OPINION
65-164

September 15, 1965 (OPINION)

Mr. Richard B. Thomas

State's Attorney

Ward County

RE: Mentally ill - Expense of care and treatment - Claims

You have asked two questions and requested our opinion in connection with said questions.

Your first question deals with whether or not the State Board of Administration, or the State Department of Health has the power to compromise and discharge claims of a county which has contributed towards the care of a person, who is, or has been institutionalized at the Jamestown State Hospital.

Your second question is, that if the State Board of Administration, or the State Department of Health does have this power to compromise and discharge claims of a county, should the county receive a pro-rata share of the settlement. You state further that these questions have arisen in connection with Ward County's claim against the Carl J. Erickson estate for its share of the costs of care and treatment it contributed to Mr. Arvey Erickson at the Jamestown State Hospital.

The same questions you asked have also been raised by Mr. Hugh McCutcheon of the Bosard, McCutcheon & Coyne Law Firm of Minot, North Dakota, in connection with another estate matter.

Effective July 1, 1943, chapter 25-08 of the North Dakota Revised Code, in the recodification of that year, took effect. This chapter of the law continued in effect up until July 1, 1961. It was then repealed, in toto, by chapter 211, at section 9 of the 1961 Session Laws. During the 1961 Legislative Session, a new bill was enacted which took effect July 1, 1961, and is presently found with its subsequent amendments in chapter 25-09 of the North Dakota Century Code, 1965 Pocket Supplement.

One significant section which originally appeared as section 25-08-28 of the North Dakota Revised Code of 1943, was enacted as section 25-09-09 of the North Dakota Century Code, and took effect July 1, 1961, along with the rest of chapter 25-09. This section provides as follows:

> "25-09-09. Statutes of limitations not bar to recovery. No statute of limitations or similar statute shall bar the right of recovery for the expense incurred by the state for care and treatment at the state hospital or state school from the patient or his estate, but this section shall not apply to

> claims that may be otherwise barred by law prior to July 1, 1961."

The earlier law, at section 25-08-28 of the North Dakota Revised Code, which was repealed effective July 1, 1961, provided as follows:

> "25-08-28. Statute of limitations not to bar recovery. The statute of limitations shall not bar the right of recovery for the expense of such treatment and maintenance at such institutions either from the patient, or his estate after his death but this section shall not apply to claims that are already barred at the time that this section takes effect."

It is significant that section 25-08-28 was repealed, and it is further significant that some slight changes were made in the wording of section 25-09-09 of the North Dakota Century Code.

The law in effect from July 1, 1943, up to July 1, 1961, placed a burden on the counties at section 25-08-02 of the North Dakota Revised Code, of anticipating the expense of keeping county patients at state institutions, and required that the counties include such anticipated expense in the county budget. Further, at section 25-08-16, the state auditor (prior to 1961), and the Department of Accounts and Purchases (after July 1, 1961), were required to draw on counties for amounts due for institutional care under the procedures set forth in that section. It further provides for determinations in those cases where the county commissioners disputed residency of a particular person and placed a mandatory duty on the county treasurer and the county auditor to remit to the state treasurer the amounts specified in the Department of Accounts and Purchases draft, as the amounts due from the county for the particular quarter of the year involved.

Section 25-08-18 provided a penalty in those cases where a county failed to pay the charges for the care of the patients under the procedures set forth in that section.

Next, section 25-08-24 provided that expenses for institutional care were chargeable against the Guardianship Estate of the patient, with certain restrictions, while section 25-08-25 provided that the expenses for institutional care were chargeable against the estate of a deceased patient, and against the patient himself.

Next, under section 25-08-26, the county auditor was authorized to collect expenses for the treatment and maintenance of the county's patients at the State Hospital, State School, and State TB Sanatorium, incurred by the county or the state including the amount advanced by the state from the institutional support funds. That section continued by providing that the full and actual costs of the county and state for care and treatment of patients hospitalized were to be collected by the county auditor from the patient, his estate, or from relatives responsible by law for the patient's support in those instances where the patients or responsible relatives were financially able to pay. This section, enacted in 1949, and amended in 1957, also defined the term "responsible relatives" as follows: "shall mean and include the patient's spouse, father, mother or children." This section also provided that if the person liable for

the payment of costs failed or refused to pay the amount set, the county auditor was to inform the County Mental Health Board, and the County Mental Health Board was to direct the State's Attorney to bring suit for recovery of the delinquent payments.

Next, section 25-08-29 provided as follows:

> 25-08-29. Disposition of funds collected. The amount collected from such persons on their estates by the county auditor shall be applied first in payment of the sum due to the county and the balance, if any, shall be paid to the state treasurer who shall credit the same to the charitable institutions revolving fund."

Now, we reemphasize the fact that chapter 25-08, including all of the aforesaid sections, was repealed, effective July 1, 1961. In its place, chapter 25-09 of the North Dakota Century Code became effective July 1, 1961, and insofar as it is concerned here, chapter 203 of the 1965 Session Laws now places the burden of recovery of the costs of care and treatment on the "supervising department" meaning, effective July 1, 1965, the Mental Health and Retardation Division of the State Department of Health, insofar as State Hospital patients are concerned. The Board of Administration still retains jurisdiction over the Grafton State School patients.

