A09-0080

STATE OF MINNESOTA
IN SUPREME COURT

IN THE MATTER OF THE WELFARE OF THE CHILD OF: S.L.J., PARENT.

BRIEF OF AMICUS CURIAE THE MINNESOTA INTER-COUNTY ASSOCIATION

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STATEMENT OF INTEREST

Minnesota Inter-County Association ("MICA"), established in 1971, is a nonprofit organization of 13 of Minnesota's growing or urban counties. The 13 counties participating in MICA are: Anoka, Benton, Blue Earth, Carver, Dakota, Olmsted, Rice, St. Louis, Scott, Sherburne, Stearns, Washington and Winona. MICA's member counties encompass a major portion of the state's population and provide a significant share of the child protective services within Minnesota. As a result, MICA has taken a formal position in support of Rice County and the Rice County Board of Commissioners in their efforts to clarify the legal requirement of counties to provide legal services or pay for privately appointed counsel to represent parents in child protection proceedings. The resolution of this case will have a significant impact on the ability of our county boards to carry out their duties to protect the welfare of children and be the elected administrative voice of their communities.

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INTRODUCTION

Minnesota Inter-County Association (MICA) appreciates the Court's willingness to hear from the perspective of those responsible for county governance as it relates to the important issues raised by this case. Counties have been entrusted by the Legislature to be responsible for the protection of child welfare under Minn. Stat. chapter 260C. Counties take their prosecutorial role in civil child protection cases (CHIPS)[1] seriously and seek to preserve their role which was established by the Legislature.

MICA's goal in its presentation of this brief is not to lay out the full extent of arguments for overturning, in part, the lower court's decision. We are in full support of the petitions put forward in this matter by the Appellant-Petitioner, Rice County. Further, we are in concurrence with the positions put forward by the Minnesota County Attorney's Association in their *amicus curiae* brief. Our goal is to give some clarity regarding legislative history and legislative intent in the

[1] Throughout this brief for simplicity's sake, the term CHIPS is to have its broadest meaning of all juvenile court proceedings taken up under chapter 260C of the Minnesota Statutes, unless we specifically refer to a separate action within the class of potential actions under chapter 260C.

takeover by the State of the public defender system. MICA, as an association, had a direct role in its development and stands in a unique position to explain the complexities of the transition of the duties and funding surrounding the public defender system.

This case is not isolated to the events arising out of the CHIPS proceeding involving S.L.J., nor is it simply about Rice County paying for Attorney Sanders. This case should more appropriately be labeled The People v Board of Public Defense (BOPD). S.L.J. is only a victim of the BOPD abandonment of its strict and clear legislative duty to represent the interests of the indigent in its effort to inappropriately shift the cost of that representation on to counties. The BOPD's unilateral abandonment of its obligation resulting after their June 5, 2008 ultimatum is a central question in this case and was the driving factor behind the Rice County bench's sudden change in practice.[2]

ARGUMENTS

I. Legislative history regarding the creation of the state public defender system was, from the beginning, understood to allow for the appointment of publicly funded council for the indigent in civil matters such as juvenile child protection proceedings where the individual's rights and liberties were at stake.

The Court of Appeals in its opinion in this matter put great weight on their conclusion that when the Legislature established a uniform state public defender system, it was only created for criminal defendants in response to the United

[2] The June 5, 2008 letter of the Board of Public Defense to Chief Justice Eric J. Magnuson can be found in the Appellant-Petitioners' Brief Appendix at P-1.

States Supreme Court decision in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). At page 14 of the opinion, it reads:

> "At the time of its enactment, 611.14 applied only to persons charged with or convicted of criminal offenses… the Legislature did not make any provisions for public defenders to provide representation in civil cases until 1969."

By drawing from this conclusion, the Court of Appeals opined that the requirement in Minn. Stat. § 611.16 [S-11] meant that public defenders could ***only*** be appointed to represent "other persons entitled by law to representation by counsel" if they were charged with a criminal offense. Therefore, they opined that 611.16 [S-11] was never meant to encompass a parent involved in a child protection case then or into perpetuity. The Court of Appeals unfortunately misread the legislative history and, as a result, reached a misguided conclusion regarding the extent and scope of 611.16 [S-11].

