OPINION NO. 88-094

Syllabus:

1. Where a county department of human services, as the child support enforcement agency for the county, has entered into an agreement with the county prosecuting attorney for the provision of legal services, assistant prosecuting attorneys who perform legal services for the child support enforcement agency are "employees," for purposes of R.C. Chapter 2744, and are thereby entitled to the defenses, immunities and protections granted employees by that chapter.

2. Where the county prosecuting attorney represents a party in a child support enforcement action, such party is subject to the statutory scheme governing the taxation and collection of costs by the clerk of courts and the provisions of R. Civ. P. 54(D) concerning the allowance of costs by the court, in the absence of any federal or state law establishing an exemption therefrom.

3. Whether a county prosecuting attorney must present a deposit for costs upon the filing of a child support enforcement action depends upon whether the court of common pleas in which the action is filed has adopted a local rule under R.C. 2323.31 requiring such a deposit.

4. An order for the payment of allmony under R.C. 3105.18, including an order for the payment of temporary allmony, is a "support order," as defined in R.C. 2301.34(B), and, pursuant to R.C. 2301.36, payments made pursuant to such an order are to be made payable to the child support enforcement agency as trustee for the person entitled to receive such payments.

To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1988

I have before me your opinion request concerning several aspects of the operation of the newly-created child support enforcement agencies. You specifically ask:

1. Are assistant prosecutors who handle cases for individuals on public assistance and not on public assistance under the child support program covered by governmental immunity, or do they require malpractice insurance?
2. Is the Greene County Prosecutor exempt, as a governmental agency, from being assessed Court costs on child support matters relating to cases being handled for the Child Support Enforcement Agency? (Funds to pay these assessed costs are budgeted to the Prosecutor from the county general fund.)
3. Are alimony only orders and temporary alimony orders required to be paid through the collections unit of the Child Support Enforcement Agency, or can such order be made payable through a private attorney's office?

Pursuant to Sub. H.B. 231, 117th Gen. A. (1987) (eff., in part, Oct. 5, 1987), a new system of child support enforcement has been established within the state. R.C. 2301.35 provides for each board of county commissioners to designate and contract with the county department of human services, the office of the prosecuting attorney, a bureau within the court of common pleas, or a separate agency under the direct control of the board of county commissioners, as the child support enforcement agency for the county. Pursuant to R.C. 2301.35(C), each such agency "shall be responsible for the collection of payments due under support orders, and shall perform all administrative duties related to the collection of payments due under any support order." Concerning the role of the county prosecuting attorney in the scheme for child support enforcement, R.C. 2301.35(F) requires each child support enforcement agency to enter into written agreements with, not only the prosecuting attorney, but also the courts and law enforcement officials; such agreements are to "establish cooperative working arrangements and specify areas of responsibility for the enforcement of child support among the agency, courts, and officials."

Your first question concerns the applicability of R.C. Chapter 2744 to assistant prosecuting attorneys who perform legal services with respect to child support enforcement actions for individuals who receive public assistance or who do not receive such assistance. In answering this question, I will assume that your concern is whether the assistant prosecuting attorneys themselves are entitled to the defenses and immunities provided for employees under R.C. Chapter 2744 in rendering legal services to the child support enforcement agency.

Specifically concerning the defenses and immunities of employees of political subdivisons, R.C. 2744.03 states in pertinent part:

> (A) ***In a civil action brought against*** a political subdivision or ***an employee of a political subdivision*** to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, ***the following defenses or immunities may be asserted to establish nonliability:***
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> ....
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> (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division, the employee is immune from liability unless one of the following applies:
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> (a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;
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> (b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
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> (c) Liability is expressly imposed upon the employee by a section of the Revised Code.

> (7) The political subdivision, and ***an employee who is a county prosecuting attorney***, city director of law, village solicitor, or similar chief legal officer of a political subdivision, ***an assistant of any such person***, or a judge of a court of this state, is entitled to any defense or immunity available at common law or established by the Revised Code. (Emphasis added.)

The defense and indemnification of employees is provided for in R.C. 2744.07 which states:

> (A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities....
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> (2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities.
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> (B)(1) A political subdivision may enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function.
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> ....
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> (C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, the employee may file, in the court of common pleas of the county in which the political subdivision is located, an action seeking a determination as to the appropriateness of the refusal of the political subdivision to provide him with a defense under that division.

Thus, in order for an assistant county prosecuting attorney who provides legal services under the county's child support enforcement program to be entitled to the protections of R.C. 2744.03(A)(6) and (7) and R.C. 2744.07, he must qualify as an employee, as that term is used in R.C. Chapter 2744.

