

# County of Nueces



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**OPINION COMMITTEE**

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July 11, 2006

FILE # ML-44899-06

I.D. # 44899

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

**RQ-0510-GA**

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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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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<sup>1</sup> *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.

<sup>2</sup> *Id.*

<sup>3</sup> *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, Texsa Practice, County and Special District Laws, Vol. 36, Chapter 21.

<sup>4</sup> See *Wexler v. State*, 241 S.W. 231 (Tex. Civ. App.-Galveston 1922, no writ)(CA lacked authority to bring 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.).

<sup>5</sup> 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.

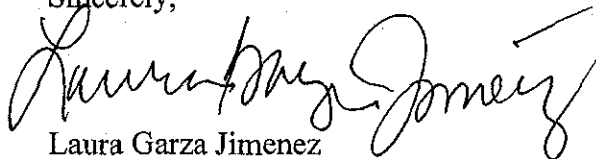
The Criminal District Attorney of Tarrant County asked the Texas Attorney General whether his office had authority to represent applicants in a commitment proceeding brought under the Mental Retardation Act of 1977.<sup>6</sup> The Attorney General reasoned that in instances in which the state has an 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. (emphasis added). 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.<sup>7</sup>

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

<sup>6</sup> Texas Attorney General Opinion NO. MW-66.

<sup>7</sup> Texas Constitution Article V Section 21.

Page 4

cc: Ms. Angela Leach  
Texas Department of Aging and Disability

Ms. Paula Ramirez  
Director, Corpus Christi State School