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CHILDREN, DEPENDENT AND CRIPPLED — COUNTY LIABLE TO STATE FOR EXPENSE OF CARE AND TREATMENT WHERE COMMITTED BY JUVENILE JUDGE TO DEPARTMENT OF PUBLIC WELFARE—WHERE EXPENSES EXCEED AMOUNT APPROPRIATED, COUNTY LIABLE—ADEQUATE APPROPRIATION MUST BE MADE FOR PAYMENT FROM COUNTY TREASURY.

SYLLABUS:

A county is liable to the state for the expense of care and treatment of dependent and crippled children committed by the Juvenile Judge to the Department of Public Welfare, even though said expenses exceed the amount appropriated by the county for that purpose. Payment from the county treasury can not be made, however, until an adequate appropriation is made.

Columbus, Ohio, August 19, 1940.

Hon. Robert C. Carpenter, Prosecuting Attorney,
Tiffin, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

“I would like your formal opinion involving the interpretation to be placed upon Ohio General Code, Section 1352-4, based upon the following facts:

Assuming that for the year 1939, the County Commissioners appropriated a certain sum of money to be used for the care of crippled children; the expenses incurred through commitments by the Probate Judge exceed the amount appropriated. Is the County liable to the State for expenses in excess of the appropriated amount?

To rephrase the question, is the Probate Judge of a County limited in his commitments and is the Board of State Charities limited in its acceptance of crippled children by the amount of money appropriated? Or is a County liable to the State for all commitments of crippled children, regardless of the amount appropriated by the Commissioners?”

Under the Juvenile Court Code as amended effective August 19, 1937,

(117 O. L. 520) the Juvenile Court has exclusive original jurisdiction of any child who is delinquent, neglected, dependent or crippled (Section 1639-16, General Code). Having found a child to be within the provisions of said Code (Section 1639-1 to 1639-62, General Code), the Juvenile Judge has a wide discretion concerning the disposition of said child. Under the provisions of Section 1639-30, General Code, he may, among other things:

“(2) Commit the child to a suitable institution or agency or to a suitable private institution or agency incorporated under the laws of the state approved by the state department of Public Welfare and authorized to care for children or to place them in suitable family homes.

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“(4) Make such further disposition as the court may deem to be for the best interests of the child except as herein otherwise provided.”

The powers and duties of the Department of Public Welfare and the Juvenile Judge with respect to dependent crippled children as set forth in Sections 1352-4, 1352-8, 1352-9, 1352-10 and 1352-16, General Code, remain unaffected by the passage of said Juvenile Court Code which, although covering to some extent the same subject matter, can readily be harmonized with said sections. Sections 1352-8, 1352-9 and 1352-10, General Code, read as follows:

Section 1352-8, General Code:

“In order to provide suitable medical and surgical treatment, and education when necessary, of crippled children whose parents or guardians fail or are financially unable to provide such treatment, the board of state charities is authorized and empowered to receive into its custody such children. Application for such care, treatment, and education, shall first be made to the juvenile court by a parent, guardian or some interested person. If such court is of the opinion that such child is in need of treatment and education, and finds that the parent or guardian fails to provide it, he may make an order to that end; or if the parent or guardian is financially unable to pay all or a part of the expense of such treatment, the court shall make a proper finding and decree. In either case the court shall at once forward a copy of the decree and a statement of facts to the board of state charities, and such board shall when able to do so under this act, accept such child for care as hereinbefore provided. Upon receipt of notice from such board that such child can be given suitable treatment the court shall then commit such child to such board and provide for its conveyance in charge of a suitable person to the place designated by such board for treatment. The expenses for conveyance

shall be paid by the county or by the parent or guardian as the court may direct. Such commitment shall be temporary and shall be only for the period necessary for the treatment of such child."