The term "employee" is defined in R.C. 2744.01, in part, as follows:

> (B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, *who is authorized to act and is acting within the scope of his employment for a political subdivision.* "Employee" does not include an independent contractor. "Employee" includes any elected or appointed official of a political subdivision.... (Emphasis added.)

In order for an assistant county prosecutor who provides legal services in connection with the county's child support enforcement program to be considered an employee of the county, for purposes of R.C. Chapter 2744, he must, therefore, be considered "an officer, agent, employee, or servant,...who is authorized to act and is acting within the scope of his employment for a political subdivision" with respect to the child support enforcement services he performs.

The hiring of assistant county prosecutors is provided for generally in R.C. 309.06 which, in part, empowers the prosecuting attorney to "appoint such

assistants...as are necessary for the proper performance of the duties of his office." Since the county prosecuting attorney is a county officer whose duties are prescribed by statute, *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940), his authority to hire assistants under R.C. 309.06 is limited to hiring persons as are necessary to assist him in the performance of his duties as county prosecuting attorney. Thus, it is necessary to determine whether the child support enforcement activities which the assistant prosecuting attorneys are hired to perform are considered part of the prosecutor's duties for the county. If so, it follows that the assistants may be authorized to perform such activities on behalf of the county for purposes of R.C. Chapter 2744. *See* 1971 Op. Att'y Gen. No. 71-050 at 2-172 ("it has long been the accepted opinion in this state that an assistant is, for all practical purposes, the alter ego of the prosecuting attorney and is authorized to act in his place in almost all matters").

By way of background, your opinion request states that in Greene County the county department of human services is the child support enforcement agency for the county. Since each child support enforcement agency is designated by the board of county commissioners in that county to act as the child support enforcement agency for that county, R.C. 2301.35(A), it appears that, for purposes of R.C. Chapter 2744, where the county commissioners have designated the county department of human services to act as the child support enforcement agency for the county, such agency may be characterized as a county agency. *Cf.* 1987 Op. Att'y Gen. No. 87-024 (syllabus, paragraph two) ("[w]hen a county, township, or municipal corporation designates a community improvement corporation as its agency pursuant to R.C. 1724.10, both the corporation and the members of the governing board of the corporation are, for purposes of R.C. Chapter 2744., 'employees' of the political subdivision that so designated the corporation. Members of the corporation who do not serve on the governing board are 'employees' of the political subdivision for purposes of R.C. Chapter 2744. if, pursuant to the organization of the corporation and agreement under R.C. 1724.10, they perform functions on behalf of the political subdivision").

Once a child support enforcement agency has been established, R.C. 2301.35 imposes certain duties upon the agency. Concerning the relationship between the agency and the county prosecuting attorney with respect to child support enforcement activities, R.C. 2301.35(F) states:

> *Each child support enforcement agency* designated under this section *shall enter into written agreements with* courts, *the prosecuting attorney*, and law enforcement officials that establish cooperative working arrangements and specify areas of responsibility for the enforcement of child support among the agency, courts, and officials. The agreements shall provide for the reimbursement of the courts and law enforcement officials for the responsibilities they assume and actions they undertake pursuant to such agreements. (Emphasis added.)

R.C. 2301.35(F) thus requires each child support enforcement agency to enter into written agreements with courts, law enforcement officials, and, specifically, the county prosecuting attorney. Such agreements are to set forth the areas of responsibility among the agreeing entities and to provide cooperative working arrangements. Since the legislature has established a mechanism whereby each county child support enforcement agency is required to enter into a cooperative agreement for the provision of child support enforcement services with, among others, the county prosecutor, the question arises as to whether the functions performed by the prosecutor in accordance with the terms of such an agreement are performed in his capacity as county prosecutor or otherwise.

The types of actions available to enforce child support obligations are provided for throughout the Revised Code. By statute, no single entity is charged with a duty to bring all such actions. For example, R.C. 2301.38 states in pertinent part:

> (A) Upon receipt of a notice under division (C) of [R.C.

> 2301.37],[1] the obligee may make application to the agency set forth in the notice or, if no agency in the county has been designated to enforce support orders, to the prosecuting attorney to maintain an action on behalf of the obligee to do either of the following:
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> (1) Obtain judgment and execution of the judgment through any available procedure....
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> (2) Obtain an order for either:
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> (a) The withholding of the personal earnings of the obligor under [R.C. 3113.21].
>
> (b) The assignment of the wages of the obligor under [R.C. 1321.33].
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> (B) An action on behalf of the obligee shall be commenced *by the agency or prosecuting attorney as required by division (A) of this section* within twenty days after completion of an application by the obligee. (Emphasis and footnote added.)