We note that section 25-09-01 provides that all of the operational and administrative expenses of the State Hospital, State School and TB Sanatorium are to be appropriated from the State Treasury. It is apparent that a different concept was used, effective July 1, 1961, in dealing with the reimbursement for the costs of care and treatment at our state institutions. The new chapter continues on by providing that responsible relatives, or their estates, are liable for the costs of care and treatment, within the limits set by the chapter. Section 25-09-07 provides that the State's Attorneys, upon the request of the supervising department, shall bring an action against the patient or his estate, or his responsible relatives, or their estates, for the payment of the amount due the state. Further, section 25-09-08 provides as follows:

> "25-09-08. Disposition of funds collected. The amount collected from patients, their estates, or responsible relatives or their estates, by the supervising department under the provisions of this chapter shall be deposited with the state treasurer and credited to the general fund of this state."

It is significant that the above section was part of the new concept in that it specifically provided that all funds collected were to be credited to the general fund of the state. At no place in the chapter does it make provisions for a pro-rata share being paid back to the counties.

In connection with the first question, section 25-09-02 of the 1965 Pocket Supplement, originally effective July 1, 1961, sets forth the basic authority, and places a burden and responsibility on the state, working in conjunction with the county judges, and the county mental health boards, in determining or ascertaining the ability to pay the

costs of care and treatment. Section 25-09-06 provides that persons may make application for review of their ability to pay, and section 25-09-05 provides that the patient, his responsible relatives, the executor, administrator, or guardian may make application to the supervising department, in this case meaning the State Mental Health and Retardation Division of the State Department of Health, to pay less than the costs, or none of the costs incurred by the state for the patient's care and treatment at either the state hospital or state school. It continues by providing that application shall be accompanied by proof of the patient's, or his estate's, or responsible relatives', or their estates' inability to pay. Special provisions are set forth in section 25-09-11 for the handling of various claims and accounts involving responsible relatives of patients at the Grafton State School.

It is our opinion, in direct response to your first question, that the supervising department, in this case, the Mental Health and Retardation Division of the State Department of Health, has the authority, under section 25-09-02 of the 1965 Pocket Supplement of the North Dakota Century Code, to determine the amounts to be charged for the costs of care and treatment, and places a responsibility on the supervising department to recover these costs of care. To assist the supervising department in implementing the provisions of this section. The county judges are required to forward lists of names of all persons whose estates have been entered for probate or heirship proceedings, along with the names of legatees, devisees, and heirs at law. Next, the supervising department, at section 25-09-05, shall direct the county mental health board, if application is made, to determine whether the patient, or his responsible relatives or their estates, are able to pay all, a portion, or none of the expenses incurred by the state for the costs of care and treatment. The supervising department is then given the authority in this section to approve, reject or amend the determination made by the county mental health board. Further, at section 25-09-06, the supervising department may reaffirm or alter the previous determination, and has the authority to make such redetermination retroactive. In addition, the supervising department on its own motion can review the ability of a patient, or his responsible relatives or their estates to pay for the costs of care and treatment. The only limitation appears in section 25-09-06.1 of the North Dakota Century Code, 1965 Pocket Supplement, which was enacted by chapter 221, section 1 of the 1963 Session Laws, that in those cases specified the state could be barred from asserting a claim against responsible relatives or their estates in excess of the amount determined payable under related provisions at sections 25-09-05 and 25-09-06.

This would appear to give the supervising department the authority to determine on the basis of all the information available, whether or not a bill or claim should be asserted in full, should be reduced, or should be eliminated completely. It would appear that this is a discretionary authority of the supervising department, and since no reference is made to the county in connection with the final decision, we are impelled to the conclusion that the counties are not entitled to a pro-rata share of any recovery made, as such a disposition of the funds collected would be completely contrary to section 25-09-08 of the North Dakota Century Code, 1965 Pocket Supplement, originally enacted as chapter 211, section 1 of the 1961

Session Laws, which took effect July 1, 1961.

It is our belief that the Legislature determined to implement a new concept in recovering for the costs of care and treatment, and we cannot escape the fact that the Legislature specifically provided that all recoveries were to be credited to the general fund of the state as indicated by section 25-09-08 referred to above.

However, this belief must be modified when certain other factors enter into the picture. First, the law from 1943 to July 1, 1961, provided that the actual costs of care were recoverable as provided in chapter 25-08 and chapter 25-02 (since repealed). Therefore, for a certain period of time the maximum the county could charge or allocate ranged from $30.00 to $45.00 per month. Many counties apparently operated on the premise that such amounts constituted the total costs of care, which in fact was not true. To further elaborate, there is one occasion when the county is entitled to part of the recovery made by the state. Bearing in mind the relationship between the total costs of care and treatment represented by both the allocated county monies, the liquor tax credits, and the balance of costs of care which represents the state's share of the total, it is our opinion that the counties can recover whatever amounts of allocated monies the counties actually expended in excess of reimbursements by the liquor tax.

Therefore, under the present law, it is our view that the state is entitled to file for the full amount of the claim, and that all recoveries made must be deposited to the credit of the general fund. The burden and the responsibility of filing claims is now on the state through the appropriate agencies, but the burden of proving up the county's claim to participation in the recovery for funds actually expended by the county and not reimbursed to the county rests clearly and solely on the county itself.

HELGI JOHANNESON

Attorney General