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PROSECUTING ATTORNEY—DUTY TO REPRESENT COUNTY OFFICERS — §309.09 R.C. — PERSON CARING FOR CHILD UNDER CONTRACT WITH COUNTY CHILD WELFARE BOARD NOT ENTITLED TO BE REPRESENTED BY PROSECUTOR—§5153.16 R.C.

SYLLABUS:

1. Section 309.09, Revised Code, imposes no obligation on the prosecuting attorney to defend one who has a contract with a county child welfare board for the custody of children, pursuant to Section 5153.16, Revised Code, in an action for damages for a tort alleged to have been committed by him.

2. Section 309.09, Revised Code, defining the duties of the prosecuting attorney, does not confer on the county child welfare board power to order such prosecuting attorney to defend one with whom such board has made a contract for the custody of a child, in an action brought against such custodian for an alleged tort against such child or against its parent.

3. Under the provision of Section 309.09, Revised Code, the prosecuting attorney is required to act as legal counsel for the county child welfare board.

Columbus, Ohio, March 6, 1959

Hon. Robert L. Marrs, Prosecuting Attorney
Butler County, Hamilton, Ohio

Dear Sir :

I have before me your request for my opinion, reading as follows :

“The undersigned would appreciate an expression of your opinion on the following subject matter :

“FIRST: The Butler County Commissioners, many years ago, established and created the Butler County Welfare Department and have appointed a Director to assume the duties of managing said department.

“In the course of its operation, the Butler County Welfare Department caused to be placed in the home of a private individual, a child whose custody had been given on a temporary basis by the Juvenile Court to said department and whose custody was changed to a permanent basis at a still later date. During the period of temporary custody the child was placed by the Welfare Department in a private home with the purpose in mind that if the conditions were satisfactory to all parties concerned and upon receipt of permanent custody, that adoption proceedings would be in order. These proceedings went along as indicated and were contested at various stages by the natural mother of the child, who was represented in court, but in each succeeding hearing of the case the court ruled against her interest and in favor of the Department of Welfare. Our problem now arises since this mother has now filed civil action for alienation of affections against the people with whom the child was placed by the Department of Welfare during the period of temporary custody and later received the custody after the permanent award. The Department of Welfare through its Managing Director now insists that the Office of Prosecuting Attorney be charged with the responsibility of defending in the alienation of affections suit, the persons with whom the child was placed. Further be advised that the Department of Welfare is *not* a party to the suit nor is the Managing Director.

“SECOND: With regard to the above stated facts, further be advised that there were two children involved. Permanent custody was awarded the Department of Welfare in one instance and temporary custody was continued in the second instance. A second suit was instituted against a boarding home for assault and battery and negligence in caring for the child placed with it by the Department of Welfare during the period of temporary custody. This boarding home receives \$10.00 per week per child

while said child lives in said home. The Welfare Department has no connection with the home as to its operation other than visitation. In this suit, as in the first suit, the Butler County Welfare Department is not a party nor is the Managing Director a party to the suit.

“The Office of Prosecuting Attorney has been requested to defend the boarding home in this matter.

“The undersigned feels that the Office of Prosecuting Attorney is under no obligation, either legal or moral, to defend the suits as indicated above, whereas the Managing Director of Welfare insists that these are matters of concern to the Welfare Department.

“Inquiry is hereby being made relative to the function of the Office of Prosecuting Attorney with regard to the defense of the litigants in the above stated facts and actually further query is made as to the obligation of the Prosecuting Attorney to the Department of Welfare itself since it is not operated as a board but a sub-function of the County Commissioners.”

Reduced to simple terms it appears to me that the question you present is whether it is the duty of the prosecuting attorney to defend a person with whom a county welfare department has made a contract for the care of a child which had been placed under the custody of the county welfare department, in actions for damages for tort brought against such custodian.

Specifically, you present two circumstances which form the bases of such actions:

- (a) an action by the mother of the child against the party with whom the child had been placed for alienation of the child's affections:
- (b) an action by the mother of a child so placed against the custodian for assault and battery and negligence in caring for such child.

It may be said at the outset that the duties of the prosecuting attorney are those which are imposed on him by the statutes. These duties so far as could possibly be involved in your questions are set forth in Section 309.09, Revised Code, which reads in part as follows:

“The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and board, including all tax supported public libraries except those organized as a part of a city school district or of a municipal corporation, and any of them may require written opinions or instructions from him in matters connected with their

official duties. He shall prosecute and defend all *suits and actions which any such officer or board directs or to which it is a party*, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code." (Emphasis added.)

The only possible ambiguity in the words underscored would seem to be connected with the word "directed." The meaning of the sentence obviously intended would be clarified either by adding after "directed" the words "to be brought," or better still by reversing the order saying: "He shall prosecute and defend all suits and actions to which any such board or officer is a party, or which it directs."

