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CHILDREN, FEEBLE-MINDED—AUTHORITIES IN CHARGE OF CHILDREN'S HOME—CANNOT LEGALLY SUPERVISE FEEBLE-MINDED CHILDREN PLACED IN BOARDING HOME BY PROBATE COURT—PURPOSE, PENDING ACCEPTANCE OF CHILDREN BY INSTITUTION FOR FEEBLE-MINDED—ILLEGAL FOR AUTHORITIES OF CHILDREN'S HOME TO SO EXPEND PUBLIC FUNDS.

SYLLABUS:

The authorities in charge of a children's home cannot legally supervise feeble-minded children placed in a boarding home by the probate court pending acceptance of such children by an institution for the feeble-minded, and it would be illegal for the authorities in charge of such children's home to expend public funds so to supervise.

Columbus, Ohio, April 24, 1943.

Hon. Nicholas F. Nolan, Prosecuting Attorney,
Dayton, Ohio.

Dear Sir:

You have requested my opinion as follows:

"We have received the following letter from the authorities of the local Montgomery County Children's Home:

'It is our understanding that as a County Children's Home, we cannot give assistance to any child who has not been committed to our custody by the Juvenile Court or by action of the Board of Trustees.

Recently we have been asked to supervise children who have been adjudicated feeble minded and placed in a licensed boarding home by the Probate Court until they can be accepted by the institution for feeble minded. The County Commissioners pay their board and it may be that the County Commissioners will pay for medical care and clothing of these children. If they do not it may be charged to the Montgomery County Children's Home if we assume the case work service in this home.

There is also a certain amount of cost to giving supervision which may not be legitimate for our agency to assume. We are fearful that the State Auditor may object if we spend any funds from our annual budget on children who are not our legal responsibility.

If possible we should like for you to obtain for us a written opinion from the Attorney General as to whether or not we can assume any responsibility in this situation and how much we can do according to the law.'

Upon receipt of above communication, we gave some thought to the subject and there still seems to us considerable doubt about the authority of the Children's Home to undertake this work. We are mindful of the provisions of G. C. 3089, which defines the types of children who may be admitted and as to who may do the admitting. We have also checked over the sections of the General Code relating to the commitment of feeble minded, particularly Sections 1890-100, -105, and -107. Apparently the County Commissioners are predicating their right to delegate the supervision of these children to the Children's Home under the language of Section 1890-107, which it seems to us would be tantamount to establishing a detention hospital.

However, inasmuch as Section 3089 does not seem to contemplate such a situation there arises considerable doubt in our minds as to whether the Children's Home can serve in such a situation."

I assume that the children's home in question was established pursuant to the authority contained in Section 3077, General Code, and the admission of children thereto would therefore be governed by the provisions of Section 3089, General Code, which reads:

"The board of trustees of the home shall receive for care and treatment children under the age of eighteen years, who have resided in the county not less than one year, and such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agreed upon, who are, in the opinion of the trustees, suitable children for acceptance by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them; provided that the juvenile court of the county may at any time commit a child to the board of trustees when in the opinion of the judge it should be so committed. The board of trustees may contract with persons, hospitals and other agencies for care and treatment of such children as need special care outside of the home, or within the home if facilities have been provided for such care and treatment. Closely supervised boarding homes shall be used for children who are not suitable for care in the children's home because of behavior, or mental or physical condition, and such children shall not be accepted under permanent surrender or by permanent commitment by the juvenile court. If a ward of such home is found to be incorrigible or can be better cared for elsewhere, he or she may be brought before the juvenile court for further disposition. Parents or guardians of such children shall

in all cases where able to do so, pay reasonable board for their children received by such children's home. The above duties and functions shall apply to a county child welfare board established under the provision of section 3092."

This section provides that the following four classes of children may be admitted to a county children's home :

1. Orphans.
2. Children who are abandoned or neglected by their parents.
3. Children whose parents are unable to provide for them.
4. Children committed by the juvenile court when in the opinion of the juvenile judge they should be so committed.

In addition to the provisions of Section 3089, General Code, supra, further provision for the admission of children to county children's homes is made by Section 3091, General Code, which provides :

"When a child maintained in the infirmary of any county becomes eligible to the children's home of such county or district, such fact shall be certified to the trustees thereof by the superintendent of the infirmary. Except such as are imbecile, idiots or insane, no child or children entitled to admission into a children's home shall be kept or maintained in any county infirmary in this state. When children are found by township trustees to be proper subjects for the care of the county, said trustees shall file their complaint with the juvenile court, and if said court orders such children to be committed to a children's home, they shall be conveyed to such home by the township trustees, and the expenses thereof paid from the township poor fund. The superintendent of the home may provide and care for temporarily until the proper officers are notified, any child found abandoned and destitute, and which is eligible to the children's home."

