

## OPINION NO. 87-082

## Syllabus:

1. Neither a county children services board nor a foster parent appointed and certified by a county children services board pursuant to R.C. 5153.16 and accompanying regulations is a "parent" under R.C. 3109.09 or R.C. 3109.10. Accordingly, neither the board nor a foster parent is liable under R.C. 3109.09 or R.C. 3109.10 for the willful damage to or theft of property, or willful or malicious assault of a person, committed by a child in their custody.
2. The operation of a county children services board pursuant to R.C. 5153.16 is a "governmental function" under R.C. 2744.01(C)(2)(n).
3. Whether a foster parent appointed and certified by a county children services board pursuant to R.C. 5153.16 and accompanying regulations is an employee of or an independent contractor for the county pursuant to R.C. 2744.01(B) in a particular case is a question of fact related to the contractual and regulatory relationship between the foster parent and the county children services board with respect to that particular case. (1964 Op. Att'y Gen. No. 1492, p. 2-385, and 1972 Op. Att'y Gen. No. 72-007, questioned.) R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion.
4. Where a foster parent is not an employee of the county pursuant to R.C. 2744.01(B) in a particular case, the county cannot be held liable under R.C. 2744.02(B) for the foster parent's negligent supervision of a child in the foster parent's custody who commits a tort.
5. A foster parent who is not a county employee pursuant to R.C. 2744.01(B) in a particular case is not protected from individual liability in that case by R.C. 2744.03(A)(6).
6. If, pursuant to R.C. 2744.01(B), a foster parent is an employee of a county, the foster parent is

not individually liable for the tortious acts of a child in his or her custody pursuant to R.C. 2744.03(A)(6) unless the foster parent acted manifestly outside the scope of employment or official responsibility or with malicious purpose, in bad faith, or in a wanton or reckless manner.

7. A county may be held liable for the negligent supervision of a child who commits a tort while in the custody of a county children services board or a foster parent determined to be an employee of the county pursuant to R.C. 2744.01(B) only if a court decides that the board or foster parent-employee could have foreseen the child's tortious acts and had a duty to prevent them. Pursuant to R.C. 2744.02(B)(4) and R.C. 2744.03(A)(3), however, the county cannot be held liable unless the child's tort occurred within or on the grounds of a building determined to be "used in connection" with the operation of a county children services board and did not result from the exercise of an employee's discretion with respect to policy-making, planning, or enforcement powers.

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To: James L. Flannery, Warren County Prosecuting Attorney, Lebanon, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, October 30, 1987

I have before me your request for my opinion on whether a county children services board or a foster parent would be liable for the intentional or negligent torts of children under their custody. Your question concerns the possible liability of the county children services board and of the child's natural or foster parents for a child's torts. My authority to render an opinion in response to your request extends only to matters relating to your duties. R.C. 109.14. Thus, I may advise you about the possible liability of the county and of the foster parents who serve it, but I may not advise you about the possible liability of private persons except to the extent that their liability relates to the county's liability.<sup>1</sup>

A county children services board is created by the county commissioners pursuant to R.C. 5153.07, which provides:

(A) In any county in which there is no county department of human services, no county children's home, and no county children services board on January 1, 1946, the board of county commissioners shall, upon such date, create a county department of human services which shall have the powers and duties of a board, or shall create a county children services board of five to fifteen members, in the manner provided in section 5153.08 of the Revised Code.

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<sup>1</sup> For further discussion of parental liability, see Laven, "Liability of Parents for the Willful Torts of Their Children Under Ohio Revised Code Section 3109.09," 24 Clev. St. L. Rev. 1 (Winter 1975).

(B) In any county where the board of county commissioners have established a county department of human services, and such department is performing the duties of a county children services board by agreement, or otherwise, such board of county commissioners, may, by a resolution, revoke such agreement, powers and duties and establish a county children services board of five members to fifteen, in the manner provided in section 5153.08 of the Revised Code. Such board shall have all of the powers and duties given to county children services boards under sections 5153.01 to 5153.442 of the Revised Code. Section 329.05 of the Revised Code does not apply to this division.

