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STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

November 14, 1996

Donna Earls Elder, Vice Chairman
South Carolina Juvenile Parole Board
P. O. Box 388
Gaffney, South Carolina 29342

Dear Ms. Elder:

You have referenced a recent Order of the Honorable Donna Strom which "would transfer all juveniles determined to be 'subclass' juveniles (those juveniles that are deemed mentally ill as provided by standards previously set forth - see attached Order of Judge Anderson) to the custody and care of the Department of Mental Health." You have also stated the following:

> [o]ur concern as members of the Juvenile Parole Board are for the safety of the community and the welfare of the juveniles themselves. We understood that these juveniles need special treatment but by transferring custody the DMH the authority to provide follow up or parole ability disappears. Since the DJJ has relinquished custody, that would appear to relinquish our authority also. We could not require these children nor could DMH require these children to maintain placement, abide by curfew or intensive supervision once out in the community.
>
> Our question now becomes, based on the previous Order by Judge Anderson, did Judge Strom misinterpret or exceed the authority of that Order by transferring legal not just physical custody of these juveniles to the Department of Mental Health after they have been adjudicated and sentenced by previous Family Court actions to the Department of Juvenile Justice.

(803) 734-3970 (803) 734-3646 Facsimile

Request Letter

> Would it be proper to interpret Judge Anderson's Order as only a dictate to transfer physical custody of these special children for treatment to the Department of Mental Health but requiring that DJJ retain legal custody and therefore subject these children to the parole authority and conditions of our Board.

The Order you have referenced is the result of a petition by the Director of the South Carolina Department of Juvenile Justice to the Family Court of the Fifth Judicial Circuit for an Order transferring the custody of certain juveniles to the South Carolina Department of Mental Health pursuant to S.C. Code Ann. Sec. 20-7-7815 (formerly Section 20-7-3310). This subclass of juveniles was deemed to consist of those "juveniles who are mentally ill and are currently or will be in the future committed to the custody of the Department Juvenile Justice." The Order referenced an Order issued by Judge Joseph F. Anderson, Jr. on March 31, 1992 in a Class Action entitled Alexander S. et al v. Flora Brooks Boyd, et al. (U.S.D.C., Dist. of S.C. Civil Action No. 3:90-3062-17), which although subsequently vacated by the District Court, established the subclass of juveniles in the class action, the criteria for subclass inclusion and the protocol for identifying subclass inclusion and the protocol for identifying subclass members. Judge Strom's Order also referenced a consent decree in the case of Robert K. et al. v. Robert E. Bell, et al. (U.S.D.C., Dist. of S.C., Civil Action No. 83-287-0) which required that the Department of Mental Health must evaluate juveniles sent to it by DJJ to determine whether placement at DMH would be more appropriate than a return to DJJ.

Pursuant to Section 20-7-7815, Judge Strom ordered the following:

> THEREFORE, IT IS ORDERED that DJJ and DMH, pursuant to the protocol adopted in conjunction with the case of Alexander S. Boyd continue to identify and transfer custody and control of juveniles fitting the criteria set forth in Judge Anderson's March 31 1992 Order to DMH, utilizing DJJ's authority under Section 20-7-7815 of the South Carolina Code. Upon transfer of those juveniles, DMH shall treat them in accordance with the consent order in Robert K. et al v. Robert Bell, et al.
>
> IT IS FURTHER ORDERED that DMH shall file individual actions for commitment for treatment pursuant to Title 44, Chapters 17 and 24. All transfers of those juveniles