It is true that when the Legislature acted in 1965, it was prodded into action by Gideon, id. Unfortunately, it defies logic and legislative history to assume that the Legislature in 1965 did not intend to cover civil cases and that intention carried through to financial take over of representation in all juvenile cases by the State in 1995. The lower court acted as if there was no such concept of attorneys being appointed to represent the indigent in criminal or civil matters brought by the State prior to 1965. The reality is there was a well-established, judicially-driven appointment of counsel to represent the indigent, even though it did not resemble

the specialized professional system we presently understand and refer to as "public defense”.

The defense of the indigent within our communities prior to 1965 certainly was not uniform and, as a result, produced significant gaps in representation of individuals. This was provided both in cases involving crimes or civil matters brought by the State that could mean loss of liberty for the individual. What happened in 1965 was not the new creation of the right to receive representation for the indigent; rather, it was the creation of a state program to bring about some uniformity and process for providing representation to the indigent along with a funding mechanism to ensure its appropriate operation. The 1965 Legislature established a funding mechanism through the judicial branch, where it would essentially bill counties their fair share to be paid by local property taxes.

The attorneys providing representation prior to and after 1965 were essentially the same individuals. These defenders of the system were part of the fraternity of attorneys that were centered in each of our many county seats. Rarely would any of that fraternity have considered themselves full-time "public defenders". Many of them would have provided that service without compensation as part of their duty as an officer of the court, but on occasion resources were made available by the county or the courts to insure that a case would stand up against appeal. One would simply pity the poor fool of an attorney who would turn down the appointment of the senior guardian of that fraternity addressed as "Your Honor", the District Court Judge.

Therefore, the proposition by the Court of Appeals that Minnesota's public defender system was created by the Legislature is a mischaracterization. That system, using the word loosely, already existed and the Legislature was simply creating some uniformity, policy guidelines, and a funding mechanism to improve its quality.

The Court of Appeals had to make some huge assumptions to reach the mistaken conclusion that despite the clear wording of 611.16 [S-11], the Legislature meant only to cover criminal cases. If it was the Legislature's clear intent in 1965 that the statute only apply to criminal matters, it could have easily drafted chapter 611.16 [S-11] as follows:

> "any person described in 611.14 of this act or any other person entitled by law to representation by counsel *in a criminal matter*, may at any time request the court in which the *criminal* matter is pending, or the court in which he is convicted, to appoint a public defender…" (underlined language not included in the act)

However, the Legislature did not make this simple limitation. The statute was adapted to ensure appropriate representation in all forms of cases brought by the State which affected an individual's liberty. Further, the Legislature wanted to make sure the court had the ability to charge counties for the representation that was already taking place. In 1965, when the Legislature created the public defender system, Minn. Stat. § 611.14 [A-1 – A-4] did not cover all criminal cases nor the full scope of all those who may be entitled to representation arising out of either the U. S. Constitution or the State's statutes. The Legislature never, although they could have, limited representation in this statute to only those

entitled to representation under the Constitution of the United States in a criminal matter which was the basis of the Gideon decision. Id.

What the lower court apparently did not know was that the Legislature created a statutory right to appointment of counsel in what we know today as child protection cases and in juvenile court matters in 1959; the very basis of the right in this present case. Minn. Stat. § 260.155 (the precursor to Minn. Stat. § 260C.163) [S-1] was part of our child protection law from its inception and was quite unambiguous in its requirements in subdivision 2:

> "The minor, parent, or custodian have the right to counsel. If they desire council but are unable to employ it, the court shall appoint counsel to represent the minor or his parents or guardian in any other case in which it feels that such an appointment is desirable." 1959 Minn. Laws ch. 685, sec. 22.

It is worth noting that because this was adopted prior to the uniform statewide funding system, there was neither mention of how the appointed representative would be compensated nor who would compensate, if at all, for that particular appointment. Nonetheless, the fact that a particular appointed attorney would be acting as a “public defender” after 1965 was never a question in the mind of the attorney. Further, the court apparently had no confusion that it could charge counties for these services pursuant to chapter 611 as that was the general practice. Therefore, it should not be a far stretch to assume the Legislature intended civil matters such as child protection to be covered under 611.16 [S-11] in 1965, only six years after the creation of the child protection statutes.