R.C. 5153.16 gives county children services boards the authority to accept custody of children in certain circumstances and to provide care for these children in a variety of ways, including foster homes:

The county children services board or county department of human services that has assumed the administration of child welfare, subject to the rules and standards of the department of human services, on behalf of children in the county considered by the board or department to be in need of public care or protective services, shall:

(A) Make an investigation concerning any child reported to be in need of care, protection, or service;

(B) Enter into agreements with the parent, guardian, or other person having legal custody of any child, or with the department of human services, department of mental health, department of mental retardation and developmental disabilities, other department, or any certified organization within or outside the county, or any agency or institution outside the state, having legal custody of any child, with respect to the custody, care, or placement of any such child, or with respect to any matter, in the interests of such child, provided the permanent custody of a child shall not be transferred by a parent to the board or county department without the consent of the juvenile court;

(C) Accept custody of children committed to the board or county department by a court exercising juvenile jurisdiction;

(D) Provide such care as the board or county department considers to be in the best interests of any child the board or county department finds to be in need of public care or service; such care shall be provided by the board or county department, by its own means or through other available resources, in the child's own home, in the home of a relative, or in a certified foster home, receiving home, school, hospital, convalescent home, or other institution, public or private, within or outside the county or state;

....  
(G) Provide temporary emergency care for any child considered by the board or county department to be in need of such care, without agreement or commitment;

(H) Find foster homes, within or outside the county, for the care of children, including handicapped children from other counties attending special schools in the county;

....  
 (J) Acquire and operate a county children's home, or establish, maintain, and operate a receiving home for the temporary care of children, or procure foster homes for this purpose;

....  
 (L) Cooperate with, make its services available to, and act as the agent of persons, courts, the department of human services, the department of health, and other organizations within and outside the state, in matters relating to the welfare of children;  
 .... (Emphasis added.)

See also Ohio Admin. Code Chapter 5101:2-7 at 422 (Regulating certification of family foster homes).

In your letter, you ask whether county boards or foster parents may be held liable for "damages" negligently or intentionally caused by children in their temporary or permanent custody. The law in the area of county liability has undergone very recent, comprehensive changes due to the enactment of R.C. Chapter 2744 (tort liability of political subdivisions). In addition, a multitude of factual and legal variables and policy considerations enter into a determination of liability in any given case. Because so many variables must be considered, I will first discuss whether a foster parent or county children services board could be held liable for the torts of a child in the board's temporary or permanent custody in the absence of R.C. Chapter 2744, and then discuss the impact of R.C. Chapter 2744 on any potential liability.

Traditionally, Ohio courts have hesitated to hold another party liable for the torts of a child; when they have, it has generally been in the context of the parent-child relationship. At common law, however, even this relationship was not enough in itself to establish liability. Courts held that there must be some further relationship, such as master and servant or principle and agent, before a parent could be held liable for the torts of his child. See Elms v. Flick, 100 Ohio St. 186, 126 N.E. 66 (1919); Motorists Mutual Insurance Co. v. Bill, 56 Ohio St. 2d 258, 261, 383 N.E.2d 880, 882 (1978). In 1965 and 1969, however, the general assembly enacted two statutes imposing legal responsibility on parents for their children's intentional torts.

The parental liability statutes make parents strictly liable for limited damages when their child, in their custody and control, commits an intentional tort or theft offense. R.C. 3109.09 provides:

Any owner of property may maintain a civil action to recover compensatory damages not exceeding three thousand dollars and costs of suit from the parents having the custody and control of a minor who willfully damages property belonging to such owner or who commits acts cognizable as a "theft offense," as defined in section 2913.01 of the Revised Code, involving the property of such owner. Such an action may be joined with an action under Chapter 2737 of the Revised Code against the minor, or the minor and his parents, to recover the property regardless of value, but any additional damages recovered from the parents shall be limited to compensatory damages not exceeding three thousand dollars, as authorized by this section. A finding of willful destruction of property or of committing acts cognizable as a theft offense is

not dependent upon a prior finding of delinquency of such minor, or upon his conviction of any criminal offense.

For the purposes of this section, a minor is not within the custody and control of his parents, if the minor is married.

Such actions shall be commenced and heard as other civil actions. (Emphasis added.)