These are the only laws which I have been able to find which make provision for the admission of children into a children's home, and they do not authorize the admission of children thereto under the circumstances outlined in your letter. In fact, Section 3091, General Code, seems to imply that imbecile, idiot or insane children should not be admitted to a children's home.

Certain other sections of the General Code authorize the trustees of a children's home to place children in private homes and to visit at least once each year children placed out by the home, and, when the welfare of the child demands it, replace it in another family home or return it to the institution. See Sections 3095, 3096, 3098, 3099, 3100 and 3101, General Code. Such children, of course, are subject to the supervision

and guardianship of the board of trustees of the children's home and such board could properly expend its funds in the exercise of such functions.

The care and treatment of mentally ill and feeble-minded persons is provided for by Sections 1890-2 to 1890-114, inclusive, General Code. It is worthy of note that a distinction is made in the Ohio statutes between persons who are mentally ill and persons who are feeble-minded. See Sections 1890-18 and 1890-97, General Code. Provision is made in Section 1890-107, General Code, for the establishment by the county commissioners of so-called detention hospitals for the care or treatment of persons who are mentally ill and who cannot be admitted to a proper state institution on account of lack of room.

However, feeble-minded persons cannot be committed to institutions established for the care or treatment of persons who are mentally ill. Section 1890-104, General Code, provides:

"No superintendent of a receiving hospital may receive or retain for observation or treatment, and no court or judge thereof may commit to a receiving hospital for observation or treatment a person believed to be or determined to be feeble-minded. All commitments of the feeble-minded shall be made to the proper institution for the feeble-minded."

If the institutions for the feeble-minded are unable to receive additional inmates, the following provision is made in Section 1890-105, General Code:

"If by reason of inability of the institutions for the feeble-minded to receive additional inmates and the department of public welfare or the division of mental diseases is unable to provide for the custody and care of any feeble-minded person, the superintendent of the institution to which application is made shall forthwith notify the judge of the probate court in which the proceedings for the commitment of such feeble-minded person are pending, of his inability to receive such feeble-minded person. The probate judge shall thereupon take such action and make such order as he may deem necessary and advisable to provide for the detention, supervision, care and maintenance of said feeble-minded person, at the expense of the county, until such time as he may be received in an institution for the feeble-minded."

This section places the matter of the supervision of feeble-minded persons who cannot be received in the state institutions for feeble-minded under the jurisdiction of the probate judge, and the county commissioners have no power to impose upon the authorities in charge of the county children's

home the duty of supervising such feeble-minded persons and, likewise, such authorities in charge of the home have no power so to supervise.

It is stated in the letter from the authorities in charge of the children's home that such supervision would entail expense. It is well settled that public boards have such powers only as are expressly given to them by law and such implied powers as may be necessary to carry into effect the express powers. It is also well settled that public funds may be expended only where the law clearly authorizes such expenditure and, in case of doubt, the doubt should be resolved against the legality of the expenditure. See:

Jones v. Commissioners, 57 O. S., 189

Peter v. Parkinson, 83 O. S., 36

State, ex rel. Locher, v. Menning, 95 O. S., 97

State, ex rel. Bentley, v. Pierce, 96 O. S., 44

Since the General Assembly has not expressly authorized the authorities in charge of a children's home to supervise feeble-minded persons who cannot be admitted to an institution for the feeble-minded because of the inability of such institution to receive them, and who have never been admitted to a children's home, I am of the opinion that such authorities in charge of the children's home cannot assume to exercise such power and cannot expend public funds therefor. This conclusion is strengthened by reason of the elaborate provisions which have been made by the General Assembly with respect to the care, custody and control of feeble-minded persons. State institutions have been established therefor and, in the event of the inability of such state institutions to receive feeble-minded persons, they are subject to the orders of the probate court.

For these reasons, you are advised that the authorities in charge of a children's home cannot legally supervise feeble-minded children placed in a boarding home by the probate court pending acceptance of such children by an institution for the feeble-minded, and you are further advised that it would be illegal for the authorities in charge of such children's home to expend public funds so to supervise.

Respectfully,

THOMAS J. HERBERT,
Attorney General.