Additionally, a close reading of the actual adoption of chapter 611 in 1965 supports the proposition that public defenders were to be appointed in civil cases. When 611.14 was enacted in 1965, it had a final paragraph which mirrored language in 611.16. The last paragraph read:

"The rights afforded by this section shall be in addition to, and not exclusive of *any other law entitling a person to representation by counsel*."[3] (Emphasis added)

Again, the Legislature could have used the phrase "representation by counsel *in criminal matters*", but it plainly did not. [Appendix A]

When you read Minn. Stat. §§ 611.14, 611.16, 611.18 and 611.27 (1967) [S-10 – S-19] as it was adopted in 1965 together with Minn. Stat. § 260.155 (1961) [S-1], there is no doubt that counties were getting charged for representation of parents in child protection cases under chapter 611. As it practically was applied, there were certainly gaps to its full implementation. Any time 87 different systems are to be melded into one, there will inevitably be

[3] There is a curious occurrence in legislative history around the drafting of 611.14 in 1965 and 1969. This last paragraph of 611.14 seems to have mysteriously disappeared in the revised statutes of 1971. Included in Appendix A are copies of the actual statutes of 1967 and 1971 along with the actual language from the legislative acts of 1965 and 1969 related to 611.14. It would appear that the Revisor's office accidentally dropped the last paragraph of the statute without clear direction from the Legislature to do so in 1969. The 1969 act does not have this last paragraph of the amendments at 1969 Minn. Laws ch. 869, sec. 1, but what is most critical is in 1969 the Legislature did not strike out the last paragraph of 611.14 (1965) as is required by legislative drafting rules. There is no other place in 1969 Minn. Laws ch. 869 that the Legislature separately repeals the last paragraph of 611.14 nor is there any specific site in legislative history for this statute between its enactment in 1965 and 1971 indicating the repeal of the last paragraph. This language would seem important to understanding the full intent of 611.14. It amounts to a very clear bold statement by the Legislature pertaining to the rights of citizens to receive representation that was not necessarily meant to be limited by 611.14. [Appendix A]

varying levels of compliance, but the statutory construction does not support the conclusion by the Court of Appeals that 611.16 [S-11] was limited only to criminal matters.

Finally, as is common for newly adopted programs, adjustments are needed soon after passage. Such was the case only four years later for the new public defender system. As noted by the Court of Appeals, the Legislature amended 611.14 to make it clear that a minor may be entitled to a public defender as a statutory right under this system in certain matters. 1969 Minn. Laws ch. 869, sec. 1. [A-6] The Legislature does not distinguish between mandated and non-mandated services. The purpose of the amendments was only to clarify that in certain cases individuals are automatically entitled to representation and it certainly was not designed to limit the right under 611.16 [S-11].

Supporting the proposition that the Legislature always intended chapter 611 to cover certain civil matters are the 1969 amendments to Minn. Stat. § 611.25 [S-13, S-14]. That statute deals with representation on appeal by the State Public Defender (SPD); nonetheless it shows the inclusive nature to civil matters contemplated by the Legislature with regard to chapter 611. Following the existing language in 611.25 [S-13, S-14], which indicates that the SPD must represent individuals on post-conviction appeals, the 1969 Legislature adds:

> "The State Public Defender shall represent any other person, who is financially unable to obtain counsel, when directed so to do by the Supreme Court, except that he shall not represent a person in any action or proceeding in which a party is seeking monetary judgment, recovery or award." 1969 Minn. Laws ch. 869, sec. 3. [S-13, S-14]

There is simply no criminal matter where the criminal is entitled to "monetary judgment, recovery or award", but only in civil matters is such relief contemplated. Therefore, the 1969 changes further support the Legislature's understanding that the new public defender system already covered civil actions and that representation needed to be limited. If not, there would have been no rational reason for the Legislature to create this distinction four years later in 611.25 [S-13, S-14]. It would seem that the Legislature was clarifying that public defenders are for defending the rights of individuals whose liberties are being challenged in civil matters by the State as opposed to bringing civil actions against the government for monetary awards. While this is a fine line distinction, it is an important one when allowing representation in civil matters at public expense.

II. Legislative history strongly supports the proposition that the Legislature intended that appointments of representation for indigent persons in all civil juvenile matters be part of the new state-funded public defender system created in the early 1990s.

A. Legislative history at the time of the transfer between 1991 and 1995 supports the proposition that all juvenile public defender services became the duty of the BOPD to be financed through the State Legislature including the representation of adults in CHIPS cases.