Similarly, R.C. 3109.10 provides for recovery for victims of a child's intentional assault:

Any person is entitled to maintain an action to recover compensatory damages in a civil action, in an amount not to exceed two thousand dollars and costs of suit in a court of competent jurisdiction, from the parents who have the custody and control of a child under the age of eighteen, who willfully and maliciously assaults the person by a means or force likely to produce great bodily harm. A finding of willful and malicious assault by a means or force likely to produce great bodily harm is not dependent upon a prior finding that the child is a delinquent child.

Any action brought pursuant to this section shall be commenced and heard as in other civil actions for damages. (Emphasis added.)

Nothing, however, indicates that persons other than the child's natural parents may be held liable under the parental liability statutes. On the contrary, the Franklin County Court of Appeals has held that the Ohio Youth Commission is not a "parent" within the meaning of R.C. 3109.09. Hahn v. Brown, 51 Ohio App. 2d 177, 178, 367 N.E.2d 884, 886 (Franklin County 1976). In Hahn, two minors who had been committed to the custody of the Ohio Youth Commission escaped from the youth camp to which they had been assigned. The minors broke into a car, hot-wired it, and drove the car several hundred miles, where they sold it after entering it in a demolition derby. When the owner of the car sued the Ohio Youth Commission, the court held that the Commission was not a "parent" under R.C. 3109.09, even though the minors were in the custody of the Commission when they stole the car. The court placed great emphasis on the General Assembly's use of the word "parent":

The mere fact that certain duties are imposed upon the Ohio Youth Commission and the Maumee Youth Camp does not convert such entities into the status of a "parent" which is defined in Webster's Third New International Dictionary (1961) as:

"[O]ne that begets or brings forth offspring: father, mother...."

Had the legislature intended for other persons, or entities, to be included within the meaning of the statute, they would not have used the word "parent."

51 Ohio App. 2d at 178, 367 N.E.2d at 886. Furthermore, the Ohio Supreme Court has determined that R.C. 3109.09, like other statutes in derogation of the common law, should be interpreted strictly. See generally Motorists Mutual Insurance Co. v. Bill, 56 Ohio St. 2d 258, 263, 383 N.E.2d 880, 883 (1978). When asked to broaden parental liability, the court responded, "if it be the legislative desire to further broaden the liability of parents in derogation of the common law, it would be a simple matter to enact language to accomplish such aim." Id. at 266, 383 N.E.2d at 885. Thus, it appears that no one

other than the child's natural parent can be held liable under R.C. 3109.09 or its companion statute, R.C. 3109.10. Accordingly, I conclude that neither foster parents nor a children services board can be held liable under R.C. 3109.09 or R.C. 3109.10 for the intentional torts of a child in their custody.

The law is not as clear regarding whether or not a person other than a child's natural parent may be held liable for the common law tort of "negligent supervision" if a child in his custody commits a tort. Formerly, one could not bring suit against even a child's parent for the child's tort unless a further relationship between the parent and child, such as master and servant or principal and agent, could be established. See generally Elms v. Flick, 100 Ohio St. 186, 126 N.E. 66 (1919). More recently, Ohio courts have allowed a common law action against parents for their child's torts when the parents knew or should have known that the child would commit the tort and failed to exercise reasonable measures to control the child. See D'Amico v. Burns, 13 Ohio App. 3d 325, 327, 469 N.E.2d 1016, 1018-19 (Cuyahoga County 1984). In 1981, the Cuyahoga County Court of Appeals held that an action for negligent supervision could be brought against parents who permitted their seventeen-year-old son to own a loaded twelve-gauge shotgun. McGinnis v. Kinkaid, 1 Ohio App. 3d 4, 437 N.E.2d 313 (Cuyahoga County 1981). The court noted:

After a general review of the case law on this issue, we are persuaded that where parents permit their inexperienced or irresponsible minor child to keep or have access to an inherently dangerous instrumentality, under circumstances which should put them on notice that the instrumentality might become a source of danger to others, reasonable minds could conclude that the parents were negligent in their acquiescence, and that they should be answerable in legal damages for an injury occasioned by the child's use of such instrumentality.

Id. at 9, 437 N.E.2d at 318. Thus, under common law, the parents must commit an independent act of negligence to be held liable for their child's tort.

