787 (Tex. Civ. App.—Corpus Christi 1977, writ filed).

77. Article 2324 authorizes the Texas Supreme Court, under its rulemaking authority, to provide for the duties and fees of court reporters. *See* TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1976-1977). This rulemaking authority is derived from TEX. CONST. art. V, § 25 which provides: "The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of this State to expedite the dispatch of business therein." In 1941 the legislature relinquished full rulemaking power in civil judicial proceedings to the supreme court by repealing all laws dealing with practice and procedure. *See* TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1962).

The power of the supreme court to make rules is the exercise of legislative power under a direct grant by the constitution, and such rules have all the effect of statutes. *See* Brown v. Linkenhoger, 153 S.W.2d 342, 343 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.); Childress v. Robinson, 161 S.W. 78, 81 (Tex. Civ. App.—Galveston 1913, writ ref'd). The authority granted is limited, and only matters of practice and procedure are included in article 1731a. Moritz v. Byerly, 185 S.W.2d 589, 590 (Tex. Civ. App.—Austin 1945, writ ref'd); *see* TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1962); TEX. R. CIV. P. 815.

Johnson left unanswered the question of whether the setting of court reporters' fees is a matter of "practice and procedure." The purpose of article 1731a is to expedite the adjudication of the litigants' rights and to avoid unnecessary expense. *See* C.E. Duke's Wrecker Serv., Inc. v. Oakley, 526 S.W.2d 228, 233 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 340 S.W.2d 548, 554 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.); TEX. R. CIV. P. 1. With the purpose of article 1731a thus stated, it would appear that "practice and procedure" embraces the setting of court reporters' fees. *See* Reedus v. Friedman, 287 So. 2d 355 (Fla. Dist. Ct. App. 1974). The Florida court held the fixing of court reporters' fees to be a matter of practice and procedure. *Id.* at 358.

78. *See* TEX. R. CIV. P. 377 (statement of facts), *as amended* July 11, 1977, effective January 1, 1978.