The BOPD put forward in its June 2008 ultimatum that Minn. Stat. § 260C.331 [S-4] states that representation of parents is a "non-mandated service" that it can shed at will. This proposition is not supported by legislative history of the State takeover of the public defender system.

In the late 1980s, due to huge disparities in the level of representation in juvenile court cases, the Supreme Court established a commission to report on the subject.[4] The June 5, 1990 report of the Juvenile Representation Study Committee was a sobering wake-up call to the justice community. There were broad disparities in representation from jurisdiction to jurisdiction, ranging from almost 100% in some counties to less than 5% in others.[5] Further, the Committee found quality and effectiveness of representation lacking in juvenile cases.[6]

Occurring in close proximity in time was the Advisory Council on State and Local Relations established by the Governor.[7] The Advisory Council's report on December 8, 1988 was the beginning of a multi-year effort to have the State Legislature take over the direct funding of most court services and the public defender services previously financed by county budgets. At the time, county property taxes were under strict levy limits. This effort was generally supported by counties, the courts and the public defender system due to increasing restrictions on the availability of counties to support the systems.

The public defender transition occurred on a separate track from the courts, but generally at the same time. State takeover of the public defender system took several years concluding in 1995. The transfer of the public defender system was

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[4] Report of the Juvenile Representation Study Committee to the Minnesota Supreme Court, June 5, 1990
[5] Id. page 11.
[6] Id. pages 11-13.
[7] Advisory Council On State and Local Relations, Report to the Governor, December 8, 1988

meant to be cost neutral at the time of its transfer and was often referred to as a dollar for dollar transfer by reducing county state aid and directly transferring that over to the base budget of the BOPD which took direct control for distributing state-financed resources to the district offices and to each specific public defender.

Counties complained at the time that the money transferred from their state aid over those four years was in excess of what they had previously been spending on public defense. This was due to formulas established in the legislation as to how much money should go into the base budget for public defense. Even though counties felt the dollars transferred were more than what they were spending, the full amount of the transfer money went into the base budget of the public defenders. [S-7 to S-10]

With the money went the services. The State identified the services transferred in four broad categories referred to in omnibus tax bills and the statutes. By the end of 1995, the State gave the BOPD the responsibility to provide representation to indigents in "felony", "gross misdemeanor", "misdemeanor" and "juvenile" cases. (Minn. Stat. §§ 477A.012, 477A.0121, [S-7 to S-10] and 611.27 subd. 5 and 7 [S-14 to S-19] between 1991 and 1995). The Legislature never distinguished between juvenile cases that arose out of criminal acts versus those arising from CHIPS proceedings. Further, the Legislature never distinguished representation in juvenile matters between the parent or the child.

In 1991 at the beginning of the transfer, the Legislature adopted Minn. Stat. § 611.27 subd. 5 (1991) [S-15] which states:

"[DISTRICT PUBLIC DEFENDER BUDGETS.] The board of public defense may only fund those items and services in the district public defender budgets which were included in the original budgets of the district public defender offices as of January 1, 1990. All other public defense related costs remain the responsibility of the counties unless the state specifically appropriates for these. The cost of additional state funding of these items and services must be offset by reductions in local aids in the same manner as the original state takeover." 1991 Minn. Laws ch. 345, art. 3, sec. 23. [S-15]

Therefore, when the public defenders accepted the responsibility to represent adults in CHIPS proceedings and the funding that followed they were agreeing that these services were part of their permanent duties. If these services were not, they should have been charged back to the counties under 611.27 subd. 7. (which was also adopted in 1991 at 1991 Minn. Laws ch. 345, art. 3, sec. 25.) [S-15] Representation of adults in CHIPS cases was not a "services and expenses beyond those appropriated" as evidenced by 13 years of practice.

B. After 1995, the subsequent legislative action supports the proposition that the Legislature fully intended the BOPD to have the duty to provide representation to parents in CHIPS cases.

There are several subsequent acts of the Legislature after 1995 which confirm that the Legislature intended to fund the full range of legal services for the indigent in juvenile court proceedings with the BOPD as the responsible entity for providing this representation when appointed by the court.