I can find very few Ohio cases in which the victim of a child's tort sought relief from a person other than the child's parent. In two cases, students who had been injured by their classmates sued their teachers. Neither teacher was held liable. In 1940, the Hamilton County Court of Appeals decided that a student assaulted by another student while the teacher was out of the room could not recover against the teacher. Guyten v. Rhodes, 65 Ohio App. 163, 29 N.E.2d 444 (Hamilton County 1940). The court found that the teacher's absence from the classroom was not the proximate cause of the injury, even though the teacher knew of previous assaults upon the injured student by the wrongdoer. Id. at 166, 29 N.E.2d at 446. In 1980, the Cuyahoga County Court of Appeals refused to hold a teacher liable for injuries that one student had inflicted on another by kicking a stool out from underneath the student in an art class. Boyer v. Jablonski, 70 Ohio App. 2d 141, 435 N.E.2d 436 (Cuyahoga County 1980). The court acknowledged that a teacher may be held liable for directly causing injury to students, but noted that courts are much more reluctant to impose liability on a teacher upon the theory that he or she failed to maintain proper classroom control. Id. at 145, 435 N.E.2d at 439. The court concluded that even if the teacher

had been aware of earlier incidents of students kicking stools out from underneath one another, "it would not appear that the teacher could have anticipated and possibly prevented the incident in question." Id. at 145-46, 435 N.E.2d at 439. Accordingly, the court decided that the incident was not foreseeable by the teacher and that the teacher could not be held liable. Id.

I can find only one case in which an Ohio court addressed the issue of recovery for a child's tort from the child's guardian. In 1939, the Hamilton County Court of Common Pleas denied a motion to strike allegations in a petition that alleged that a child's grandmother was liable for the intentional torts of her grandson, who had lived with her "for a number of years." Davis v. Mack, 29 Ohio L. Abs. 210, 210 (Hamilton County C.P. 1939). The court noted that the grandmother was the child's "natural guardian," that she had "reared and maintained [her grandson] since he was a very small child, treating him as her own," and that the grandmother stood "in the position loco parentis towards" her grandson. Id. Accordingly, the court allowed the action to proceed to the determination whether the grandmother had been negligent in not restraining her grandson from his "violent and vicious nature." Id. at 210-11.

If such a suit were brought against a county children services board or a foster parent, a court might find that a person who had custody of the child would be able to foresee a particular tortious act and that the person had a duty to prevent it. The Cuyahoga County Court of Appeals has addressed the tort of negligent supervision and noted:

It is well established in Ohio, in cases not involving the use of an inherently dangerous instrumentality by a child, that the parent of a minor child may be held liable for the torts of the child where such parent fails to exercise proper parental control over his child and the parent knew or should have known from his knowledge of the habits or tendencies of the child, that the failure to exercise such control posed an unreasonable risk that the child would injure others.

McGinnis v. Kinkaid, 1 Ohio App. 3d at 8-9, 437 N.E.2d at 317 (citations omitted). Liability appears to be based more on the parent's knowledge of the child's propensity to commit the tort than on the parent-child relationship.

I cannot, of course, conclude definitely that a foster parent or county children services board could be held liable for a child's tort. That holding would depend on a variety of factors too numerous for speculation. I note, however, that some statutes indicate that a court could find that a county children services board and foster parents have the responsibility to exercise "parental control" over children in their custody. R.C. 2151.353 provides that the Juvenile Court may commit children adjudged abused, neglected, or dependent to the temporary or permanent custody of the county children services board, and the General Assembly has taken care to define temporary and permanent custody as those terms are used in R.C. Chapter 2151. R.C. 2151.011(B)(13) provides that "[t]emporary custody" means legal custody as defined in [R.C. 2151.011(B)(10)] which may be terminated at any time at the discretion of the court." R.C. 2151.011(B)(10) provides:

"Legal custody" means a legal status created by

court order which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.<sup>2</sup> (Emphasis and footnote added.)

R.C. 2151.011(B)(12) defines "permanent custody":

"Permanent custody" means a legal status created by the court which vests in the county department of human services which has assumed the administration of child welfare, county children services board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations. (Emphasis added.)

