July 11, 2006

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711

RE: Request for Attorney General Opinion
Legal Representation under the Mental Retardation Act

Dear Attorney General Abbott:

I respectfully request a legal opinion regarding an issue that is in the interest of the State pursuant to Section 402.043 of the Texas Government Code.

Issue:
Whether the County Attorney of Nueces County has the authority to represent the Texas Department of Aging and Disability, a state agency, in a prosecuting an Application for Placement under the Mental Retardation Act (Tex. Health & Safety Code Ch. 593).

Facts & History:
The Texas Department of Aging and Disability, a state agency, requested the County Attorney to pursue litigation, specifically to file an Application for Placement under the Mental Retardation Act in accordance to Chapter 593 of the Texas Health & Safety Code. In Nueces County there is a County Attorney and a District Attorney. In 1998, by legislation affecting Nueces County only, the criminal jurisdiction of the County Attorney (prosecution of misdemeanor offenses) was consolidated with the criminal jurisdiction of the District Attorney (prosecution of the felonies). Section 593.041 of the Texas Health & Safety Code does not specifically state who represents this state agency. Based on Article 5, Section 21 of the Texas Constitution, Chapter 593 of the Texas Health & Safety Code, Attorney General Opinion No. MW-66 and other caselaw, it is the legal opinion of the County Attorney that she is without authority to represent this state agency in this matter.
Authority and Argument:
Section 593.041 of the Texas Health and Safety Code states:

A proposed resident, if an adult, a parent if the proposed resident is a
minor, the guardian of the person, the court, or any other interested person,
including a community center or agency that conducted a determination of
mental retardation of the proposed resident, may file an application for an
interdisciplinary team report and recommendation that the proposed client
is in need of long-term placement in a residential care facility.

Unlike mental commitments under Section 574.001 of the Texas Health and Safety Code
the County Attorney is not specifically mentioned as a party with authority to file the
application. Therefore, it must be determined whether the County Attorney has the
authority to represent the Texas Department of Aging and Disability in such a
proceeding.

The Texas Department of Aging and Disability is a state agency. There are statutes that
have been construed by the courts to imply representation by the attorney general or local
prosecutor whenever the State is made a party. In the case of Duncan v. State, the court
held that a county attorney had no right to intervene in a forfeiture case filed by the
attorney general. \(^1\) The court concluded that a county attorney’s facial authority to
represent the State in trial exists only when there is no district attorney in that county.
According to the Duncan Court, this was a qualification of the county attorney to
represent the State. \(^2\) When a district attorney exists in a county with a county attorney
the respective duties of county and district attorneys are determined by the legislature as
required by Article 5 section 21 of the Texas Constitution. \(^3\) Other courts have also
determined that if there is a district attorney in the county, the authority of the county
attorney to represent the State lies statutorily. \(^4\) In other proceedings, such as
guardianships, the statutes are specific that the prosecuting attorney representing the state
in criminal cases in county court shall represent the Texas Department of Aging and
Disability. \(^5\) In Nueces County, as of 1998 the County Attorney does not have any
criminal jurisdiction. Although these guardianship proceedings are not criminal matters
the authority to represent the State is derived from the authority to represent the State in

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\(^1\) Duncan v. State, 28 Tex. Civ. App. 447, 67 S.W. 903 (1902 no writ); This is a case involving school
lands; see also Brooks, Texas Practice, County and Special District Laws, Vol. 36, Chapter 21.
\(^2\) Id.
\(^3\) Duncan v. State, 28 Tex. Civ. App. 447, 67 S.W. 903, 905 (1902 no writ); See also Texas Constitution,
Article 5 Section 21; See also Brooks, Texas Practice, County and Special District Laws, Vol. 36, Chapter 21.
suit); State v. Texas Cent. R. Co., 62 Tex. Civ. App. 166, 130 S.W. 633 (1910 no writ) (CA lacked
authority to bring suit to recover civil penalties against the railroad co.).
\(^5\) Texas Human Resources Code, Sec. 161.110.
criminal proceedings before the County Courts. Therefore, in guardianship proceedings
the District Attorney is the office that has statutory authority to represent the Texas
Department of Aging and Disability.

The Criminal District Attorney of Tarrant County asked the Texas Attorney General
whether his office had authority to represent applicants in a commitment proceeding
brought under the Mental Retardation Act of 1977. The Attorney General reasoned that
in instances in which the state has an interest, the Tarrant County District Attorney had
authority to represent the applicant in such a commitment. This was premised upon the
District Attorney's authority to represent the State. The Tarrant County District Attorney
by statute has authority to represent the State in all matters pending before District and
County Courts. The Attorney General in this case does state that there are cases
specifically authorizing the district and county attorney to act in matters as officials
representing the State. This is an accurate statement and is based on Texas Constitution
Art. 5 Section 21. However, this statement is referencing district and county attorneys offices as a whole and does not contemplate the functions of specific offices. Texas Constitution Art. 5 Section 21 states the following:

...The County Attorneys shall represent the State in all cases in the District and
inferior courts in their respective counties, but if any county shall be included in a
district in which there shall be a District Attorney, the respective duties of District
Attorneys and County Attorneys shall in such counties be regulated by the
Legislature.

In Nueces County there is a District Attorney. Thus, the County Attorney's authority to
represent the State is guided by statute.

Chapter 593 of the Texas Health & Safety Code does not specify who is the prosecuting
authority in pursuing residential placement under the Mental Retardation Act. Since
there is no specific statute that authorizes the county attorney to represent the State and in
reviewing the law I have come to the conclusion that I, as the County Attorney, am not
authorized to pursue litigation under Chapter 593 on behalf of the State. However,
because this is an important issue to this state agency I respectfully ask whether it is
within the authority of the County Attorney of Nueces County to represent this state
agency in a proceeding pursuant to Chapter 593 of the Texas Health & Safety Code.

Sincerely,

Laura Garza Jimenez
Nueces County Attorney

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7 Texas Constitution Article V Section 21.
cc: Ms. Angela Leach
    Texas Department of Aging and Disability

    Ms. Paula Ramirez
    Director, Corpus Christi State School