Thus, pursuant to R.C. 2301.38, an obligee who has received a notice as provided for in R.C. 2301.37(C) may apply to the agency specified in the notice or, in those instances where a child support enforcement agency has not been designated, to the prosecuting attorney, to obtain judgment and execution as provided in R.C. 2301.38(A)(1) or to obtain an order of the type specified in R.C. 2301.38(A)(2). Pursuant to R.C. 2301.38(B), an action brought under R.C. 2301.38(A) "shall be commenced by the agency or prosecuting attorney *as required by division (A) of this section*" (emphasis added). The above-emphasized language appears to require the entity to whom the obligee applies under R.C. 2301.38(A) to bring the action. I note, however, that, pursuant to R.C. 2301.35(A), where a board of county commissioners failed, by December 31, 1987, to designate and contract with one of the four entities specified in that division as the child support enforcement agency for the county, R.C. 2301.35(A) designated the county department of human services as the child support enforcement agency for the county. Thus, since that date there has been no county in which "no agency in the county has been designated to enforce support orders," for purposes of R.C. 2301.38. Consequently, application will always be made to the child support enforcement agency, rather than to the prosecuting attorney. R.C. 2301.38(B), therefore, imposes upon the child support enforcement agency, not the prosecuting attorney, the obligation to commence the action as authorized by R.C. 2301.38(A). In most instances, however, as appears from your opinion request to be the situation in Greene County, the county prosecuting attorney will serve as attorney for the agency under a cooperative agreement entered into pursuant to R.C. 2301.35(H).

In contrast to the provisions of R.C. 2301.38, R.C. 2301.372 imposes duties directly upon the county prosecuting attorney. R.C. 2301.372 states in pertinent part:

> (A) If the court or the child support enforcement agency fails to comply with the requirements of [R.C. 2301.37 or R.C. 3113.21] and if the rights to support have been assigned to the department of human services under [R.C. 5107.07] or the responsibility for the collection of support has been assumed under Title IV-D of the "Social Security Act," 88 Stat. 2351 (1975), 42 U.S.C.A. 651, as amended,[2] the child

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1 R.C. 2301.37 provides in part for the child support enforcement agency to notify the obligee of child support, in certain circumstances, of the obligor's default, of the obligee's rights and remedies, and that the child support enforcement agency is the agency in the county designated to provide for the enforcement of support orders under Title IV-D of the Social Security Act and R.C. 5101.31.

2 *See generally* 1987 Op. Att'y Gen. No. 87-033 at 2-231 n. 6 (explaining the possible interpretations of the phrase, "responsibility for the collection of support has been assumed under title IV-D," as used in a prior version of R.C. 2301.372 (1985-1986 Ohio Laws, Part III, 4725 (Am. Sub. H.B. 509, eff. Dec. 1, 1986))).

> support enforcement agency shall, unless the office of the prosecuting attorney has been designated as the child support enforcement agency for the county under [R.C. 2301.35], notify the prosecuting attorney of the county in which the obligee resides. If the office of the prosecuting attorney has been designated as the child support enforcement agency, the board of county commissioners of the county shall seek a writ of mandamus under [R.C. Chapter 2731] directing the prosecuting attorney to comply with the requirements of this section and [R.C. 2301.37 or 3113.21]. *The prosecuting attorney shall commence* either or both of the following:
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> (1) Proceedings under [R.C. 3113.21] requesting the issuance of one or more orders under [R.C. 3113.21(D)];
>
> (2) A civil action in the small claims division of the municipal or county court within whose jurisdiction the obligor resides. (Emphasis and footnote added.)

Pursuant to R.C. 2301.372, under the circumstances specified therein, the county prosecuting attorney is under a duty to bring one or both of the actions specified in R.C. 2301.372(A)(1) and (2). Unlike R.C. 2301.38, R.C. 2301.372 does not authorize or require another entity, such as the child support enforcement agency, to initiate such support enforcement actions. *See also* R.C. 3115.22 (under the statutory scheme for reciprocal enforcement of support, the prosecuting attorney of the county in which it appears that the enforcement of a support order could be effected "shall proceed with enforcement and report the results of the proceedings to the court first issuing the order").