A county children services board would therefore have "the right and duty to protect, train, and discipline" a child in its temporary custody, and would have "all parental rights, duties, and obligations" toward a child in its permanent custody. Thus, a court could conclude that the board, or a foster parent acting in its stead, could be held to the same standard of care in controlling a child as the child's natural parent. Accordingly, a court could decide, in appropriate fact situations, that a county children services board or foster parent knew or should have known of the possibility of the tort and negligently failed to supervise the child properly. I must next consider whether R.C. Chapter 2744 would have any impact on this potential liability.<sup>3</sup>

R.C. Chapter 2744 limits tort liability of political subdivisions to certain specified circumstances. R.C.

<sup>2</sup> R.C. 5153.16, discussed above, apparently gives the children services board the authority to delegate to foster parents the rights and responsibilities assigned to it.

<sup>3</sup> One of my predecessors considered whether a child welfare board may be held liable to third persons for personal injuries or property damage caused by children under the jurisdiction of the child welfare board who are placed in foster homes or child welfare receiving homes. 1964 Op. Att'y Gen. No. 1492, p. 2-385. Relying on the rule that the state may not be sued without its consent, my predecessor found no statutory authority to sue the welfare board. Since that opinion was issued, the Ohio Supreme Court has approved the judicial abolishment of the doctrine of sovereign immunity. Schenkolewski v. Cleveland Metroparks System, 67 Ohio St. 2d 31, 426 N.E.2d 784 (1981), and the General Assembly has, subsequently, enacted R.C. Chapter 2744 to limit tort liability of political subdivisions. Accordingly, I question the validity of 1964 Op. No. 1492 and will not consider it in rendering this opinion.



2744.01(F) defines "political subdivision" to include "county" for the purposes of R.C. Chapter 2744. The chapter outlines the circumstances under which a political subdivision can and cannot be held liable for its acts or the acts of its employees. Your question raises the issue of whether the county can be held liable for the acts of the children services board or foster parents under R.C. Chapter 2744. To resolve that issue, I will first address the question of what constitutes a county employee under R.C. Chapter 2744. "Employee" is defined in R.C. 2744.01(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. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 of the Revised Code to perform community service or community work in a political subdivision. (Emphasis added.)

A county children services board easily qualifies as an "employee" under this definition. A county children services board is "authorized to act for a political subdivision" by R.C. 5153.07, which provides for the creation of the board, and R.C. 5153.16, which delineates the authority of the board. It is not clear whether foster parents qualify as employees. Two of my predecessors have addressed similar issues under other circumstances. In 1964, one of my predecessors opined that "[o]perators of a foster home in which children under the jurisdiction of a county child welfare board are placed pursuant to Section 5153.16, Revised Code, are not immune from suit for injuries to such children." See 1964 Op. Att'y Gen. No. 1492, p. 2-385 (syllabus, paragraph three).<sup>4</sup> In deciding whether or not the foster parents were county employees, my predecessor noted:

The precise relationship between the county and operators of a foster home to whom the care of children under the jurisdiction of the county child welfare board has been given, is not clear. It appears, however, that foster parents act as independent contractors and not as agents of the county in carrying out their responsibilities under this kind of arrangement.

1964 Op. No. 1492 at 2-388. In 1972, however, my predecessor reached the opposite conclusion about persons who volunteer to provide necessary transportation in their own vehicles for children under the custody of a county children services board. 1972 Op. Att'y Gen. No. 72-007. My predecessor noted

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<sup>4</sup> Because this opinion was rendered before the enactment of R.C. Chapter 2744, I question its current validity. See footnote 3, supra.

the degree of the board's control over the drivers and concluded that the drivers were agents of the board:

Although it is contemplated that the volunteers will use their own cars and do the driving themselves, other aspects of the plan make it quite clear that the drivers will be acting as agents of the Board. The children, whom they are to transport, will be assigned to them by the Board; their destination and the time to be spent in the trip will depend upon the Board; and the drivers are to be paid by the Board on a mileage basis.

Op. No. 72-007 at 2-43.<sup>5</sup> The definition of "employee" provided in R.C. 2744.01(B) was not considered in either opinion because R.C. Chapter 2744 had not yet been enacted. Accordingly, I am not bound by the conclusion of either of my predecessors on this issue. On the contrary, the issue of whether a foster parent is a county employee or an independent contractor is primarily a factual issue, which I cannot properly resolve by way of opinion. See generally 1986 Op. Att'y Gen. No. 86-076 at 2-422.