Section 1352-9, General Code:

"The board of state charities shall arrange for the treatment and education of crippled children committed to it by the juvenile court. The expenses for board, clothing and personal necessities and for mental, medical, surgical, dental, and optical examination and treatment, including massaging and other beneficial treatment and braces, artificial limbs and accessories and their upkeep, and for education when necessary shall be paid out of funds appropriated to the use of the board of state charities by the general assembly; but the board of state charities may require parents or guardians to pay the state for such expenses when in its judgment such action is just. Such board shall exercise close supervision over such crippled children while patients in such hospitals and may at any time terminate any contracts so made when in its judgment such action should be taken. Each child shall be visited as frequently as necessary and proper by a representative of such board who shall prepare and present to the board a written report concerning the progress of such patient."

Section 1352-10, General Code:

"Whenever it appears that a crippled child has been successfully treated, or that it cannot be further benefited by such treatment, the board shall order its discharge and thereupon its guardianship and responsibility shall cease. After such a child has been in the care of the board of state charities in accordance with this act for more than one year the parent or guardian, with the approval of the juvenile court, may cause its release from the supervision of the board of state charities."

The duties and powers of the Board of State Charities are now vested in the Department of Public Welfare, Division of Charities (Section 154-57, General Code).

With respect to the question of jurisdiction over a crippled child committed to the Department of Public Welfare for treatment, Section 1639-35 of the Juvenile Court Code must be considered in connection with Section 1352-10, General Code, above quoted. Section 1639-35 reads:

"When a child is committed to the boys' or girls' industrial school, or to the Ohio state reformatory, or to the permanent care and guardianship of the state department of public welfare, or to an institution or association certified by the state department of public welfare with permission and power to place such child in a foster home with the probability of adoption, the jurisdiction

of the child so committed shall cease and terminate at the time of commitment. All other commitments made by the court shall continue for such period as designated by the court, or until terminated or modified by the court, or until a child attains the age of twenty-one years. * * *

Construing these sections together it appears that a crippled child may be released by the Department of Public Welfare when the latter determines either that said child has been successfully treated or that it can not be further benefited by treatment or upon the order of the Juvenile Judge, the original commitment to the department being a temporary one.

I come now to the question of payment of the expenses for dependent crippled children. Section 1352-4, General Code, referred to in your letter, reads as follows:

“The actual traveling expenses of any dependent, neglected, crippled or delinquent child and of the agents and visitors of said board shall be paid from funds appropriated to said board, but the amount of board, if any, paid for the care of such child and the expenses for providing suitable clothing and personal necessities, mental, medical, surgical, dental and optical examination and treatment, including massaging and other beneficial treatment and braces, artificial limbs and accessories and their upkeep and for the education when necessary of a crippled child, shall be charged by the board of state charities to the county from which said child was committed or transferred as provided in Sections 1352-3, 1352-5 and 1352-8. The treasurer of each county, upon the warrant of the county auditor, shall pay to the treasurer of state the amount so charged upon the presentation of a statement thereof. The sum so received by the treasurer of state shall be credited to the fund appropriated for the purpose of maintaining the child placing work of the board.”

Section 1352-16, General Code, provides:

“When an account for a crippled child is presented to the county from which committed, an allowance shall be credited to such account as may be determined to be equitable by the division of charities, due to funds allotted by the United States or the state of Ohio, or both.

The board of county commissioners in each county shall establish a crippled children's fund and shall appropriate thereto a reasonable amount for the county's share in providing medical, surgical and other aid to crippled children residing therein.”

Sections 1639-34 and 1639-57 of the Juvenile Court Code also definitely place upon the county the duty of paying the necessary expenses, over and

above that paid by the state or federal government, for crippled children who have been committed by the Juvenile Judge whether said commitment be to the state Department of Public Welfare, which is usually the case, or to some other agency or institution. See also State, ex rel. Crabbe vs. Wead, 113 O. S. 692 and Opinions of the Attorney General for 1922, Volume I, page 125.

