



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88- 28

Gene Porter
Barton County Attorney
P.O. Box 881
Great Bend, Kansas 67530

Re: Counties and County Officers -- County Attorney --
Duties

Public Health -- Alcoholism and Intoxication
Treatment -- Change of Venue; Hearing Procedure

Synopsis: K.S.A. 65-4041(A) does not require the county attorney who represented the applicant in the initial filing to continue that representation after a change of venue has been granted. However, K.S.A. 65-4041 and 65-4053 allow the district court to which venue has been changed to tax the costs of the proceeding to the county of residence. Cited herein: K.S.A. 1987 Supp. 19-702; 19-703; K.S.A. 22-2616; K.S.A. 1987 Supp. 59-2912; K.S.A. 60-609; 61-1907; 65-4031; 65-4032; 65-4034; 65-4036; 65-4041; 65-4053.

* * *

Dear Mr. Porter:

As Barton County Attorney you request our opinion on the duties of a county attorney under K.S.A. 65-4001 et seq. You inform us that the issue arose in the context of an alcohol commitment proceeding initially filed in Barton county but subsequently moved to Saline county pursuant to a change of venue order issued as authorized by K.S.A. 65-4041.

K.S.A. 65-4001 et seq. contains statutory procedures whereby a person may be detained for treatment in a state or private alcohol treatment facility. A protective custody order issued pursuant to K.S.A. 1987 Supp. 59-2912, K.S.A. 65-4034(A) or K.S.A. 65-4031, may be used to initially detain a proposed patient. K.S.A. 65-4032 provides the procedure whereby it is determined whether a proposed patient is an alcoholic or incapacitated by alcohol and allows an order for further treatment to be made.

An application made under K.S.A. 65-4032 may be filed in the district court of the county of the proposed patient's residence or presence. In the instant case the application was initially filed in Barton county. K.S.A. 65-4041(A) allows venue to be changed from the resident county to the district court of the county in which the treatment facility or state institution is located. This is often done to facilitate procedures and accessibility of witnesses required for the hearing.

K.S.A. 65-4036 states that "[i]f the applicant is not represented by counsel, the county or district attorney shall represent the applicant. . . ." The original application was made in Barton county, and thus, if the applicant was not represented by counsel, the Barton county attorney had the original duty to represent the applicant.

K.S.A. 65-4041 states that "[a]ny district court to which venue is transferred shall proceed in the case as if the application had been originally filed therein. . . ." When a change of venue is properly made, the court to which the change is taken is vested with jurisdiction which is as full and complete as if the action had been originally commenced in that county. 92 C.J.S. Venue § 207 (1955). A change of venue does not vacate any proceedings taken in the case before the change was granted. 77 Am. Jur. 2d Venue § 86 (1975). Thus, a change of venue merely moves the matter to another court and does not change the parties to that matter. See generally, K.S.A. 22-2616, 60-609, and 61-1907. We must therefore determine whether the county from which venue was moved is considered a party in a proceeding such as this, and if not, whether the county attorney has any duty to continue representation of the applicant in a district court located in another county.

A fundamental rule of statutory construction is that the purpose and intent of the legislature governs. Harris Enterprises, Inc. v. Moore, 241 Kan. 59 (1987). The purpose of K.S.A. 65-4001 et seq. is to provide for the

care and treatment of individuals in alcohol treatment facilities. The purpose of K.S.A. 65-4036 appears to be the assurance of representation of the applicant. That purpose does not automatically make the county a party to the matter nor mandate continued representation of the applicant by the same county attorney.

The duties of a county attorney have historically been limited to certain legal services rendered to the county. See Commissioners of Leavenworth County v. Brewer, 9 Kan. 307 (1872); Heinz v. Shawnee County Commissioners, 136 Kan. 104 (1932); Nichols v. Shawnee County, 76 Kan. 266 (1907); and Attorney General Opinions No. 87-179, 87-147, and 81-186. It is presumed that the legislature acted with full knowledge of prior law, Rogers v. Shonahan, 221 Kan. 221 (1976), and thus, when enacting K.S.A. 65-4001 et seq., the legislature is presumed to have been aware of previous statutes and case law delineating and limiting the county attorney's duties.