The status of a worker as an independent contractor or employee has traditionally depended upon whether or not his employer has a right of control over the manner of the work to be performed. See Cuncell v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955). The Ohio Supreme Court has laid out a test for defining the relationship of an employer and a worker:

The relationship of principal and agent or master and servant is distinguished from the relationship of employer and independent contractor by the following test: Did the employer retain control of, or the right to control, the mode and manner of doing the work contracted for? If he did, the relationship is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor.

Id. at 292, 126 N.E.2d at 598 (syllabus, paragraph one). The application of this test, however, does not necessarily result in a finding that a worker was solely an independent contractor or solely an agent of his employer. The Ohio Supreme Court has held that "[w]hen an employer retains control over the [contractor's] mode and manner of doing a specified portion of the work only, and an injury results to a third person from the doing of some other portions of the work, the contractor alone is liable." Hughes v. Railway Co., 39 Ohio St. 461 (1883)(syllabus, paragraph five). The United States District Court for the Southern District of Ohio cited that standard with approval recently when it held a franchisor liable for the actions of a franchisee. Taylor v. Checkwrite, Ltd., 627 F. Supp. 415 (S.D. Ohio 1986)(applying Ohio law). The court noted that the franchisee and franchisor signed a very specific contract detailing the franchisee's duties, and that the franchisee had "virtually no discretion" in the areas of operation relevant to the plaintiff's claims. Id. at 417-18.

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<sup>5</sup> Again, because this opinion was rendered before the enactment of R.C. Chapter 2744, I question its current validity.

Thus, in those areas of operation, the franchisee was an employee for purposes of liability. Id. at 418.

In the situation you present, foster parents are given the authority to act for the county by R.C. 5153.16, which provides that the county children services board may care for children in its custody by placing them in a certified foster home. Chapter 5101:2-47 at 1404 and Chapter 5101:2-7 at 422 of the Ohio Administrative Code regulate the relationship between county children services boards and foster parents and the relationship between foster parents and foster children. Some of these regulations are very specific; for example, rule 5101:2-7-59(A)(1) provides that a foster child under two years of age shall be provided with a crib with a "firm mattress which is at least one and one-half inches thick and covered with a waterproof material not dangerous to children." On the other hand, some of the regulations allow the foster parents to exercise much more discretion. Rule 5101:2-7-43(C) provides: "Outdoor areas on the grounds of or immediately adjacent to a family foster home which are potentially hazardous to a foster child placed in the home shall be reasonably safeguarded, considering the age and functioning level of the foster child." In addition, rule 5101:2-7-31 provides that before a foster child is placed, the foster parents and a representative of the county children services board must sign a "care agreement" outlining the rights and responsibilities of both the board and the foster parents regarding each foster child placed in the home. The specific contents of each care agreement would presumably vary from child to child and from foster parent to foster parent. Accordingly, the precise relationship between the foster parents and the children services board would vary from parent to parent and from case to case; any determination of that relationship would be a factual determination, beyond the scope of my authority. Thus, I cannot decide whether a foster parent is a county employee under R.C. 2744.01(B) with respect to any particular situation. See generally Op. No. 86-076 at 2-422 ("it is inappropriate for [the Attorney General] to use the opinion-rendering function to make findings of fact..."). However, in order to respond to your question, I will discuss the potential liability of a county to a person injured by a child in the custody of either a county children services board or a foster parent who is found to be a county employee with respect to that particular situation.<sup>6</sup> Of course, if a foster parent is found not to be a county employee pursuant to R.C. 2744.01(B) in a particular case, under R.C. Chapter 2744 the county cannot be held liable in that case for the foster parent's acts. R.C. 2744.02(B) provides that a political subdivision is liable under certain circumstances only for "injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees." (Emphasis added.) See also Warden v.

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<sup>6</sup> I note that if a foster parent is a county employee under R.C. 2744.01(B), he would be immune from individual liability for his acts pursuant to R.C. 2744.03(A)(6) unless he acted manifestly outside the scope of employment or official responsibility or with malicious purpose, in bad faith, or in a wanton or reckless manner. In addition, even if a foster parent is not a county employee under R.C. 2744.01(B), R.C. 5153.131 specifically allows county children services boards to purchase insurance to protect foster parents.