In making your inquiry regarding the legality of expenses and liability of the county therefor, where said expenses for crippled children exceed the amount appropriated for that purpose, you probably have in mind Section 5625-33, General Code which reads in part as follows:

“No subdivision or taxing unit shall:

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(b) Make an expenditure of money unless it has been appropriated as provided in this act;

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(d) Make any contract or give an order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same * * * has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * * Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. * * *”

With respect to the applicability of Section 5625-33, General Code, and other cognate sections to the creation of obligations of the county to the state for the support of dependent crippled children, your attention is directed to an analogous situation considered by one of my predecessors in an opinion reported in Opinions of the Attorney General for 1928, Volume I, page 571. There the question was whether the Common Pleas Judge had authority to incur obligations for jury and witness fees over and above the amount appropriated for that purpose. While said opinion held that courts, as well as other officers must follow the provisions of Section 5625-33, supra, the then Attorney General stated at page 574:

“It does not follow however, that courts must necessarily suspend even though no money has been appropriated or is available for appropriation for the purpose of paying the fees of necessary witnesses and jurors. * * * Our statutes do provide for paying witnesses and jurors. If they serve they have a lawful claim

for such fees as are provided for by the statutes but they cannot be paid until the money is appropriated as provided by law. Claims for witness and jury fees are not based on contract but are payable by virtue of statutory law.

In Ohio the court's power to determine what expenditures are necessary is controlled by the constitutional provision that no money shall be expended from the county treasury except as provided by law. Art. X, Sec. 5, *supra*. The law provides in Section 5625-33, *supra*, that appropriations must be made and that no contract for the expenditure of money may be entered into or obligation incurred until the money therefor is appropriated and a certificate of the fiscal officer is made to the effect that the money to meet the obligation has been appropriated, is in the treasury and is unencumbered. *This, however, has no application to the creation of obligations for witness and jury fees which is fixed by statute.* The making of these appropriations so far as a county is concerned is solely in the hands of the county commissioners. County commissioners, however, cannot abuse the control they have over appropriations by refusing to provide for the necessary expenditures of the court but neither may the court disregard the authority vested in the county commissioners." (Emphasis mine.)

In Opinions of the Attorney General for 1927, Volume I, page 104, the third branch of the syllabus reads:

"The court in fixing an allowance under Section 3004-1 of the General Code must look to the appropriation made by the county commissioners for that purpose. If the court makes an allowance in excess of the amount appropriated and the county commissioners do not within the fiscal year amend their appropriation measure so as to include the amount of such allowance, then although such allowance is not illegal, it is ineffective."

In *State, ex rel. vs. Huwe, et al.*, 103 O. S. 546 (1921) a writ of mandamus was issued to require the county commissioners to make a levy, the county auditor to draw a warrant, and the county treasurer to pay pursuant to Section 1815-12, General Code, for the support of feeble-minded patients in state institutions from Hamilton County for the years 1910 to 1915, amounting to Sixty-Eight Thousand Nine Hundred Seven Dollars (\$68,907.00). The court in this case stated at page 555:

"It seems quite obvious that the provisions of Section 2460 have no application to a claim of this nature. In the first place it must be noted that the very provisions of that section except cases in which the amount due is fixed by law or in which it is authorized to be fixed by some other person or tribunal. But this claim does not come within the requirement that claims against the county be presented to the board of county commissioners for the

further reason that the provisions of the statute to which we refer having specifically prescribed the method of fixing the amount which each county shall pay and having designated the officials who shall determine the same, and also having specified the procedure with reference to the presentation of the statement and the payment thereof, such specific provision, upon principles of statutory construction that are familiar, constitutes an exception to the general provisions of Section 2460 G. C."

While Section 5625-33, General Code, was not in effect at the time the obligations involved in the above case were incurred, Sections 5660 and 5661, General Code, (now repealed) were in effect and provided substantially as does the present Section 5625-33, General Code, yet the court made no mention thereof as a possible bar to the legality of the obligations of the county in the absence of an appropriation and while of course payment could not be made until the money was appropriated, the court required the commissioners to make the necessary levy thereby recognizing the legality of the county's indebtedness to the state. It will be noted that feeble-minded patients are committed to the care of the state by the Probate Judge (Sections 1890-27 and 1890-98) as the dependent crippled children are committed by the Juvenile (or Probate) Judge and the county is by law liable for their support.