In 1998 the Legislature directed the BOPD to corroborate with the Supreme Court, Conference of Chief Judges, and the Association of Minnesota Counties to report on issues related to public defender representation of juveniles and other

parties in court proceedings.[8] The report was drafted by the then and present State Public Defender (SPD), John Stuart and transmitted to the Legislature in January of 1999. There was no consensus recommendation that came out of the report, but each of the separate parties stated their positions going into the 1999 Legislature. The BOPD gave the following position in this report:

> "The board would continue to provide counsel to parents in juvenile court CHIPS proceedings, and to legal guardians…"[9]

In 2002, the Legislature had to cut several budgets, including the public defenders. 2002 Minn. Laws ch. 220, art. 6, sec. 2, 7-13. To provide some relief, the Legislature reduced some of the services the BOPD had to provide in truancy cases. The Legislature also used some creative financing, instituted to boost the general fund base appropriation to the BOPD. The Legislature established a $28 fee paid by recipients of public defender services to be deposited in the general fund. The Legislature simultaneously increased the base general fund appropriation for public defenders by the estimated amount the fee would bring in to the general fund, but did not designate the fee revenues to the BOPD. Therefore, if the fee did not raise the money anticipated, which it did not, it would not affect the base budget increase received by the BOPD. This is a creative way to get a base appropriation increase without suffering the consequences for the poor performance of the fee collections.

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[8] Public Defender Representation in CHIPS Cases: A Report to the Legislature, John Stuart. "January, 1999." Minnesota Legislative Library, MINN. DOC. NO. 99-0270. KFM5494.5 .S78 1999. 1998 Minn. Laws ch.367, art. 1, sec. 6

[9] *Id.*, page 4.

When the budget crisis worsened in 2003, the Legislature went a little too far with this creative funding mechanism by substantially increasing the fees and making them mandatory. 2003 1st Sp. Sess. Minn. Laws ch. 2, art. 3, sec 4. [S-12] This Court rightly ruled that this new mandatory scheme was unconstitutional. State v. Tennin, 674 N.W.2d 403 (Minn. 2004). Instructive from that act is that the Legislature specifically broke down reimbursement for each area of service provided by the public defenders; it included:

> "If the person is a parent of a child and the parent was appointed counsel under the provisions of section 260C.163, subdivision 3, the parent shall pay to the court a co-payment of $200." Minn. Stat. § 611.17, subd. 1 (c)(Supp. 2003) [S-12]

In both the 85th (2007-08) and 86th (2009-10) sessions of the Legislature, bills were introduced to modify the law squarely on the questions raised by this case.[10] The bills generally would have modified the mandatory representation by public defenders in non-criminal cases by deleting the language in 611.16 where it states, "any other person entitled by law to representation by counsel". These bills also sought to clarify the role of public defenders in CHIPS cases to representation of parents and legal guardians. Counties in those bills would have helped public defenders by providing reimbursement to the BOPD for the representation of the non-custodial parents if they were made parties. None of the bills made it out of the committee process.

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[10] 2007-08 Legislature SF1678/HF1948 chief authors Sen. Schied/Rep. Hilstrom 2009-10 Legislature, SF1018/HF892 chief authors Sen. Moua/Rep. Hilstrom

In 2005 and 2008, the Legislature commissioned task forces to look for solutions to representation in CHIPS cases. The Legislature was seeking solutions to addressing a very complex question of representation that has, in part, arisen from the joint Supreme Court and Department of Human Service initiative known as the Children's Justice Initiative (CJI). The answer from these task forces were that the Legislature has to provide better funding for the BOPD which unfortunately has been unrealized given the budget circumstances.[11]

III. The Court of Appeals erred in its finding that Minn. Stat. § 260C.331, subd 3(4) was unambiguous and not in conflict with the statutes transferring duties and payment obligations for the public defenders from counties to the state.

A. When the words of Minn. Stat. § 260C.331, subd 3(4) are applied to the existing situation regarding payment of the representation of parents in CHIPS cases, they are not clear and free from all ambiguity.

The objective in interpretation and construction of statutes is to ascertain and effectuate the intention of the Legislature. Olson v. Ford Motor Co., 558 N.W.2d 491, 494 (Minn. 1997); Eischen Cabinet Co. v. Hildebrandt, 683 N.W. 813, 815 (Minn. 2004). "When the words of a law *in their application to an existing situation are clear and free from all ambiguity*, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2008) [S-19] *emphasis added*. Rice County, in its brief, goes into

[11] CHIPS Public Defender Working Group, Final Report 2005 and Report of Children's Justice Initiative Parent Legal Representation Workgroup to Minnesota Judicial Council, November 17, 2008.

substantial detail regarding why 260C.331 does not create a mandatory obligation for counties to pay for the representation of parents in CHIPS cases. We fully concur with Rice County's arguments and will only touch on one point.