In other instances, however, support enforcement actions may be commenced by more than one particular officer or entity. *See, e.g.,* R.C. 2705.031(B) ("[a]ny party who has a legal claim to any support ordered for a child, spouse, or former spouse may initiate a contempt action for failure to pay the support. *In Title IV-D cases, the contempt action also may be initiated by an attorney retained by the party, the prosecuting attorney, or an attorney of the department of human services or the child support enforcement agency*" (emphasis added)); R.C. 3113.21(N) (stating in part: "If an obligor is in default under a support order and has a claim against another person or is a party in an action for any judgment, *the child support enforcement agency or the agency's attorney*, on behalf of the obligor, immediately shall file with the court in which the action is pending a motion to intervene in the action or a creditor's bill" (emphasis added)). These statutes, although merely representative of the various statutory provisions for the enforcement of child support, demonstrate that in certain instances the prosecutor will be performing such activities as expressly required of his office by statute; at other times, however, he may be acting at the request of the child support enforcement agency.

According to your opinion request, the Greene County commissioners have designated the county department of human services to act as the child support enforcement agency for the county. As concluded in 1987 Op. Att'y Gen. No. 87-090 at 2-598: "A county human services department is a county board within the meaning of R.C. 309.09(A)."[3] Your request states further, that the child support enforcement agency has contracted with the prosecuting attorney to provide legal services in child support enforcement matters. Thus, in the situation you present, the county prosecuting attorney is acting in his official capacity as the county prosecuting attorney whether he is performing a child support enforcement function

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3 R.C. 309.09(A) states in pertinent part:

> The prosecuting attorney shall be the legal adviser of the board of county commissioners...and all other county officers and boards...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 [R.C. 305.14].

specifically imposed upon his office or acting pursuant to R.C. 309.09(A) on behalf of the county human services department.

Support for this conclusion is found in the administrative treatment of the cooperative agreements between child support enforcement agencies and county prosecuting attorneys. As noted above, R.C. 2301.35(C) states that each child support enforcement agency is operated under the supervision of the state department of human services which, pursuant to R.C. 2301.35(D), has adopted rules governing "the operation of child support enforcement by child support enforcement agencies." Concerning a child support enforcement agency's entering into cooperative agreements for legal services, [1987-1988 Monthly Record] Ohio Admin. Code 5101:1-29-53 states:

> IV-D cooperative a[g]reements shall be executed with the county prosecuting attorney whenever possible. The agreement must cover legal services for establishing parentage, child support, and medical support in Uniform Reciprocal Support Enforcement Act actions as well as in-county actions. It shall also cover other legal services to the local IV-D program.
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> (B) If legal services are to be provided by a source other than the county prosecutor, the CSEA must follow the provisions of sections 305.14 and 309.09 of the Revised Code. It is suggested the agency seek the assistance of the prosecuting attorney in following this procedure.
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> (C) *The CSEA shall not enter into an agreement with the county prosecuting attorney or his employees as a private attorney during his term of office if he has refused to enter into an agreement as a public official.*
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> (D) When a new prosecuting attorney takes office or a new CSEA director is appointed, cooperative agreements with the prosecutor or private attorneys must be reviewed. The agreements will continue to be in effect until either party changes or terminates the agreement. (Emphasis added.)

Division (C) of rule 5101:1-29-53 thus prohibits a child support enforcement agency from entering into an agreement with the county prosecuting attorney as a private attorney during his term of office if he has refused to enter into such an agreement as a public official. Further, pursuant to division (B) of the rule, where the child support enforcement agency will receive legal services from a source other than the county prosecuting attorney, the agency must follow the procedures for the appointment of legal counsel other than the county prosecuting attorney as provided for by R.C. 305.14[4] and R.C. 309.09. *See generally* 1983 Op. Att'y Gen. No.

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4 R.C. 305.14 states in part:

> (A) The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

In *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 463, 423 N.E.2d 105, 109 (1981), the court discussed the provisions of R.C. 305.14 and R.C. 305.17 as follows:

> R.C. 305.14 contemplates an application by both the prosecuting attorney and the board of county commissioners for appointment of counsel. R.C. 305.17 provides that the board of county commissioners shall fix the compensation of persons appointed or employed pursuant to R.C. 305.14.
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> Under ordinary circumstances, the common pleas court should not authorize the appointment of counsel for any county board or officer, even with respect to an action pending in the

83–078 (syllabus) ("[a] county director of welfare may not employ an attorney to represent the department of welfare in juvenile court proceedings or to perform other legal services on behalf of the department. Pursuant to R.C. 305.14, however, a court of common pleas, upon application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to act on behalf of the county welfare department"). Thus, the administrative treatment of the functions of the county prosecuting attorney with respect to child support enforcement matters contemplates that where the county prosecuting attorney handles such matters, he is doing so in his capacity as county prosecuting attorney.