Section 5153.16, Revised Code, outlines the general powers and duties of the county child welfare board. Among other provisions we find the following :

"The county child welfare board shall, subject to the rules, regulations, and standards of the division of social administration, have the following powers and duties on behalf of children in the county deemed by the board or department to be in need of public care or protective services: * * *

"(D) To provide care of all kinds which the board deems for the best interests of any child the board finds in need of public care or service; provided that such care shall be provided by the board by its own means or through other available resources, in such child's own home, in the home of a relative, or in a certified foster home. * * *"

Section 5153.20, Revised Code, provides that the cost of care furnished by the county child welfare board is to be borne as follows :

"The cost of care furnished by the county child welfare board, by the board of county commissioners, or by the county department of welfare, to any child having a legal residence in another county, shall be charged to the county of legal residence. * * *"

We have, therefore, a situation where children who were in the custody of a child welfare board were by contract placed in homes, pursuant to contract with the proprietors of such homes, to be cared for at the expense of the county. It appears from your letter that the proprietors of these homes were charged in a suit for damages by the natural mother of the children with the acts above mentioned. These alleged wrongful acts were torts, the essential character of which is that they do harm to the rights of another, arising either by statute or under the common law. 29 Ohio

Jurisprudence, 219. It is stated in your letter that neither the department of welfare nor its managing director are parties to these suits. On the face of it I find it hard to understand how a question could even be raised as to the duty of the prosecuting attorney to defend a civil suit for damages brought against the individuals who are under contract with the county welfare department to care for these children. The householder in question is not a public officer; he is not an employee of the county welfare department; *he is plainly an independent contractor.*

Section 309.09, Revised Code, in its general scope shows very clearly that the prosecuting attorney, being a public officer is the legal advisor and defender of public officers. I would regard this duty, even if the suit were against a public officer, as being confined to a defense of his action in his official capacity, and not to individual torts which he might commit.

I would here apply the test laid down in Opinion No. 4567, Opinions of Attorney General for 1954, p. 570, the syllabus of which reads as follows:

“In an action brought against a county coroner for damages for ordering an alleged illegal autopsy it is the duty of the prosecuting attorney to examine carefully all the facts and circumstances on which the action is based and to determine whether such facts and circumstances indicate a well intentioned attempt on the part of the defendant to perform duties attending his official position. If the prosecuting attorney, following such evaluation, concludes that there was such a well intentioned attempt to perform an official duty by the defendant he is then authorized to defend such action.”

But the persons whom the prosecuting attorney is here asked to defend are *not public officers* and the offenses for which damages are claimed are certainly not for acts done in the performance of any official duty whatsoever.

It is stated in said Section 309.09, Revised Code:

“He shall prosecute and defend all suits and *actions which* any such officer or board *directs or to which* it is a party.”
(Emphasis added)

Giving the plain and obvious construction to the quoted sentence, it is plainly the duty of the prosecutor to prosecute or defend any action *to which* the county officers named *are parties*, and it is likewise his duty to prosecute any action *which* such officer or board may lawfully initiate

or direct. It is conceivable that these words could be so construed as to make it his duty, at the direction of a county board or officer, to defend any person or corporation with whom the board or the county officers may have a contract, in *an action for damages for torts committed by them* or their employees? To arrive at this conclusion it would be necessary to rely on the word "which" as referring not only to suits and actions but also a defense of such non-official person *whenever directed* by "such officer or board."

This, it appears to me, is the height of absurdity. If that position is tenable, then when a board of county commissioners has made a contract with some person for the construction of a county road or public building, and that contractor, by his own negligence or that of his employees, injures some person and a suit for damages against the contractor is instituted, the prosecuting attorney by the *mere fiat or order* of the county commissioners must undertake the defense of such contractor in such civil action growing out of his tort.

Turning to Webster's Dictionary, we find the pronoun "which" defined as "a simple relative, introducing an added qualification, sometimes a restriction of its *antecedent*; as, a letter which he wrote; a subject of which he knew little."

Note that in the sentence which I have quoted from Section 309.09, *supra*, the word "which" is used twice; the second time it clearly refers to an action in which the board of county commissioners or one of the other officers named is a party. Is it possible to give a different meaning or scope to the first "which"? They are coupled by the word "or", and plainly both refer to the antecedent words "suits and actions." The definition which I have given of the word "which" plainly indicates that it has reference to an antecedent word or phrase, and it seems to me perfectly plain that in both cases where the word is used, "which" refers to "suits and actions," and not to the arbitrary imposition on the prosecutor, by the director of child welfare of a duty to defend an action which the statute itself does not directly impose upon him.

In your letter you make a final request for an opinion on the question as to the obligation of the prosecuting attorney to act as legal counsel for the county department of welfare, saying that "it is not operated as a board, but a sub-function of the county commissioners."

The establishment of a department of child welfare and the appointment by the county commissioners of a child welfare board are clearly set

forth in Chapter 5153., Revised Code, particularly Sections 5153.07 and 5153.08.

Section 5153.15, Revised Code, contains the following provision:

“The powers and duties enumerated in sections 5153.16 to 5153.19, inclusive, of the Revised Code, with respect to the care of children, needing or likely to need public care or services, shall be vested in a single agency of county government, namely, a county department of welfare or a county child welfare board.”

These provisions certainly make members of such board officers of the county, and in my opinion, bring them within the purview of Section 309.09, Revised Code, and make the prosecuting attorney their legal advisor and representative.

Accordingly, in specific answer to the questions which you have submitted, it is my opinion and your are advised:

1. Section 309.09, Revised Cod, imposes no obligation on the prosecuting attorney to defend one who has a contract with a county child welfare board for the custody of children, pursuant to Section 5153.16, Revised Code, in an action for damages for a tort alleged to have been committed by him.

2. Section 309.09, Revised Code, defining the duties of the prosecuting attorney, does not confer on the county child welfare board power to order such prosecuting attorney to defend one with whom such board has made a contract for the custody of a child, in an action brought against such custodian for an alleged tort against such child or against its parent.

3. Under the provision of Section 309.09 Revised Code, the prosecuting attorney is required to act as legal counsel for the county child welfare board.

Respectfully,
MARK McELROY
Attorney General