When Minn. Stat. § 260C.331, subd 3(4) is viewed in light of the statutes creating state takeover of the public defense system, (Minn. Stat. §§ 477A.012, 477A.0121, [S-7 to S-10] and 611.27 subd. 5 and 7 [S-14 to S-19] between 1991 and 1995) the "application to the existing situation" becomes very unclear and certainly not free of ambiguity. Since 1995, the public defenders and the courts statewide have all interpreted the statutes as requiring public defenders to provide representation at state expense. The BOPD now wants us to believe that on June 5, 2008, Minn. Stat. § 260C.331 suddenly arose from the ashes like a phoenix to provide obvious clarity, and thus blinding us all to the 13 years of common practice. The actions of the Legislature, the courts and even the BOPD, prior to their unilateral ultimatum, is evidence enough that the existing circumstances are anything but clear and unambiguous as related to the application of Minn. Stat. § 260C.331, subd 3(4) [S-4, S-5] as contemplated by the Court of Appeals.

B. Minn. Stat. § 260C.331, subd 3(4) can be logically interpreted in light of the statutes calling for the state takeover of the public defender system and the payment by the state of the representation of adults in CHIPS cases.

"If different statutes relating to the same subject matter may fairly be construed so as to give full effect to all, it is the duty of the court so to construe them." Mergens v. Babcock, 175 Minn. 583, 585, 222 N.W. 285, 287 (1928). It is a long-standing judicial and legislative principle that when related statutes on the same subject matter appear to be in contradiction, it is the role of the courts to try to give full effect to all. *Id.*

The cost associated with representing adults in CHIPS cases were carried by counties until the state's full assumption of those responsibilities in 1995. The sweeping changes that occurred in the early 1990s were meant to replace the obligations that existed under the old county-based public defender system as it relates to all juvenile matters. Therefore, subsequent laws could be fairly said to significantly limit the role of Minn. Stat. § 260C.331[S-4, S-5] as it relates to most cases of representation in juvenile matters.

As Rice County points out in its brief, there are some rational reasons to keep this provision for limited purposes. Nonetheless, it should not be viewed as creating or preserving a blanket right for the courts to select between the public defenders or private counsel at county expense. Such a reading would shift the financial responsibility back to county budgets which the Legislature unambiguously intended to fully assume as of 1995.

It certainly would have been preferable if the Legislature made it eminently clear while drafting its changes in the early 1990s by amending Minn. Stat. § 260C.331 [S-4, S-5] so as not to leave the impression of a loophole. However, it is not surprising that the Legislature paid little attention to this particular statute because of its limited utility. We would argue that legislative history would indicate that Minn. Stat. § 260C.331 [S-4, S-5] is often "the forgotten child" in the drafting of changes to the child protection statutes.

In 1999, the courts assumed the costs associated with witness fees and mileage fees, Minn. Stat. §480.182(b) (1999) [S-10], yet the language was not taken out of 260C.331, which one can assume was an oversight. 1999 Minn. Laws ch. 216, art. 7, sec. 27. Further, in 2000 the Legislature amended Minn. Stat. § 611.26, Subd. 6 [S-14] exempting District Public Defenders from being appointed to represent guardian ad litems creating confusion with Minn. Stat. § 260C.331, subd 3(4). 2000 Minn. Laws ch. 357, sec. 3.

Finally, we note that the Court of Appeals hinted at a statutory construction that would give discretion to the courts to chose between a public defender and a private counsel paid for the county pursuant to Minn. Stat. § 260C.331, subd 3(4) [S-4, S-5]. S.L.J., *id.* page 15. This proposition is found nowhere in the text of legislative history and it would be an absurd conclusion that the Legislature unambiguously intended to give such a choice to a District Court Judge by not amending 260C.331, subd 3(4) during the takeover. This proposition flies in the face of the entire state takeover concept that was so methodically executed by

several different legislative bodies. Such a proposition should not be part of the consideration of this Court.