It appears, therefore, that where a county department of human services, acting as the child support enforcement agency for the county, has entered into a cooperative agreement with the prosecuting attorney for the provision of legal services with respect to child support enforcement matters, the county prosecuting attorney, in rendering such services, is performing duties as required of his office. Since the legal services provided to the child support enforcement agency under the circumstances you describe are performed as part of the official duties of the prosecuting attorney, the prosecutor may hire assistants pursuant to R.C. 309.06, to assist him in the performance of such duties for the county. I must conclude, therefore, that assistant prosecuting attorneys are employees, as defined in R.C. 2744.01(B), and are acting within the scope of their employment for the county when handling child support enforcement actions on behalf of the county prosecuting attorney who has entered into an agreement for the provision of such services with the county department of human services in its capacity as the child support enforcement agency for the county. *See generally* 1985 Op. Att'y Gen. No. 85–035 at 2–123 ("[i]t is clear that the office of prosecuting attorney is a county office. A person employed as an assistant prosecuting attorney is, therefore, a county employee" (citation omitted)).

Your second question asks: "Is the Greene County Prosecutor exempt, as a governmental agency, from being assessed court costs on child support enforcement matters relating to cases being handled for the child support enforcement agency?" Your request notes that funds to pay such costs are budgeted to the prosecutor's office from the county general fund.

Concerning the allowance of costs, R. Civ. P. 54(D) states: "(D) Costs. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing *party* unless the court otherwise directs." (Emphasis added.) According to this rule, costs are awarded by the court to a party to an action. Since the county prosecuting attorney is not a party in a child support enforcement action, but is instead the legal representative of a party, I will assume that your question does not concern whether the court may award costs against the prosecuting attorney while the prosecuting attorney is acting in that capacity. *See generally* 1987 Op. Att'y Gen. No. 87–033 (discussing the various clients which may be represented by the county prosecuting attorney in a child support enforcement action); 1983 Op. Att'y Gen. No. 83–075 (discussing the awarding of costs in actions in which the county or a county officer is a party); note 6, *infra*. With respect to the court's awarding of costs in a child support enforcement action which is being handled by the prosecuting attorney on behalf of a child support enforcement agency, I note that specific provision is made in numerous statutes governing child support enforcement actions for the court's awarding of costs against the obligor. *See, e.g.,* R.C. 3105.21(C); R.C. 3111.13(F); R.C. 3113.04(B); R.C. 3115.22(D). I

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court, unless an application for such appointment is made by both the prosecuting attorney and the board of county commissioners. *Application by the prosecuting attorney ordinarily is necessary because the counsel being appointed will fulfill a duty otherwise imposed by law upon the prosecuting attorney.* Application by the board of county commissioners is necessary because it is that board which not only must fix the compensation to be paid for the person so appointed but also must provide the necessary funds for that purpose. (Emphasis added.)

am, however, aware of no statute or other provision of law that exempts a party represented by the county prosecuting attorney from the payment of costs.

Concerning the taxation and collection of costs by the clerk of courts, the court in *White v. White*, 50 Ohio App. 2d 263, 269, 362 N.E.2d 1013, 1017 n. 1 (Cuyahoga County 1977) stated: "The taxing and collection of costs concerns the obligation of the parties to the clerk of courts and is wholly governed by statute. R.C. 2335.18 to 2335.33." As with the awarding of costs by the court, I am not aware of any statute or other provision of law that exempts a party represented by the county prosecuting attorney in a child support enforcement action from the statutory scheme otherwise governing the taxation and collection of costs.

Since your request states that funds are budgeted to your office for the payment of court costs in child support enforcement actions, it appears that part of your concern is whether there is an exemption from the provision of security for costs in child support enforcement actions where such actions are brought by the prosecuting attorney. In Op. No. 83-075 I discussed whether the county or a county officer is required to provide security for costs when filing civil actions, and stated at 2-309:

> I am aware of no statute or established rule in Ohio which would exempt a county or county officeholder from the operation of court rules requiring the deposit of a sum of money as security for costs prior to the filing of a civil action.[2]....
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> [2] Cf. R.C. 109.19, which exempts "the state or an officer thereof" from any security requirements in the prosecution or defense of actions. Counties do not share this exemption with the state for the reason that "county" is not synonymous with "state." See, e.g., R.C. 1703.01 (foreign corporations); R.C. 2743.01(A) (court of claims); R.C. 3115.01(B) (reciprocal enforcement of support). But see State ex rel. Meader v. Sullivan, 15 Ohio C.C. 477 (Hamilton County 1897) (where county prosecutor files motion in quo warranto on relation of the state, he is not required to furnish security for costs under statute stating "no undertaking or security is required on behalf of the state, or of any officer thereof in the prosecution or defense of any action, writ or proceeding").

