



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

May 18, 1992

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 92- 67

R. Douglas Sebelius
Norton County Attorney
P.O. Box 10
Norton, Kansas 67654

Daniel C. Walter
Norton County Counselor
120 S. State St.
P.O. Box 364
Norton, Kansas 67654-0364

Re: Counties and County Officers -- County Attorney --
Duties; Juvenile Matters

Counties and County Officers -- County
Commissioners; County Counselor -- Duties; Juvenile
Matters

Synopsis: In counties that have hired a county counselor pursuant to K.S.A. 19-247, matters which are deemed to be criminal or quasi-criminal in nature, such as juvenile offender proceedings, are the responsibility of the county attorney; matters which are deemed to be civil in nature, such as child in need of care, forfeiture, determination of habitual traffic offenders, mental illness, alcoholism or intoxication, and habeus corpus matters, are the responsibility of the county counselor. However, due to the fact that the county counselor is usually appointed with the idea that the individual will only advise the board of county commissioners and handle contract issues,

and that issues requiring trial work shall be the duty of the county attorney, it is reasonable that some counties which have a county attorney and a county counselor may wish to enter into a contract wherein the county attorney would handle all duties except advising the board of county commissioners and contractual matters. Cited herein: K.S.A. 8-285; 8-286; 19-247; 19-248; 19-702; 19-704(a); 19-716; 21-3105; 38-1501; 38-1510; 38-1554; 38-1561; 38-1601; K.S.A. 1991 Supp. 38-1602; K.S.A. 60-1507(b); K.S.A. 1991 Supp. 65-4171.

* * *

Dear Mr. Sebelius and Mr. Walter:

As Norton county attorney and Norton county counselor, respectively, you have requested our opinion regarding the duties that fall within the jurisdiction of the county counselor versus the county attorney. Specifically, you request which attorney has the duty of handling (1) child in need of care cases; (2) juvenile offender cases; (3) forfeiture cases; (4) habitual traffic violator cases; (5) mental illness proceedings; (6) alcoholism proceedings; and (7) habeus corpus matters.

K.S.A. 19-247 establishes that the county counselor shall have the duty to:

"(a) When requested by the board of county commissioners or when necessary, attend the meetings of such board;

"(b) give advice upon all legal questions that arise and assist the board on all legal matters referred to the county counselor;

"(c) commence, prosecute or defend, as the case requires, all civil suits or actions in which the county is interested and represent the county generally in matters of civil law;

"(d) draw all contracts and other papers required by the board of county commissioners and furnish to the board, when requested by it, opinions in writing upon legal matters pending before the board;

"(e) if applicable, perform the duties provided by K.S.A. 19-716 and amendments thereto; and

"(f) perform all the duties in civil matters that have previously been required by law of the county attorney of the county." (Emphasis added).

The duties of the county attorney include:

"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." K.S.A. 19-702

"Except as otherwise provided in this section, the county attorney shall without fee or reward, give opinions and advice to the board of county commissioners and other civil officers of the county, when requested by such board of officers, upon all matters in which the county is interested, or relating to the duties of such board or officers, in which the state or county may have an interest." K.S.A. 19-704(a).

"As discussed in Attorney General 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." Attorney General Opinion No. 89-102. K.S.A. 19-248 states that the effect of the appointment of a county counselor is such that "the county attorney of such counties shall not be required to represent said counties in any civil actions or business" (with an exception which is not applicable to Norton county).

"Whether an offense defined by statute is civil or criminal is primarily a matter of statutory construction. Although not alone decisive, the degree of severity of the penalty is important in determining whether an offense defined by statute is civil or criminal. Thus, a civil infraction is generally not a crime where it is not punishable by imprisonment or by a penal fine." C.J.S. Criminal Law § 8 (1989).

The introductory statute to the Kansas code for care of children specifically states that "[a]ll proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state. Proceedings pursuant to this code shall be civil in nature." K.S.A. 38-1501. Also, K.S.A. 38-1554 establishes that the "rules of evidence of the code of civil procedure shall apply" to these proceedings. Furthermore, the dispositional procedure statute, K.S.A. 38-1561, states that any order is given so as to be in the best interests of the child. In such matters, although the child may be removed from his or her home or may be a witness in court, such actions are not deemed to rise to the level of a criminal proceeding.

The argument has been raised that since K.S.A. 38-1501 indicates that these proceedings are taken in the exercise of the parental power of the state, the county counselor would not be required to handle such matters, in that his or her duty is to act on behalf of the county. Further, K.S.A. 38-1510 charges the county attorney with the duty to prepare and file child in need of care petitions, plus appear at the hearing and assist in the adjudication. Some argue that this statute means only the county attorney and not the county counselor has such a duty. However, it is our opinion that the language in K.S.A. 19-247(f) which requires the county counselor to perform all civil matters that were previously required of the county attorney means that upon the appointment of a county counselor, the counselor steps into the shoes of the county attorney in regard to civil matters. Further, we believe the county has an interest in such matters as well as the state.

