



STATE OF KANSAS

## Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

**Curt T. Schneider**  
Attorney General

August 16, 1978

ATTORNEY GENERAL OPINION NO. 78-265

Mr. William C. Ellis  
Cowley County Attorney  
Cowley County Courthouse  
Winfield, Kansas 67156

Re: Counties--County Counselors--Duties

Synopsis: Under K.S.A. 19-246, upon the appointment of a county counselor, all duties in civil matters otherwise required by law of the county attorney pass to the county counselor. Thus, the county counselor properly may be responsible for representation in proceedings under the Act for Obtaining Treatment of Mentally Ill Persons, K.S.A. 1977 Supp. 59-2901 *et seq.*, in proceedings for the treatment of alcoholism and intoxication, in uniform reciprocal enforcement of support actions, and in juvenile matters.

\* \* \*

Dear Mr. Ellis:

I have your letter of August 9, 1978, concerning the responsibilities of the county attorney and county counselor, respectively. You suggest that because the county counselor is required by K.S.A. 19-247 and -248 to "perform all duties in civil matters that have heretofore been required by law of the county attorney," that the responsibility for representing representation in mental illness proceedings, alcoholism cases, reciprocal support actions and juvenile proceedings properly rests with the county counselor.

K.S.A. 19-247 states thus:

Mr. William C. Ellis  
Page Two  
August 16, 1978

"The county counselor shall, when requested by the board of county commissioners, or when it may be necessary, attend the meetings of such board, and shall give his advice upon all legal questions that may arise, and assist the board on all legal matters as may be referred to him; commence, prosecute or defend, as the case may require, all civil suits or actions in which the county is interested, represent the county generally in matters of civil law; draw all contracts or other papers required by the said board, and furnish to said board when requested by it to do so, opinions in writing upon legal matters pending before said board; and shall perform all the duties in civil matters that have heretofore been required by law of the county attorney of such counties." [Emphasis supplied.]

K.S.A. 19-248 specifies the effect of an appointment of a county counselor upon the duties of the county attorney:

"Upon and after the appointment of such county counselor, the county attorney of such counties shall not be required to represent said counties in any civil actions or business, excepting tax foreclosure suits in [certain] counties . . . , but nothing herein . . . shall be construed to limit, qualify or in any manner affect the duties of said county attorney in any criminal actions or business, and said county attorney shall continue to discharge such duties in all criminal matters as they are now required by law to do . . . ."

These statutes were first enacted in 1917, applicable only to counties with a population in excess of 100,000. Ch. 128, L. 1917. In 1975, the legislature repealed K.S.A. 19-246, and in 1976, it repealed K.S.A. 19-249, both sections which originated as a part of the 1917 act, leaving, of that original act, K.S.A. 19-247 and -248. Thus, there is now no express statutory authority for the appointment of county counselors. If a board of county commissioners chooses to appoint a county counselor, it

Mr. William C. Ellis  
Page Three  
August 16, 1978

does so in the exercise of its statutory home rule powers under K.S.A. 1977 Supp. 19-101a. Yet, once that home rule power is exercised, the powers and duties of the person so appointed are expressly enumerated by statute, K.S.A. 19-247 and -248.

In many counties in which county counselors have been appointed, he or she has acted as counsel for the board of county commissioners in a wide variety of civil matters. However, county attorneys have generally continued to handle several matters, such as those about which you inquire, which are clearly civil in nature. Proceedings under the Act for Obtaining Treatment for a Mentally Ill Person, K.S.A. 1977 Supp. 59-2901 *et seq.*, are essentially civil in nature. Likewise, proceedings for the hospitalization and treatment of persons for alcoholism and intoxication under K.S.A. 1977 Supp. 65-4001 *et seq.* are not criminal in nature. Both acts are premised upon a recognition that mental illness and alcoholism are in fact illnesses, and should be treated as such, with careful civil safeguards surrounding the hospitalization and treatment of persons under court order. Proceedings under the Uniform Reciprocal Enforcement of Support Act, K.S.A. 23-451 *et seq.*, are likewise civil proceedings for the enforcement of civil obligations.

Historically, proceedings under the juvenile code have been regarded as civil in nature. K.S.A. 1977 Supp. 38-801 provides that no proceeding under the Juvenile Code shall be deemed to import a criminal act on the part of any child, and that

"all proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state."

Characterization of juvenile court proceedings as civil in nature likewise does not forestall the applicability of certain procedural due process safeguards which are also required in criminal proceedings. *Re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967).

Proceedings upon petitions for writs of habeas corpus are civil proceedings, as well as post conviction motions under K.S.A. 60-1507, attacking the validity of criminal convictions under which the movant is confined.

Clearly, the prevailing practice in most, if not all, Kansas counties which have both a county or district attorney and a

Mr. William C. Ellis  
Page Four  
August 16, 1978

county counselor does not reflect a strict apportionment of responsibilities between them upon a careful characterization of the matter as either civil or criminal. Nonetheless, the language of K.S.A. 19-246 is clear, that "all the duties in civil matters that have heretofore been required by law of the county attorney of such counties" shall devolve upon the county counselor upon his or her appointment. [Emphasis supplied.]

Thus, I have no basis upon which to differ with your evaluation of the duties of the county counselor, and your proposal to defer to that office in matters involving juvenile proceedings, actions under the Act for Obtaining Treatment for a Mentally Ill Person, uniform reciprocal support enforcement matters, and actions under K.S.A. 1977 Supp. 65-4001 *et seq.* involving alcoholism and intoxication. These are all civil proceedings or "civil matters" and the duties of the county or district attorney in such matters pass by operation of law to the county counselor upon the appointment of such persons.

It is obvious that some legislative attention is needed to these sections. In most if not all counties, the office of county counselor is neither budgeted nor staffed to permit an assumption of all of the duties heretofore undertaken by the county or district attorney which are strictly civil in nature. At the same time, the compensation provided to county attorneys is to compensate for the performance of all county business which it is his or her legal duty to conduct. Certainly, one may readily fashion at least an argument that a county attorney who continues to perform duties which are not his to perform, may be entitled to additional compensation therefor. A board of county commissioners which wishes the county attorney to continue to provide representation in such matters as mental illness and alcoholism actions, proceedings for reciprocal enforcement of support, and juvenile actions may so provide by an appropriate charter ordinance, excepting such county from the pertinent provisions of K.S.A. 19-246 and -247, and providing substitute or additional provisions in lieu thereof, for those remaining sections of the 1917 act do not in their entirety apply uniformly to all counties.

Yours truly,



CURT T. SCHNEIDER  
Attorney General

CTS:JRM:kj