

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 45

CHILD ABUSE - Duty of county attorney to represent Department of Family Services in child abuse proceedings;
COUNTY ATTORNEYS - Responsibilities in child abuse, neglect, and dependency proceedings;
FAMILY SERVICES, DEPARTMENT OF - Duty of county attorney to represent department in child abuse, neglect, and dependency proceedings;
STATE AGENCIES - Duty of county attorney to represent Department of Family Services in child abuse, neglect, and dependency proceedings;
MONTANA CODE ANNOTATED - Title 41, chapter 3; sections 7-4-2716, 7-4-2717, 41-3-401, 53-2-303;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 34 (1985).

HELD: It is the duty of the county attorney to represent the Department of Family Services in child abuse, neglect, and dependency proceedings under the provisions of Title 41, chapter 3, MCA.

14 December 1987

Gene Huntington, Director
Department of Family Services
P.O. Box 8005
Helena MT 59604

Dear Mr. Huntington:

You have asked me to clarify the role of the county attorney in child abuse and neglect proceedings following the enactment of House Bill 325 by the 1987 Legislature.

HB 325 (1987 Mont. Laws, ch. 609) reorganized the executive branch of state government by creating the

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Department of Family Services (the department) and transferring the responsibility for providing child protective services from the Department of Social and Rehabilitation Services and the county welfare departments to the new department, effective July 1, 1987. Your inquiry arises from the fact that HB 325 did not amend section 53-2-303, MCA, which requires the county attorney to be the legal advisor to the county welfare board and to render legal services to the county welfare department. You ask whether the Legislature's failure to include a reference to the new Department of Family Services in section 53-2-303, MCA, means that the county attorney is not required to represent the department in child abuse and neglect proceedings.

The duties of county attorneys are set forth in sections 7-4-2711 to 2717, MCA. Section 7-4-2716(1), MCA, provides that the county attorney must "represent the state in all matters and proceedings to which it is a party or in which it may be beneficially interested, at all times and in all places within the limits of his county." Section 7-4-2717, MCA, requires the county attorney to perform "such other duties as are prescribed by law."

To make effective the transfer of authority in child protection matters to the new department, the Legislature considered and amended numerous statutes, including section 41-3-401, MCA. However, the Legislature retained subsection (1) of section 41-3-401, MCA, which provides that the "county attorney, attorney general, or an attorney hired by the county welfare department or office of human services shall be responsible for filing all petitions alleging abuse, neglect, or dependency." In 1985 the Legislature amended this statute by giving authority to file such petitions to the attorney general and to specially retained attorneys in addition to the county attorney. 1985 Mont. Laws, ch. 659. But, importantly, the Legislature did not relieve the county attorney from his responsibility for filing abuse, neglect, or dependency petitions. I agree with your view that the county attorney remains primarily responsible for filing the petitions and that the attorney general or specially retained attorney would act under section 41-3-401(1), MCA, only when the county attorney does not act because of absence, illness, differences in policy, personal conflicts, pressure of official business, or similar reason. See, e.g., 41 Op. Att'y Gen. No. 34 (1985). This responsibility continues irrespective of the transfer of child protective services to the Department of Family Services under HB 325.

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The Legislature has also made clear its intention that county attorneys have a major role in child abuse, neglect, and dependency matters through other statutory provisions. The Department of Family Services is required to notify the county attorney of all reports of suspected child abuse or neglect. § 41-3-201, MCA. The county attorney may convene an interdisciplinary child protective team and is a member of the team. § 41-3-108, MCA. If the evidence indicates violation of the criminal code, the county attorney is responsible for filing appropriate charges against the alleged offender. § 41-3-106, MCA. The county attorney has authority to remove a youth believed to be in immediate or apparent danger and to place the youth in a protective facility. § 41-3-301, MCA. The county attorney may direct law enforcement agencies to conduct investigations and furnish reports concerning the alleged abuse or neglect. § 41-3-401(1), MCA. The county attorney may file a petition for temporary investigative authority and protective services. § 41-3-402, MCA. These statutes lead me to conclude that HB 325 did not change the role of the county attorney in child abuse, neglect, and dependency proceedings. The county attorney must represent the new department in such proceedings.

THEREFORE, IT IS MY OPINION:

It is the duty of the county attorney to represent the Department of Family Services in child abuse, neglect, and dependency proceedings under the provisions of Title 41, chapter 3, MCA.

Very truly yours,

MIKE GREELY
Attorney General