> currently identified as members of the subclass must occur within the time frames set forth below.
>
> IT IS FURTHER ORDERED that DJJ transfer custody of all juveniles currently identified as subclass members and all others identified within the next ninety (90) days as fitting the criteria to DMH no later than one hundred sixty (160) days from the effective date of this Order or the date on which they are identified, whichever is later. Thereafter, a juvenile identified as a member of the subclass must be transferred to the custody of DMH no more than ninety (90) days after being identified.
>
> IT IS FURTHER ORDERED that when custody has been transferred to DMH, DMH is responsible for and will make all subsequent placement and therapeutic decisions regarding those juveniles. DMH will select what it determines to be the most suitable therapeutic environment for these juveniles, taking into consideration the protection of the public.
>
> IT IS FURTHER AGREED BETWEEN THE PARTIES that when DMH determines it is appropriate to discharge one of these juveniles from a residential facility as defined by Section 44-24-10 (13) of the 1976 S.C. Code Annotated, as amended, DMH shall give notice to the Solicitor and defense counsel in the county in which that juvenile was adjudicated delinquent of its intent to discharge the juvenile, the reasons for the discharge, and the discharge plan.

(emphasis added).

LAW \ ANALYSIS

Section 20-7-8305 (A) requires the Board of Juvenile Parole to

> ... meet monthly and at other times as may be necessary to review the records and progress of children committed to the custody of the Department of Juvenile Justice for the purpose of deciding the release or revocation of release of these

> children. ... It is the right of a juvenile to appear personally before the parole board every three months for the purpose of parole consideration, but no appearance may begin until the parole board determines that an appropriate period of time has elapsed since the juvenile's commitment. In addition, and at the discretion of the parole board, the quarterly reviews of juveniles committed to the department for having committed a violent offense, as defined in Section 16-1-60, may be waived by the parole board until the juvenile reaches the minimum parole guidelines established for the juvenile by the parole board.
>
> ... (B) In the determination of the type of discharges or conditional releases granted, the parole board shall consider the interests of the person involved and the interests of society and shall employ the services of and consult with the personnel of the Reception and Evaluation Center. The parole board may from time to time modify the conditions of discharges or conditional releases previously granted.

(emphasis added). We have previously recognized that the Juvenile Parole Board clearly "acts as the paroling authority to determine the release of children who have been committed by Family Court to correctional facilities of the South Carolina Department of Youth Services ... . "[now Department of Juvenile Justice]. Op.Atty.Gen., Op.No. 84-126 (October 29, 1984).

The exclusive role of the Juvenile Parole Board has been summarized by one treatise writer as follows:

> [t]he Juvenile Parole Board is charged with reviewing the progress of juvenile offenders committed to the custody of DJJ and making the decision to release or revoke release. The parole board has the authority to issue temporary and final discharges or releases to those children in its custody along with conditions for their care once they have left the institution. The parole board may order restitution as a condition of institutional release.

21 S.C. Juris. § 113, pp. 99-100.

In that same vein, we have concluded that the Family Court lacks the authority to mandate DJJ to place a juvenile in a specific rehabilitative program. Referencing Section 20-7-2180 [now Section 20-7-8005], which places the "exclusive care, custody and control" of a juvenile committed to its custody in the Department, we opined:

> [a] family court's direction in a commitment to DYS to involve the juvenile in an outside program during his commitment is closely analogous to a judge's direction of a particular place of confinement. See: Bell v. Leeke, 225 S.E.2d 188 (S.C. 1976). If viewed as mandatory, rather than a recommendation, it would place in the family court the jurisdiction to manage the internal details of how DYS will attempt to control and rehabilitate juveniles. See: State ex rel. Dept. of Health and Rehab. Services v. Nourse, 437 So.2d 221 (Fla. App. 4 Dist. 1983). See also: In the Matter of A- N- M-, 542 S.W.2d 916 (Tex. 1976); Heustis v. Sanders, 320 S.W.2d 602 (Ky. 1959). The General Assembly has, however, placed the "exclusive care, custody and control" of committed juveniles, not with the family court, but clearly and unambiguously with the Board of Youth Services. Section 20-7-2180, CODE OF LAWS (1976). Therefore, it is my opinion that any direction in a family court order that included enrollment in a non-DYS sanctioned "Save the Children" Program was merely precatory and not mandatory upon DYS. Bell v. Leeke, supra.

(emphasis added). Op.Atty.Gen., Op.No. 84-86 (July 25, 1984).