Section 5546-20a, General Code, effective June 24, 1937, (117 O. L. 55) is also pertinent to this matter and reads in part as follows:

"The auditor of state shall not make distribution of the local government fund as provided in Sections 5546-1 to 5546-22 of the General Code, both inclusive, to any county which is indebted or otherwise obligated to the state until such indebtedness or other obligation has been duly paid and satisfied. * * *"

The constitutionality of the above law was challenged in the case of State, ex rel. v. Ferguson, 133 O. S. 325 wherein it was claimed that the Legislature had attempted to confer upon the state auditor and director of finance the power to adjudicate the validity of debts. The court held, as disclosed by the syllabus:

"1. Computation by the Auditor of State of the amount of money due from one political subdivision to another is not an exercise of judicial power.

2. Section 5546-20a, General Code, does not confer power to adjudicate the validity of debts, but to compute the amount of debts, and, therefore, does not confer judicial power on the Audi-

tor of State or Director of Finance of the state of Ohio. Such section does not violate Section 5, Article XII, nor the due process or equal protection provisions of the Constitution of Ohio, and is not unconstitutional."

At page 332, the court stated:

"The claim is made that the statute violates the equal protection clause of the Constitution. The statute is concerned with the adjustment of accounts between the counties and the state. The statute treats each county alike. If one county has paid its obligations to the state and another has not, that is not the fault of the statute but of the counties themselves. The statute does not act retrospectively. Nor is it inequitable. The state treasury can only be kept in balance if obligations are paid when due. While the state is sovereign and paramount in respect to taxation, by this statute it is not exacting from the counties any rule of conduct not applicable to itself. It demands that as it distributes funds to the counties, pursuant to certain statutes, the counties shall meet their obligations to the state in like manner. It is said by the relators that if the state has any claim against the county it may go into a court of competent jurisdiction and there secure judgment. The same argument applies to the claim of the relators. If the Auditor of State or other official makes an error the courts are open for a proper correction. * * *"

The "indebtedness or other obligation" of the county to the state, satisfaction of which the Legislature in enacting Section 5546-20a, supra, desired to effect, is for the most part the exact type of indebtedness about which you inquire. The chief obligations of the county to the state are for the support of insane, epileptic, tubercular and feeble-minded persons and dependent, neglected and crippled children. It is obvious that no appropriations were made for payment of said indebtedness for which the state is authorized to withhold local government funds due the county, yet, neither the Legislature nor the court in the Ferguson case, supra, even considered this fact as invalidating the county's obligation to the state.

The purpose of the Juvenile Court Code is set forth in Section 1639-59, General Code, which reads as follows:

"The purpose of this chapter is to secure for each child under its jurisdiction such care, guidance and control, preferably in its own home, as will serve the child's best welfare and the best interests of the state. When a child is removed from its own family, it is the intent of this chapter to secure for such child, custody, care and discipline, as nearly as possible equivalent to that which should have been given by its parents. The principle is hereby recognized that children under the jurisdiction of the court are wards of the

state, subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from neglect or injury, and to enforce the legal obligations due to them and from them. To this end this chapter shall be liberally construed."

With the above purpose in mind and considering for the moment the practical side of your question, let us re-examine the duties of the Welfare Department when a child is committed to its care. The department has the duty of giving the child the treatment which it needs and while it may release said child when cured or when it determines that further treatment is useless, it is almost impossible to determine in advance how much treatment is necessary and how fast the child will respond thereto. This makes it difficult to fix the cost in advance and the Juvenile Judge could not accurately determine if funds appropriated would suffice to take care of all commitments.

The obligation to pay for the support is placed upon the county by law and it is not a contractual obligation within the provisions of Section 5625-33, supra, even though the Juvenile Judge has discretion in his commitments. To say that the county is not liable would be to say that merely by failing to appropriate sufficient money the county could evade its legal obligation and shift the same to the state. Such a construction of Section 5625-33, supra, in the face of the definite statutory provisions placing the liability on the county appears untenable. Naturally, payment from the county treasury can not be made without an appropriation, but this does not destroy the obligation.

Specifically answering your inquiry, it is my opinion that a county is liable to the state for the expense of care and treatment of dependent and crippled children committed by the Probate Judge to the Department of Public Welfare, even though said expenses exceed the amount appropriated by the county for that purpose. Payment from the county treasury can not be made, however, until an adequate appropriation is made.

Respectfully,

THOMAS J. HERBERT,
Attorney General.