Pennsylvania Railway Co., 123 Ohio St. 304, 306, 175 N.E. 207, 208 (1931); Knickerbocker Building Services, Inc. v. Phillips, 20 Ohio App. 3d 158, 485 N.E.2d 260 (Wood County 1984)(Syllabus, paragraph one)(noting the general rule that employers are not liable for the acts of independent contractors).

As I have already indicated, the only possible cause of action against the county under the facts you present would be based on the claim that an injury resulted from the negligent supervision of a child by either the county children services board or the foster parent who had custody of the child. Even in that case, however, R.C. Chapter 2744 provides that the county may be held liable only for certain types of acts in certain circumstances. R.C. 2744.02(A)(1) provides:

For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function. (Emphasis added.)

Both caring for a child and placing a child in a foster home appear to be governmental functions. R.C. 2744.01(C)(2) provides:

A "governmental function" includes, but is not limited to, the following:

....  
(n) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies....

I conclude that a county children services board is a "children's agency" under R.C. 2744.01(C)(2)(n). Accordingly, a county is performing a "governmental function" under R.C. Chapter 2744 when it operates a children services board.

Although R.C. 2744.02(A)(1) indicates that in most cases a political subdivision is not liable for the acts of its employees performing governmental functions, there are several exceptions to this immunity. R.C. 2744.02(B) provides:

Subject to [R.C.] 2744.03 and 2744.05<sup>7</sup>...a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for

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<sup>7</sup> R.C. 2744.03, discussed below, provides certain immunities and defenses to political subdivisions and their employees. R.C. 2744.05 places certain limitations on damages that may be awarded.

injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid operator's or chauffeur's license issued pursuant to Chapter 4507 of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision

or because of a general authorization that a political subdivision may sue and be sued. (Emphasis and footnote added.)

Four of these exceptions to immunity are clearly inapplicable to a claim based on the alleged negligent supervision of a foster child by a county children services board or foster parent-employee.

R.C. 2744.02(B)(1) does not apply to the situation you present. Even if a child in the temporary or permanent custody of a county children services board or foster parent-employee committed a tort while operating an automobile, the county could not be held liable because the child is not an employee of the county under R.C. 2744.01(B).<sup>8</sup> R.C. 2744.02(B)(2) does not apply because, as I noted earlier, the operation of a county children services board is a governmental rather than a proprietary function. See R.C. 2744.01(C) and R.C. 2744.01(G). Thus, county children services boards and foster parent-employees are acting "with respect to" a governmental rather than a proprietary function when they supervise children in their custody. R.C. 2744.02(B)(3) does not apply because a county children services board performs no functions related to maintenance of public roads or of any public grounds. R.C. 2744.02(B)(5) is also inapplicable to this fact situation; I can find no statute that expressly imposes liability on a county for the torts of children in its

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<sup>8</sup> I note, however, that a delinquent child who is ordered by a juvenile court to perform community service work pursuant to R.C. 2151.355 would be a county employee under R.C. 2744.01(B). I further note that R.C. 4507.07 provides for liability for the parent or custodian of a minor driver when that parent or custodian has assumed liability under the terms of this statute. R.C. 4507.07 provides in pertinent part:

(A) The registrar of motor vehicles shall not grant the application of any minor under eighteen years of age for a probationary license or restricted license, unless the application is signed by one of his parents, his guardian, other person having custody of the applicant, or, if there is no parent or guardian, by a responsible person who is willing to assume the obligation imposed under this section.

....  
 (B) Any negligence, or willful or wanton misconduct, that is committed by a minor under eighteen years of age when driving a motor vehicle upon a highway shall be imputed to the person who has signed the application of the minor for a probationary license or restricted license, which person shall be jointly and severally liable with the minor for any damages caused by the negligence or the willful or wanton misconduct.