IV. The Legislature never authorized the BOPD to declare representation of parents in CHIPS cases as "non-mandatory" and the BOPD cannot unilaterally declare to the courts that public defenders will no longer provide representation in juvenile cases.

Despite the Court of Appeals indicating it need not decide the legality of the BOPD unilateral ultimatum issued on June 5, 2008 to the courts, it is central to the resolution of this matter and should be addressed by this Court. This is a judicial problem created by an agency under judicial authority which is having a direct impact on the implementation of justice in this state and in this case. Counties are the unfortunate party suffering the consequences of a dispute between the BOPD and the Legislature. It was the District Court that references the BOPD's ultimatum issued on June 5, 2008[12] and we would not be having this dispute but for that ultimatum being followed by the District Court in Rice County. The court chose to change the long-standing practice of appointing public defenders in such cases as a direct result of the BOPD's ultimatum.

This unilateral action by the BOPD undermines the fabric of our democracy and the balance of power so intricately interwoven in our State's Constitution. A state agency's jurisdiction is limited to and is dependent entirely upon the statutes under which it was created. Mckee v. Ramsey County, 310 Minn. 192, 245 N.W. 2d 460 (1976). Even though the BOPD is a quasi-judicial body, it remains a

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[12] Peremptory Writ of Mandamus, January 9, 2009, finding of facts (J) see Appellant-Petitioner's appendix PA-29.

creation of the Legislature and may not act outside the bounds of its enabling statute. Id.

The BOPD is not empowered to make any broad legislative policy decisions determining what are "mandatory" and "non-mandatory" services. Minn. Stat. § 611.215 subd. 2 [S-12, S-13]. The statute only empowers the BOPD to submit a budget, distribute the funds to the different districts, and to set "standards" to regulate caseload and maintain professionalism of public defenders.

The BOPD is not empowered to unilaterally present ultimatums to the court as to who is entitled to appointments of public defenders. The June 5, 2008 action appears to be a direct violation of the Supreme Court order in 2003 when public defenders tried to modify their obligations for representation in CHIPS cases outside the legislative process. In re Pet. of the Bd. of Pub. Def., No. C8-85-1433 (Minn. Dec. 26, 2003). The BOPD and the SPD filed a petition requesting the court to limit its appointment in CHIPS cases across the board. The opinion of Justice Blatz was to the point when it stated:

> "We emphasize that it is for the court, and not the public defender, to appoint counsel in CHIPS proceedings. 260C.163, subd. 3. Any directive by the State Public Defender or a chief public defender as to which party the public defenders will represent is a nullity." Id., pages 5-6.

V. Minn. Stat. § 375.1671 was intended to limit the right of the courts to force unlimited payment of administrative functions outside of the normal county budgeting process.

We wish to make a few points relating to the history and utility of Minn. Stat. § 375.1671 [S-6] in addition to the arguments made by the Appellant-

Petitioner and Amicus Curiae Minnesota County Attorney's Association (MCAA) with which we fully concur. First, Minn. Stat. §375.1671[S-6] was passed by the Legislature in 1988 as part of the Omnibus Tax Bill. 1988 Minn. Laws ch. 220, art. 6, sec. 15. It was passed during the period of time when the Legislature had imposed strict levy limits on county governments. 1988 Minn. Laws ch. 719, art. 5, sec. 36. The ability of county governments to raise revenues or property taxes were, at that time and still are, restricted by the specific timing requirements in the statutes. Minn. Stat. Chap. 275.[13] Counties are required to set levees in the fall of the preceding year before the funding can be appropriated; there is little counties can do after that to adjust the revenue side of the ledger. Having bills accumulating outside of the budgeting process by outside forces is nearly impossible to manage. This is, of course, amplified during tough economic times and when levy limits are in place.

Second, the very budgeting discretion protected by Minn. Stat. § 375.1671[S-6] would be defeated if this Court accepts the lower court's line of reasoning that each District Court Judge has the discretion to appoint private counsel who would then submit a bill to the county as opposed to following the mandate of appointing a public defender. The Court of Appeals correctly ruled that the District Court could not directly tell the Rice County Board to set up a program for these private attorneys, but the lower court's interpretation of Minn.

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[13] Overview of Property Taxes, A Presentation to the House Committee on Taxes, February 2009 by Karen Baker, Steve Hinze, and Pat Dalton, House Research: available on the Web at http://www.house.leg.state.mn.us/hrd/issinfo/2009PropTaxHandout.pdf.