With respect to the deposit of security for costs in proceedings brought by the county prosecuting attorney, I remain unaware of any statute or other law which provides an exemption from making such deposit merely on the basis that it is the county prosecuting attorney who is bringing the action.

Specifically concerning a deposit for costs in child support enforcement actions, I concluded in the syllabus of 1987 Op. Att'y Gen. No. 87-022 (issued prior to the effective date of Sub. H.B. 231) that:

> No state or federal statutes or regulations prohibit county courts of common pleas from requiring, through local rule, a court cost deposit in actions brought pursuant to title IV-D of the Social Security Act (42 U.S.C. Sections 651-669) on behalf of non-recipients of public assistance to enforce or modify child support obligations. If a court cost deposit is required in any non-recipient title IV-D action filed through a county's title IV-D agency, that county's department of human services must advance the deposit.

In reaching this conclusion, I noted that, pursuant to R.C. 2323.31:

> The court of common pleas by rule may require an advance deposit for the filing of any civil action or proceeding....[B]ut *if a*

> ***plaintiff***[5] ***makes an affidavit of inability either to prepay or give security for costs, the clerk of the court shall receive and file the petition.*** Such affidavit shall be filed with the petition, and treated as are similar papers in such cases. (Emphasis and footnote added.)

Thus, since each court of common pleas may promulgate a rule requiring an advance deposit for the filing of civil actions or proceedings, and since no federal or state law of which I am aware prohibits a court of common pleas from requiring, through adoption of a local rule, the deposit of security for costs in actions brought by a county prosecuting attorney in a child support enforcement proceeding, whether the county prosecuting attorney's office must present such deposit upon the filing of a child support enforcement action depends upon the provisions of any local rule governing such deposits. Although Op. No. 87-022 addresses the deposit of court costs only in child support enforcement actions brought on behalf of clients who are not recipients of public assistance, I am unaware of any state or federal law that would compel a different conclusion with regard to the deposit of costs in such actions when brought on behalf of clients who are recipients of public assistance.[6]

Your final question asks: "Are alimony only orders and temporary alimony orders required to be paid through the collections unit of the Child Support Enforcement Agency, or can such order be made payable through a private attorney's office?"

Concerning the payment of court-ordered support, R.C. 2301.36 states in pertinent part:

> (A) ***Upon issuing or modifying a support order*** or issuing or modifying any order described in [R.C. 3113.21(D)], ***the court shall require that support payments be made to the child support enforcement agency*** as trustee for remittance to the person entitled to receive payments, except as otherwise provided in [R.C. 2151.49 and R.C. 3113.07].[7] Any payment of money by the person responsible for

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5 As noted in Op. No. 87-033, the party bringing the action for child support enforcement may vary depending upon who is the real party in interest.

6 Although it appears that your second question concerns only the provision of security for costs in child support enforcement actions, I note, by way of background, that 1983 Op. Att'y Gen. No. 83-075 discusses the differences between the taxation and collection of costs by the clerk of courts and the awarding of costs by the court. As set forth in that opinion, the taxing and collection of costs relate to the obligation of the parties to the clerk of courts and are governed by statute. The awarding of costs, however, is governed in civil actions by Ohio R. Civ. P. 54(D), except when express provision for costs is made either in a statute or in the rules of civil procedure. *See, e.g.*, R.C. 3105.21(C); R.C. 3113.04(B); R.C. 3113.31(K).

7 R.C. 2151.49 states in pertinent part:

> In the case of conviction for non-support of a child who is receiving aid under [R.C. Chapter 5107 or 5113], if the juvenile judge suspends sentence on condition that the person make payments for support, the payment shall be made to the county department of human services rather than to the child or custodian of the child.

R.C. 3113.07 states:

> Sentence may be suspended, if a person, after conviction under [R.C. 3113.06] and before sentence thereunder, appears before the court of common pleas in which such conviction took place and enters into bond to the state in a sum fixed by the court at not less than five hundred dollars, with sureties approved

> the support payments under a support order to the person entitled to receive the support payments that is not made to the child support enforcement agency in accordance with the applicable support order shall not be considered as a payment of support and, unless the payment is made to discharge an obligation other than support, shall be deemed to be a gift. (Emphasis and footnote added.)