Accordingly, if a foster parent or children services board employee signed a minor's license application, he or she would be individually liable under the terms of R.C. 4507.07, regardless of the child's status as a ward of the children services board.

temporary or permanent custody. The exception noted in R.C. 2744.02(B)(4), however, could, in certain circumstances, apply to the hypothetical fact situation you describe. I have already noted that the operation of a county children services board is a governmental function. The board's placement of children in a county children's home, foster home, or "receiving home" can be a necessary part of that operation under R.C. 5153.16(D), (H), and (J). A county children's home, foster home, or receiving home could, therefore, be determined to be a building "used in connection with the performance of a governmental function," but this determination would be a finding of fact that must be made by a court of law. See Op. No. 86-076 at 2-422. Even if a court did decide that a county children's home, foster home, or receiving home is a building "used in connection with the performance of a governmental function," however, other sections within R.C. Chapter 2744 may prevent the county from being held liable.

R.C. 2744.03 lists defenses and immunities of political subdivisions and employees to actions brought against them for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental function. For example, R.C. 2744.03(A)(3) provides:

The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

R.C. 2151.011, which defines temporary and permanent custody, provides that a child's custodian has "the right and duty to protect, train, and discipline him," in the case of temporary custody, and has "all parental rights, duties, and obligations," in the case of permanent custody. A court could determine that the exercise of these rights constitutes a matter "within the discretion of the employee" under R.C. 2744.03(A)(3). Of course, such a determination would be a factual determination that should be made by a court of law. See generally 1986 Op. No. 86-076 at 2-422.

I have already discussed the very limited circumstances under which a foster parent or county children services board might be held liable for the acts of a child in their custody in the absence of R.C. Chapter 2744. Under R.C. Chapter 2744, a county could be held liable for the acts of a county children services board or foster parent-employee only under even more limited circumstances. In most situations counties will be immune from liability for the torts of children in the custody of children services boards or foster parent-employees. There appear to be some factual situations in which the county might be held liable for the negligence of a board or foster parent-employee, but these determinations would rest with a court of law. See 1986 Op. No. 86-076 at 2-422.

Accordingly, it is my opinion and you are advised that:

1. Neither a county children services board nor a foster parent appointed and certified by a county children services board pursuant to R.C. 5153.16 and accompanying regulations is a "parent" under R.C. 3109.09 or R.C. 3109.10. Accordingly, neither the board nor a foster parent is liable

- under R.C. 3109.09 or R.C. 3109.10 for the willful damage to or theft of property, or willful or malicious assault of a person, committed by a child in their custody.
2. The operation of a county children services board pursuant to R.C. 5153.16 is a "governmental function" under R.C. 2744.01(C)(2)(n).
  3. Whether a foster parent appointed and certified by a county children services board pursuant to R.C. 5153.16 and accompanying regulations is an employee of or an independent contractor for the county pursuant to R.C. 2744.01(B) in a particular case is a question of fact related to the contractual and regulatory relationship between the foster parent and the county children services board with respect to that particular case. (1964 Op. Att'y Gen. No. 1492, p. 2-385, and 1972 Op. Att'y Gen. No. 72-007, questioned.) R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion.
  4. Where a foster parent is not an employee of the county pursuant to R.C. 2744.01(B) in a particular case, the county cannot be held liable under R.C. 2744.02(B) for the foster parent's negligent supervision of a child in the foster parent's custody who commits a tort.
  5. A foster parent who is not a county employee pursuant to R.C. 2744.01(B) in a particular case is not protected from individual liability in that case by R.C. 2744.03(A)(6).
  6. If, pursuant to R.C. 2744.01(B), a foster parent is an employee of a county, the foster parent is not individually liable for the tortious acts of a child in his or her custody pursuant to R.C. 2744.03(A)(6) unless the foster parent acted manifestly outside the scope of employment or official responsibility or with malicious purpose, in bad faith, or in a wanton or reckless manner.
  7. A county may be held liable for the negligent supervision of a child who commits a tort while in the custody of a county children services board or a foster parent determined to be an employee of the county pursuant to R.C. 2744.01(B) only if a court decides that the board or foster parent-employee could have foreseen the child's tortious acts and had a duty to prevent them. Pursuant to R.C. 2744.02(B)(4) and R.C. 2744.03(A)(3), however, the county cannot be held liable unless the child's tort occurred within or on the grounds of a building determined to be "used in connection" with the operation of a county children services board and did not result from the exercise of an employee's discretion with respect to policy-making, planning, or enforcement powers.