

OPINION NO. 82-069**Syllabus:**

A provider's duty to determine eligibility for Title XX social services, which is created by contracts made pursuant to R.C. 5101.463, may be delegated to a third party unless the contract includes a prohibition against such delegation or unless the state agency is determined to have a substantial interest in the provider determining eligibility. A county department of welfare, however, has no authority to agree to determine eligibility on behalf of such providers.

To: Kenneth B. Creasy, Director, Department of Public Welfare, Columbus, Ohio
By: William J. Brown, Attorney General, September 28, 1982

I have before me your request for my opinion concerning recently enacted Sub. H.B. 694, 114th Gen. A. (1981) (eff. Nov. 15, 1981). The bill enacted R.C. 5101.463 which reads in part:

(A) Except for contracts entered into directly between providers and the departments of public welfare, mental health, and mental retardation and developmental disabilities, all purchases of services under the Title XX social services program shall be made under a contract entered into by the provider of the services and the county department of welfare, community mental health board, or county board of mental retardation and developmental disabilities. The directors of public welfare, mental health, and mental retardation and developmental disabilities shall each prescribe a standard form for such contracts.

(B) Each contract shall specify:

. . .

(6) That the provider agrees to determine eligibility for all service recipients in accordance with state law;

. . .

You ask whether the duty which a provider agrees by contract to perform pursuant to R.C. 5101.463(B)(6) can be delegated to a third party or back to a county department of welfare.

The common law with regard to the delegation of contractual duties has been restated as follows:

- (1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.
- (2) Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.
- (3) Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.

Restatement (Second) of the Law of Contracts §318 (1981). See Thomas-Bonner Co. v. Hooven, Owens & Rentschler Co., 284 F. 377 (S.D. Ohio 1920), Caracciolo v. Bonnell, 57 Ohio App. 397, 14 N.E.2d 361 (Hamilton County 1937); cf. R.C. 1302.13 (delegation of duties is generally permitted in sales contracts). Where the General Assembly intends to abrogate the common law it must do so with clear, unambiguous and preemptory language. Andrews v. Lembeck, 46 Ohio St. 38, 18

September 1982

N.E. 483 (1888); Central Trust Co. v. Gilardi, 21 Ohio Op. 2d 183, 186 N.E.2d 771 (C.P. Hamilton County 1962). Since it did not do so in this situation, it is proper to apply the provisions of Restatement §318.

There does not appear to be any reason founded on public policy for requiring that an employee of the agency which provides social services actually determine eligibility. It is, however, within your power to prohibit such delegation by including a provision to that effect in the form contract. If such a provision is not included and objection is subsequently made to a delegation made by a provider, the Department would have to show that it had a substantial interest in having the provider, itself, determine eligibility in order to find that the contract had been breached.¹

Having, thus, concluded that a provider's duty to determine eligibility may be delegated unless the contract provides otherwise, I must consider whether a county department of welfare is authorized to agree to make the eligibility determinations for a provider. As a creature of statute, a county department of welfare has only those powers expressly granted or necessarily implied from an express power. See State ex rel. Shriver v. Board of County Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947); State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921). There is no express authority for a county welfare department to determine eligibility for persons other than those which it serves directly. See R.C. 5101.463. Although there is authority for a county welfare department to perform administrative functions connected with the provision of Title XX services (see R.C. 329.04), it is not appropriate to imply therefrom the existence of authority to make eligibility determinations since R.C. 5101.463 expresses the intent of the General Assembly that such determinations be made by the providers.

Therefore, it is my opinion, and you are advised, that a provider's duty to determine eligibility for Title XX social services, which is created by contracts made pursuant to R.C. 5101.463, may be delegated to a third party unless the contract includes a prohibition against such delegation or unless the state agency is determined to have a substantial interest in the provider determining eligibility. A county department of welfare, however, has no authority to agree to determine eligibility on behalf of such providers.

¹I note that R.C. 5101.463(B)(11) requires that each provider promise to "have conducted an independent audit of expenditures and determinations of eligibility under the program and make copies of the audit available to the county department of welfare, community mental health board, county board of mental retardation and developmental disabilities. . . ." This check on the determination performed by the providers lessens the reliance placed on that initial determination by the welfare department and, therefore, reduces the Department's interest in who actually performs that determination.