Therefore, although the child in need of care cases are originally within the jurisdiction of the county attorney and are brought on behalf of the state and others, once a county counselor is appointed those civil matters that have been previously required by law of the county attorney become the duty of the county counselor. In our opinion, the county counselor has the responsibility of handling the child in need of care cases since they are deemed to be civil matters.

Next, you ask who is responsible for proceedings under the Kansas juvenile offenders code, K.S.A. 38-1601 et seq. The introductory statute in this code states:

"In no case shall any order, judgment or decree of the district court, in any

proceedings under the provisions of this code, be deemed or held to import a criminal act on the part of any juvenile; but 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." K.S.A. 38-1601.

The United States Supreme Court in In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), and the Kansas Supreme Court in State v. Muhammad, 237 Kan. 850 (1985) and In re Mary P, 237 Kan. 456 (1985) have held that juvenile offender proceedings, while being quasi-criminal in nature, cannot be deemed to be a true criminal proceeding in regard to invoking constitutional rights and privileges. The rationale for calling juvenile proceedings quasi-criminal is based on the fact that juveniles who face incarceration have the constitutional right to counsel, notice of charges, confrontation and cross-examination of witnesses, and the privilege against self-incrimination. In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967). Furthermore, K.S.A. 38-1654 "imposes upon juvenile offender proceedings the same burden of proof as in criminal cases - proof beyond a reasonable doubt," Findlay v. State, 235 Kan. 462, 466 (1984), and K.S.A. 38-1636 authorizes a motion to a court to allow for the prosecution of a juvenile offender as an adult.

The Kansas legislature in 1982 split the juvenile code into the Kansas code for care of children, K.S.A. 38-1501 et seq. and the Kansas juvenile offenders code, K.S.A. 38-1601 et seq. The juvenile offenders code "now deals only with those minors between the ages of ten and eighteen who commit acts that would be crimes if they were committed by adults, or who violate the laws governing purchase and possession of alcohol and beer." K.S.A. 38-1602.

Therefore, based on the fact that juvenile offender proceedings are quasi-criminal and are not strictly civil in nature we opine that such matters are the responsibility of the county attorney.

Your third area of dispute concerns the responsibility of handling forfeiture matters. We reaffirm the opinion expressed in Attorney General Opinion No. 89-102, which stated that "forfeiture procedures pursuant to K.S.A. 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."

Your fourth question involves the issue of habitual traffic violator cases. K.S.A. 8-286 states that if a person is deemed to be a habitual violator as set out in K.S.A. 8-285, "the district or county attorney forthwith shall commence prosecution of such person. . . ." The Kansas courts have held:

"that a proceeding under K.S.A. 8-286 is a civil proceeding since the statute does not create a new crime but rather provides for a determination of a driver's status. State v. Boos, 232 Kan. 864, 659 P.2d 224, cert. denied 462 U.S. 1136 (1983). In Boos the court found that, although a K.S.A. 8-286 proceeding may result in the revocation of a person's privilege to drive, such revocation does not make the habitual violator status a crime as defined in K.S.A. 1987 Supp. 21-3105. The court noted that no criminal sanctions are imposed upon this status determination." State v. Whitehurst, 13 Kan.App.2d 411, 414 (1988); State v. Hines, 14 Kan.App.2d 100 (1989); and State v. Walden, 15 Kan.App. 139 (1990).

Therefore, based on case law which states that habitual traffic violator cases are deemed to be civil proceedings, such are the responsibility of the county counselor.

Next, you inquire whose responsibility it is to handle matters involving the treatment of people who suffer from mental illness or alcoholism and intoxication. "Proceedings for the hospitalization and treatment of persons for alcoholism and intoxication under K.S.A. 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." Attorney General Opinion No. 78-265. Therefore, such action would be the responsibility of the county counselor.

Finally, you request our opinion regarding habeus corpus matters. Proceedings regarding a writ of habeus corpus matters are found at K.S.A. 60-1501 et seq. The remedy of such an action is that "the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence

said prisoner or grant a new trial or correct the sentence as may appear appropriate." K.S.A. 60-1507(b). Since the proceeding and the remedy are civil in nature, such matters fall within the jurisdiction of the county counselor.

In conclusion, matters which are deemed to be criminal or quasi-criminal in nature, such as juvenile offender proceedings, are the responsibility of the county attorney. Matters which are deemed to be civil in nature, such as child in need of care, forfeiture, habitual traffic offenders, mental illness, alcoholism or intoxication, and habeus corpus matters, are the responsibility of the county counselor. However, due to the fact that the county counselor is usually appointed with the idea that the individual will only advise the board of county commissioners and handle contract issues and that issues requiring trial work shall be the duty of the county attorney, it is reasonable that some counties which have a county attorney and a county counselor may wish to enter into a contract wherein the county attorney would handle all duties except advising the board of county commissioners and handling contractual matters.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mary Jane Stattelmann
Assistant Attorney General

RTS:JLM:MJS:bas