



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

May 17, 1977

ATTORNEY GENERAL OPINION NO. 77- 161

Mr. Dennis W. Moore
District Attorney
Johnson County Courthouse
P.O. Box 728
Olathe, Kansas 66061

RE: Juvenile Code - Waiver of Juvenile Jurisdiction -
Motion to Find Juvenile Non-Amenable

SYNOPSIS: A district court judge cannot order the district attorney nor the petitioner to file a motion alleging that a juvenile is not a fit and proper subject to be dealt with under the Kansas Juvenile Code.

* * *

Dear Mr. Moore:

You ask whether a district court judge may order you or one of your assistant district attorneys to file a motion to waive juvenile jurisdiction in order to certify a juvenile for prosecution as an adult. K.S.A. 1976 Supp. 38-808(b) states:

"Notwithstanding any provisions of the Kansas juvenile code or any other law of this state to the contrary, whenever a petition has been filed pursuant to the Kansas juvenile code alleging that a child is, by reason of violation of any criminal statute, a delinquent or miscreant child described in K.S.A. 1976 Supp. 38-802, and that the child was sixteen (16) years of age or older at the time of the alleged commission of such offense and the petitioner, or the county or district attorney upon motion made prior to the hearing on the petition, alleges that such

child is not a fit and proper subject to be dealt with under the Kansas juvenile code, the court shall immediately set a time and place for a hearing to determine if such child is a fit and proper person to be dealt with under the Kansas juvenile code." [Emphasis supplied.]

The underscored phrase specifically enumerates those who may move the court for a hearing on non-amenability to include only "the petitioner, or the county or district attorney."

Under K.S.A. 1976 Supp. 38-815c, the district attorney must:

". . . give to the district court such aid in presenting evidence and otherwise assisting at hearing held pursuant to the juvenile code as may be requested by the judge of the district court Each county or district attorney shall prepare such petitions for proceeding pursuant to the juvenile code as may be requested by the district court of such attorney's district pursuant to the provisions of subsection (b) of K.S.A. 1976 Supp. 38-816." [Emphasis supplied.]

These two statutory provisions address themselves to petitions, not motions. A motion is an entirely different form of pleading from a petition. As to the petition, K.S.A. 1976 Supp. 38-816 grants to the juvenile judge broad powers of inquiry, in order to determine whether or not a petition should be filed. In subsection (f), the court's power is further broadened so that:

"Upon the hearings on any petition filed pursuant to the juvenile code, the judge of the district court may amend the petition to conform with the facts and render judgment accordingly. [Emphasis supplied.]

The caveat here, is that these powers are granted to facilitate the execution of the parental function of the state set forth in K.S.A. 1976 Supp. 38-801. That is, these powers are granted to the court to enable it to carry out its juvenile jurisdictional mandate, which must be distinguished from the waiver of that jurisdiction. The certification of a juvenile to be tried as an adult for an alleged criminal act, requires a hearing, apart from the ordinary every day business of the juvenile court.

The introductory phrase of the statute, K.S.A. 1976 Supp. 38-808(b), which sets forth the procedure whereby the court finds the juvenile not amenable to its juvenile jurisdiction specifically sets such procedure apart from the rest of the juvenile code:

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"Notwithstanding any provisions of the Kansas juvenile code or any other law of this state to the contrary, . . ."

The wording is clear. The non-amenability hearing is to be conducted precisely as set forth in the statute. The juvenile judge's power to amend the petition granted by K.S.A. 1976 Supp. 38-816(f) does not apply to this hearing which can be initiated only

". . . upon motion made prior to the hearing on the petition . . ." by "the petitioner, or the county or district attorney . . ."

Further, an order by a district court judge to a county or district attorney to file such a motion contemplates a degree or prejudgment of the merits of such a motion. In proceedings under the Kansas Criminal Code, K.S.A. 1976 Supp. 22-2301(2) empowers a judge of the district court in extraordinary cases to order the county attorney to institute criminal proceedings against a person, but, such judge "shall" be disqualified from sitting in that case. Similarly, a judge, in his juvenile jurisdictional capacity, would not want to order a county attorney to file a non-amenability motion and then decide the motion himself.

When the court waives its juvenile jurisdiction, it subjects the juvenile to criminal jurisdiction, a procedure which requires the utmost care to see that the juvenile has a guardian ad litem, notice, and a hearing. The statutory procedure must be followed strictly.

Some states have specifically granted the juvenile court the authority to so order the filing of the motion, while others have not. Had the Kansas legislature intended the juvenile court to have such an important power, it could easily have so provided in the code. In the absence of such a provision, it can hardly be surmised that the legislature intended the juvenile court to exercise such a power.

The district court does not have the power to order the county attorney or district attorney to file a motion for a non-amenability hearing to enable the court to waive its juvenile jurisdiction.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:MGM:ksn