Thus, where a court issues or modifies, among other things, a support order, pursuant to R.C. 2301.36, "the court shall require that support payments be made to the child support enforcement agency," with certain exceptions. *See* note 7, *supra*.

The term "support order," as used in R.C. 2301.34-.44, means "an order of a court requiring payments pursuant to [R.C. 2151.23, 2151.36, 2151.49, 3105.18, 3105.21, 3109.05, 3111.13, 3113.04, 3113.07, 3113.31, or 3115.22]." R.C. 2301.34(B). Concerning the allowance of alimony, R.C. 3105.18(A) states:

> In divorce, dissolution of marriage, or alimony proceedings, the court of common pleas may allow alimony it considers reasonable to either party.
>
> The alimony may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, as the court considers equitable.

The allowance of alimony in divorce, dissolution of marriage, or alimony proceedings is, therefore, governed by R.C. 3105.18. Thus, the court's order with respect to such payments falls within the term "support order," for purposes of R.C. 2301.36, and pursuant to that section, the court shall require that such payments be made to the child support enforcement agency as trustee for the person entitled to receive such payments.[8] R.C. 3105.18(C), concerning actions under R.C. 3105.17 solely for an order for alimony, states in part: "any continuing order for periodic payments of money entered pursuant to this section is subject to further order of the court upon changed circumstances of either party." Thus, it appears that even if an action is brought under R.C. 3105.17 solely for an order for alimony, any continuing order for periodic payments in such an action is issued under R.C. 3105.18, and is, therefore, a support order subject to the payment procedures set forth in R.C. 2301.36.[9]

> by such court, conditioned that such person will pay, so long as the child remains a ward of the county children services board or county department of human services or a recipient of aid pursuant to [R.C. Chapter 5107 or 5113], to the executive secretary thereof or to a trustee to be named by the court, for the benefit of such department or board if the child is a recipient of aid pursuant to [R.C. Chapter 5107 or 5113], to the county department of human services, the reasonable cost of keeping such child. The amount of such costs and the time of payment shall be fixed by the court.

8 Pursuant to R.C. 2301.351(B):

> Each court that issues an order for the payment of support pursuant to...[R.C. 3105.18]...shall report to the director of human services the name, address, and social security number or other identification number of each person responsible for the support payments under the support order, regardless of whether the person to whom payments are to be made is a recipient of public assistance. The report also shall indicate whether the support order is being administered by the child support enforcement agency.

9 Pursuant to R.C. 3105.18(E): "Each order for alimony made or modified by a court on or after December 1, 1986, shall be accompanied by one or more orders described in division (D) or (H) of [R.C. 3113.21], whichever is appropriate under the requirements of that section...." Thus, if the court chooses to issue or modify an order described in R.C. 3113.21(D) which has

Your question also concerns the procedures for the payment of temporary alimony, as governed by R. Civ. P. 75, which states in part:

> (G) Relief pending appeal: custody, support, alimony. The trial court may, when a motion to modify a custody, support or alimony order is filed prior to the filing of the notice of appeal, modify the order for the period of the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party and in the best interests of the children involved. Rule 62(B) does not apply to custody, alimony or support orders. When an appeal is taken by any party, the court of appeals may grant like orders concerning custody, support or alimony during the pendency of the appeal.
>
> ....
>
> (M) Allowance of alimony, child support and custody pendente lite.
>
> (1) When requested in the complaint, answer or counterclaim, or by motion served with the pleading, upon satisfactory proof by affidavit duly filed with the clerk of the court, the court or referee, without oral hearing and for good cause shown, may grant alimony pendente lite to either of the parties for his sustenance and expenses during the suit....
>
> (2) Counter affidavits may be filed by the other party within fourteen days from the service of the complaint, answer, counter-claim or motion, all affidavits to be used by the court or referee in making a temporary alimony, child custody, support and care order; and, upon request in writing after any temporary alimony or child custody and support order is journalized, the court shall grant the party so requesting an oral hearing within twenty-eight days to modify such temporary order. A request for oral hearing shall not suspend or delay the commencement of alimony or support payments previously ordered...until the order is modified by journal entry after the oral hearing.

Division (A) of R. Civ. P. 75 states: "These Rules of Civil Procedure shall apply in actions for divorce, annulment, alimony and related proceedings, with the modifications or exceptions set forth in this rule."