K.S.A. 1987 Supp. 19-702 sets forth the general duties of a county attorney:

"Except as otherwise provided in this section, it shall be the duty of the county attorney to appear in any court having jurisdiction within the county and prosecute or defend on behalf of the people all actions and proceedings, civil or criminal, in which the state or the county is a party or interested."
(Emphasis added).

The scope of statutory duties of a county attorney is further set forth in K.S.A. 1987 Supp. 19-703:

"Each county attorney, when requested by any judge of the district court of the county, shall appear on behalf of the state before such judge, and prosecute all complaints made in behalf of the state of which such judge has jurisdiction; and upon like request shall appear before such judge and conduct any criminal examination which may be had before such judge and, except as otherwise provided in subsection (b) of K.S.A. 19-702, and amendments thereof, shall also prosecute all civil

suits before such judge in which the county is a party or interested."
(Emphasis added).

K.S.A. 1987 Supp. 19-703 mandates the appearance of the county attorney before any judge of the district court of the county. It does not necessarily extend to orders made by judges of district courts in other counties.

K.S.A. 65-4001 et seq. does not make the county in which the proceedings were initiated a party to the proceedings. K.S.A. 1987 Supp. 19-703 and 19-702 mandate that a county attorney appear only in matters to which the county is a party or interested. We must therefore conclude that the county attorney of the resident county has no continuing duty to represent the applicant in the court to which venue was removed.

However, the resident county may have a fiscal interest pursuant to K.S.A. 65-4011 and 65-4053. K.S.A. 65-4041 provides:

"Any district court to which venue is transferred shall transmit a statement of any court costs incurred and a certified copy of all pleadings and orders in the case to the district court of the county of the residence of the patient or, if the county of residence is not ascertainable, to the secretary."

K.S.A. 65-4053 sets forth the entities responsible for the payment of costs connected with the proceeding:

"The costs shall be taxed to the estate of the patient, to those bound by law to support such patient or to the county of the residence or nexus of the patient as the court having venue shall direct.

. . . .

(C) Any district court receiving a statement of costs from another district court shall forthwith approve them for payment out of the general fund of its county, except that it may refuse to approve them for payment only on the grounds that the patient is not a resident

of its county. In such case it shall transmit the statement of costs to the secretary." (Emphasis added).

These provisions indicate legislative intent to allow the placement of fiscal responsibility on the resident county. This fiscal responsibility is not dependent upon representation by that county's attorney nor does it necessarily expand the scope of duties required of a county attorney. The fiscal responsibility of the county is not dependent upon nor affected by any action of the county, but rather is constant in nature. Thus, this responsibility does not constitute an interest requiring representation under K.S.A. 1987 Supp. 19-702.

The legislature may statutorily expand the scope of duties required of a county attorney (see e.g. K.S.A. 22-2616), and under K.S.A. 65-4001 et seq. it has done so. However, this particular legislative expansion of duties does not go beyond the scope of duties established under K.S.A. 1987 Supp. 19-702 and 19-703 to require representation by the county attorney before another county's court in a matter to which the county is not a party or is not interested.

It is therefore our opinion that when a change of venue has been granted pursuant to K.S.A. 65-4041(A), the county attorney of the county in which the application was initially filed does not have a statutorily imposed duty to continue representing the applicant. However, K.S.A. 65-4041 and 65-4053 indicate that the resident county may retain certain fiscal responsibilities connected with the costs of the proceeding. We are cognizant of the burden this interpretation of K.S.A. 65-4001 et seq. places upon the county attorneys in those counties where such treatment facilities are located. It may therefore be appropriate to seek a legislative solution or clarification.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General