



STATE OF KANSAS

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August 14, 1989

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ATTORNEY GENERAL OPINION NO. 89- 102

Jeff Elder
Pottawatomie County Attorney
Courthouse, P.O. Box 219
Westmoreland, Kansas 66549

Re: Public Health -- Controlled Substances;
Forfeitures; Procedure -- Forfeitures of Property;
Procedure

Counties and County Officers -- County Attorney --
Duties

Counties and County Officers -- County Counselor --
Duties

Synopsis: Forfeiture procedures pursuant to K.S.A. 1988 Supp.
65-4171 et seq. are in the nature of a civil
action and, therefore, if a county hires a county
counselor, the county attorney no longer has the
sole duty to represent the county in such an
action. Cited herein: K.S.A. 19-247; 19-702;
19-703; 19-726; 22-2101; 22-2525; 60-101; K.S.A.
1988 Supp. 65-4135; 65-4136; 65-4171.

* * *

Dear Mr. Elder:

As Pottawatomie County Attorney you request our opinion
concerning whether a county attorney or a county counselor has
the duty to assist the county with forfeiture procedures
brought pursuant to K.S.A. 1988 Supp. 65-4171 et seq.

K.S.A. 19-702 and 19-703 generally delineate the duties of the county attorney. In addition to these provisions, the legislature may statutorily mandate or authorize the county attorney to represent the county in specific legal capacities and situations. See Attorney General Opinions No. 87-179 and 88-28. However, K.S.A. 19-726 and 19-247 permit the county to hire additional or outside counsel as deemed appropriate or necessary. See Attorney General Opinions No. 78-127, 78-265, 80-121, and 86-174. As discussed in opinion no. 80-121, 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 issue becomes whether a judicial forfeiture procedure under K.S.A. 1988 Supp. 65-4171 et seq. is civil or criminal in nature.

It is our opinion that these procedures more closely resemble a civil action. This conclusion is based upon the differences between civil and criminal proceedings. See 22 C.J.S. Criminal Law, § 240 (1961). K.S.A. 60-101 et seq. generally govern civil procedures while K.S.A. 22-2101 et seq. and 22-2525 et seq. establish criminal procedures. Criminal proceedings are characterized by criminal charges made against a defendant, arrest procedures, the availability of bail or bond, an increased burden of proof that the state must meet, the right to a jury trial, and the possible imposition of felony or misdemeanor convictions. In contrast, though forfeiture statutes in general are penal in nature (see Christiansen v. Virginia Drilling Co., 170 Kan. 355 (1951)), a forfeiture proceeding under K.S.A. 1988 Supp. 65-4171 et seq. does not impose criminal sanctions or result in a criminal conviction. Rather, if possession of the property is prohibited or if the property is used in the commission of a prohibited act, K.S.A. 1988 Supp. 65-4135 and K.S.A. 1988 Supp. 65-4156 allow law enforcement agencies to seize the property and K.S.A. 1988 Supp. 65-4171 et seq. permits the property to be permanently taken from the owner pursuant to court action.

K.S.A. 1988 Supp. 65-4171(a) provides:

"(a) The county or district attorney within whose jurisdiction there is property which is sought to be forfeited pursuant to K.S.A. 65-4135 or 65-4156, and amendments thereto, or such attorney as employed by the law enforcement agency and approved by the county or district

attorney seeking forfeiture of such property, shall promptly proceed against the property by filing in the district court having jurisdiction of such property a petition for an order to show cause why the court should not order forfeiture of such property." (Emphasis added).

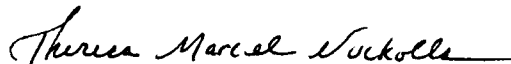
Thus, the statute clearly contemplates some ability to divest the county or district attorney of the duty to proceed against the property. If the county counselor is employed by the county, the county counselor may represent the county in forfeiture proceedings.

It is our opinion that forfeiture procedures pursuant to K.S.A. 1988 Supp. 65-4171 et seq. are in the nature of a civil action and, therefore, if a county hires a county counselor, the county attorney no longer has the sole duty to represent the county in such an action.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas
Enclosure