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December 13, 2018

ATTORNEY GENERAL OPINION NO. 2018- 18

Laura E. Johnson-McNish  
Marshall County Attorney  
Marshall County Courthouse  
1201 Broadway  
Marysville, KS 66508

Re: Counties and County Officers – County Commissioners – Duties of  
County Counselor

Counties and County Officers – County Attorney – Duties

Minors – Revised Kansas Code for Care of Children – Duties of County or  
District Attorney

Synopsis: When a board of county commissioners appoints a county counselor, all  
duties in civil matters, otherwise required by law of the county attorney, pass  
to the county counselor, including the filing of child in need of care petitions.  
Cited herein: K.S.A. 19-247, 19-248, 19-702; K.S.A. 2018 Supp. 38-2214.

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Dear Ms. Johnson-McNish:

As the County Attorney for Marshall County, you ask our opinion on a matter related to the duties of the county attorney in a county where the board of county commissioners (BOCC) has appointed a county counselor. Specifically, you ask whether K.S.A. 2018 Supp. 38-2214 supersedes Attorney General Opinion No. 92-67, which concluded it is the duty of the county counselor to prepare and file a petition alleging a child is a child in need of care (CINC) in counties where a county counselor has been appointed by the BOCC. For the reasons discussed below, we do not believe K.S.A. 2018 Supp. 38-2214 supersedes Attorney General Opinion No. 92-67, and we affirm the portion of that opinion

concluding “the county counselor has the responsibility of handling the child in need of care cases” in a county where the BOCC has appointed a county counselor.

The duties of the county attorney are defined by statute: “[I]t 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.”<sup>1</sup> Among the civil proceedings for which the county attorney is responsible are CINC cases.<sup>2</sup>

Likewise, the duties of the county counselor are defined by statute: “The county counselor shall . . . perform all the duties in civil matters that have previously been required by law of the county attorney.”<sup>3</sup>

Attorney General Opinion No. 80-121 concluded that when a BOCC appoints a county counselor, the county attorney’s duties in civil matters pass to the county counselor “[u]pon the appointment of a county counselor.”<sup>4</sup> Thus, because the responsibility for preparing and filing a CINC petition falls on the county attorney by law, in Attorney General Opinion No. 92-67, Attorney General Robert T. Stephan concluded:

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.<sup>5</sup>

In your request for an opinion, you inquire whether K.S.A. 2018 Supp. 38-2214, which was adopted in 2006, supersedes Attorney General Stephan’s conclusion made in 1992. While Attorney General Opinions are advisory only, we acknowledge the Legislature may intentionally supersede the conclusion reached in an attorney general opinion.<sup>6</sup> Nevertheless, we conclude that did not occur here.

In determining legislative intent, we rely on a well-known canon of statutory construction:

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings. When a statute is plain and

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<sup>1</sup> K.S.A. 19-702(a).

<sup>2</sup> K.S.A. 2018 Supp. 38-2214.

<sup>3</sup> K.S.A. 2018 Supp. 19-247(f).

<sup>4</sup> Attorney General Opinion No. 1980-121 (page 3); see K.S.A. 19-248.

<sup>5</sup> Attorney General Opinion No. 1992-67 (page 4).

<sup>6</sup> See Attorney General Opinion No. 1983-80 (Legislature amended home rule statute, superseding Attorney General Opinion No. 1982-87).

unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.<sup>7</sup>

Our inquiry thus begins with the text of the statute. Attorney General Opinion No. 92-67 acknowledged that 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.”<sup>8</sup> Specifically, the statute read:

It shall be the duty of the county or district attorney to prepare and file the petition alleging a child to be a child in need of care and to appear at the hearing on the petition and to present evidence that will aid the court in making an appropriate adjudication at the conclusion of the hearing. The county or district attorney shall also have the other duties required by this code.<sup>9</sup>

K.S.A. 38-1510 was repealed when the Kansas Revised Code for Care of Children was adopted in 2006.<sup>10</sup> Prior to its repeal, K.S.A. 38-1510 was identical to the version analyzed by Attorney General Stephan in 1992.<sup>11</sup>

The text of the equivalent statute adopted in K.S.A. 2018 Supp. 38-2214 has only minor differences, which are noted by underlining:

It shall be the duty of the county or district attorney or the county or district attorney's designee to prepare and file the petition alleging a child to be a child in need of care, and to appear at the hearing on the petition and to present evidence as necessary, at all stages of the proceedings, that will aid the court in making appropriate decisions. The county or district attorney or the county or district attorney's designee shall also have the other duties required by this code.<sup>12</sup>

In all three versions of the statute, the duty to prepare and file the petition alleging a child to be in need of care belongs to the county or district attorney. K.S.A. 19-247(f) makes clear that this civil duty passes to the county counselor upon the appointment of a county counselor. We find no change made to K.S.A. 2018 Supp. 38-2214 that indicates the Legislature intended to supersede the conclusion reached in Attorney General Opinion 92-67.

We would be remiss, however, not to note the practical considerations raised in the concluding paragraph of Attorney General Opinion 92-67:

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<sup>7</sup> *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918 (2013), quoting *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 564-65 (2012) (internal citations omitted).

<sup>8</sup> Attorney General Opinion No. 1992-67 (page 4).

<sup>9</sup> K.S.A. 38-1510 (Ensley 1986).

<sup>10</sup> L. 2006, Ch. 200.

<sup>11</sup> K.S.A. 38-1510 (Furse 2000).

<sup>12</sup> K.S.A. 2018 Supp. 38-2214.

[D]ue 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.<sup>13</sup>

In conclusion, because K.S.A. 19-247(f) assigns “the duties in civil matters that have previously been required by law of the county attorney,” we affirm the portion of Attorney General Opinion No. 92-67 concluding “the county counselor has the responsibility of handling the child in need of care cases” in a county where the BOCC has appointed a county counselor.

Sincerely,

/s/Derek Schmidt

Derek Schmidt  
Kansas Attorney General

/s/Craig Paschang

Craig Paschang  
Assistant Attorney General

DS:AA:CP:sb

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<sup>13</sup> Attorney General Opinion No. 1992-67 (page 7).