Stat. § 375.1671[S-6] in effect allows the District Court Judge to force such a program to be created through the back door by simply repeatedly submitting bills to the county.

That is why in 1988 the Legislature gave counties relief, in part, through limitations on court orders related to budgetary items such as contemplated here. Minn. Stat. § 375.1671 [S-6]. We respectfully submit that in this present time where counties are operating under a new set of strict levy limits (Minn. Stat. § 275.71[S-5, S-6]), the "may" in the second sentence of 375.1671 [S-6] has significant meaning and is in place to restrict District Court Judges from setting county budgets or creating new county programs.

VI. From a public policy perspective, if the Court supports the Rice County petition, it will not cause the collapse of our public defense system in the State of Minnesota.

It is not productive to waste this Court's time laying out the depth of the financial and service crisis we all individually face as partners in our state justice system. We wholeheartedly concur with the sentiments expressed by Justice Paul H. Anderson in his concurrence for the recent decision to increase lawyer registration fees for the support the public defenders when he stated:

> "I write separately to chronicle the extraordinary circumstances that compel us to issue this order, to express my reluctance to fund a constitutional mandate in this manner, and to express my disappointment that the governor and legislature have failed to adequately fund a constitutional mandate by appropriate means." MN Sup. Ct., Order Temporarily Increasing Lawyer Registration Fees, November 4, 2009, C1-81-1206, p. C-1

We are all facing unique challenges for multiple reasons. Had we desired, we could easily show that counties have dealt with and are facing deeper budgetary challenges than our partners at the BOPD. Counties have incurred severe un-allotments, cuts and levy limits. Unfortunately, such a unilateral and self-centered focus misses the importance of working together to solve the problems that we face. We should be working together in the appropriate forum: the Legislature. In that vein, we appreciate the efforts of the Judicial Council and the individual Justices who make up the Supreme Court in bringing the many partners together to look for meaningful solutions in these times of crisis.

Despite our frustration with the means by which representation of adults in CHIPS cases was foisted back upon counties, the community of county governments has stepped forward to protect the needs of the indigent. Many counties have provided, on a temporary basis, for the representation of adults in CHIPS cases.[14] These temporary measures were taken solely to ensure that counties maintain their duty to protect children. It is not an appropriate role for counties to play as both protector of the children's interests and provider of the parent's representation against those very actions.

Still, the Court should rest assured that following the ruling in this case, counties will work in a cooperative manner with all of our partners in each of our jurisdictions to develop realistic solutions in administration of CHIPS cases. We

[14] Report of Children's Justice Initiative Parent Legal Representation Workgroup, *id.* Appendix C.

will also continue to work at the Legislature to solve the funding problems we all face in delivering justice.

Nonetheless, a word of caution meant only to express a reality we at MICA are presently observing. MICA acts only as a broker providing our leaders (county elected officials) with policy solutions. Frankly, our leaders are losing trust in our partnership to deliver justice, and trust is an essential commodity in this policy marketplace. We hope the history we have laid out above establishes why our leaders, many of whom were around during the state takeover, feel the actions by the BOPD are akin to a bait and switch scam. The Justice System's acquiescence to this caustic move on the part of the BOPD is making it difficult for those of us as brokers of public policy ideas to convince our leaders to put trust in this partnership as we move forward. We are at a critical juncture.

CONCLUSION

This *Amicus Curiae* respectfully requests this Court to support the petition of Appellant-Petitioner by reversing in part the decision of the Court of Appeals in this matter; that the District Court be ordered to follow the mandatory statutory provisions of 611.18 and appoint the appropriate public defenders to represent indigent custodial parents in CHIPS proceedings as was contemplated by the Legislature in the takeover of the public defender system completed in 1995; and

that costs and fees of court-appointed counsel be the sole responsibility of the Board of Public Defense.

Respectfully submitted:

MINNESOTA INTER-COUNTY ASSOCIATION

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CERTIFICATE OF COMPLIANCE

This brief contains 6530 words (exclusive of the table of contents and table of authorities), as computed by the word processing program used to prepare this brief, Microsoft Word 2002, and it complies with the typeface provisions of the Rules of Appellate Procedure 132.01, Subd.3.

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