Since R. Civ. P. 75 provides for temporary alimony, the question arises as to whether an order for the payment of temporary alimony fits within the meaning of a "support order," as defined in R.C. 2301.34(B), and must therefore be made payable to a child support enforcement agency pursuant to R.C. 2301.36. In *Rahm v. Rahm*, 39 Ohio App. 2d 74, 78, 315 N.E.2d 495, 500 (Cuyahoga County 1974), the court set forth the following explanation of temporary alimony:

> There are two kinds of alimony, namely: temporary alimony and permanent alimony. Temporary alimony may be temporary alimony pending litigation and temporary alimony pending an appeal, and it may be awarded in divorce actions or alimony actions. R.C. 3105.18; Civil Rule 75(H) [currently at R. Civ. P. 75(G)] and Civil Rule 75(N) [currently at R. Civ. P. 75(M)].
>
> Temporary alimony pending litigation may be awarded by the trial court any time after a complaint is filed and before judgment on the merits. *Norton v. Norton* (1924), 111 Ohio St. 262; Civil Rule 75(N) [currently at R. Civ. P. 75(M)].

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been issued in conjunction with an order for the payment of alimony in an action brought under R.C. 3105.17, R.C. 2301.36(A) requires any such support payments to be made to the child support enforcement agency.

The court stated further:

> Civil Rule 75(N)(1) [currently at R. Civ. P. 75(M)] allows a trial court when requested by either party, to grant alimony pending the litigation for sustenance and expenses during the pendency of an action for divorce, annulment or alimony. The trial court has exclusive jurisdiction to grant temporary alimony pending litigation....
>
> Civil Rule 75(H) [currently at R. Civ. P. 75(G)] deals with relief pending appeal and is divided into two parts—one with the trial court's authority over temporary alimony pending appeal, and the other with the Court of Appeals' authority over temporary alimony pending appeal.

39 Ohio App. 2d at 82, 315 N.E.2d at 502.

The discussion by the court in *Rahm* seems to suggest that a trial court's authority to grant temporary alimony derives from R. Civ. P. 75. I note, however, that the Rules of Civil Procedure were adopted in accordance with Ohio Const. art. IV, §5(B), which states in pertinent part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right....All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *State v. Smith*, 47 Ohio App. 2d 317, 354 N.E.2d 699 (Cuyahoga County 1976). Concerning the effect of such rules, the court in *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972), *appeal dismissed*, 409 U.S. 1052 (1972), stated in paragraph five of the syllabus: "The rule-making authority of the Supreme Court of Ohio is limited under Section 5(B) of Article IV of the Ohio Constitution to the formulation of rules governing practice and procedure in all courts of this state, and by such rules this court may not abridge, enlarge or modify any substantive right." Thus, it appears that R. Civ. P. 75 sets forth only the procedure to be followed where alimony is awarded on a temporary basis in an action governed by R.C. 3105.18. *See generally Davis v. Davis*, 12 Ohio App. 3d 38, 39, 465 N.E.2d 917, 919 (Cuyahoga County 1983) ("Civ. R. 75(M) governs the application procedure for temporary alimony and child support" (footnote omitted)). Thus, where a court orders the payment of temporary alimony in an action governed by R.C. 3105.18, such order is a "support order" for purposes of R.C. 2301.36 and must be paid to the child support enforcement agency as trustee for the person entitled to receive such payments.

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. Where a county department of human services, as the child support enforcement agency for the county, has entered into an agreement with the county prosecuting attorney for the provision of legal services, assistant prosecuting attorneys who perform legal services for the child support enforcement agency are "employees," for purposes of R.C. Chapter 2744, and are thereby entitled to the defenses, immunities and protections granted employees by that chapter.

2. Where the county prosecuting attorney represents a party in a child support enforcement action, such party is subject to the statutory scheme governing the taxation and collection of costs by the clerk of courts and the provisions of R. Civ. P. 54(D) concerning the allowance of costs by the court, in the absence of any federal or state law establishing an exemption therefrom.

3. Whether a county prosecuting attorney must present a deposit for costs upon the filing of a child support enforcement action depends upon whether the court of common pleas in which the action is filed has adopted a local rule under R.C. 2323.31 requiring such a deposit.

4. An order for the payment of alimony under R.C. 3105.18, including an order for the payment of temporary alimony, is a "support order," as defined in R.C. 2301.34(B), and, pursuant to R.C. 2301.36, payments made pursuant to such an order are to be

made payable to the child support enforcement agency as trustee for the person entitled to receive such payments.