Moreover, Section 20-7-8010 provides that "[f]rom the time of the lawful reception of a child into custody by the department [of Juvenile Justice] and during the period of custody, the department shall provide for, either solely or in cooperation with other agencies, the care, custody and control of the child ... ." (emphasis added).

Furthermore, Section 20-7-7810 (D) only provides certain mechanisms for release of a juvenile who has been committed to the Department of Juvenile Justice. That Section in pertinent part states:

> [w]hen a child is adjudicated delinquent or convicted of a crime or has entered a plea of guilty or nolo contendere in a court authorized to commit to the custody of the Department of Juvenile Justice, the child may be committed for an indeter-

> minate period until the child has reached age twenty-one or until sooner released by the Board of Juvenile Parole under its discretional powers or released by order of a judge of the Supreme Court or the circuit court of this State, rendered at chambers or otherwise, in a proceeding in the nature of an application for a writ of habeas corpus.

Subsection (D) continues as follows:

> A juvenile who has not been paroled or otherwise released from the custody of the department by the juvenile's nineteenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections. If not sooner released by the Department of Corrections, the juvenile must be released by age twenty-one according to the provisions of the child's commitment; however, notwithstanding the above provision, any juvenile committed as an adult offender by order of the court of general sessions must be considered for parole or other release according to the laws pertaining to release of adult offenders.

Subsection (E) also provides:

> A juvenile committed to the Department of Juvenile Justice following an adjudication for a violent offense contained in Section 16-1-60 or for the offense of assault and battery of a high and aggravated nature, who has not been paroled or released from the custody of the department by his seventeenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections. A juvenile who has not been paroled or released from the custody of the department by his nineteenth birthday must be transferred to the custody and authority of the Youthful Offender Division of the Department of Corrections at age nineteen. If not released sooner by the Department of Corrections, a transferred juvenile must be released by his twenty-first birthday according to the provisions of his commitment. Notwithstanding the above provision, a juvenile committed as an adult offender by order of the court of

> general sessions shall be considered for parole or other release according to the laws pertaining to release of adult offenders.

In none of the foregoing statutes, is authority to release from the custody of the Department of Juvenile Justice given to the Department of Mental Health.

It is true that the Family Court does have jurisdiction to order a juvenile to receive treatment at the Department of Mental Health. In South Carolina Department of Mental Health v. State In the Interest of Darren J., 301 S.C. 75, 390 S.E.2d 185 (1990), the Supreme Court of South Carolina addressed this question in the context of a Family Court's ordering a juvenile with suicidal tendencies to the Department of Mental Health for safekeeping. There, the juvenile, charged with felony DUI and grand larceny, was sent to DMH until a hearing transferring jurisdiction to the Court of General Sessions could be held. Referencing 20-7-400 (A) (2), which authorizes the Family Court to provide for the treatment or commitment to mental institution of any emotionally disturbed child, the Court concluded:

> ... the Family Court is expressly granted the authority to commit a child to DMH for the purposes of examination or treatment. This authority, however, may not conflict with that of the probate courts. Section 62-1-302 (a) (6) vests the Probate Court with exclusive jurisdiction over the involuntary commitment of a person. Therefore, we construe these statutes to mean that the Family Court has the authority to order treatment or an evaluation for a child, but may not involuntarily commit a child for an indefinite period of time. Absolutely no authorization is given for the detention of a child in DMH in the absence of the need for an examination or treatment.

301 S.C. at 186. Of course, in Darren J., the juvenile had not yet been committed to the custody of the Department of Juvenile Justice for an indeterminate period as is the case here.

Judge Strom relied upon Section 20-7-7815 which provides as follows:

> [n]o person may be committed to an institution under the control of the Department of Juvenile Justice who is seriously handicapped by mental illness or retardation. If, after a person is referred to the Reception and Evaluation Center, it

> is determined that the person is mentally ill, as defined in Section 44-23-10, or mentally retarded to an extent that the person could not be properly cared for in its custody, the department may institute necessary legal action to accomplish the transfer of the person to another state institution as in its judgment is best qualified to care for the person in accordance with the laws of this State. This legal action must be brought in the resident county of the subject person. The department shall establish standards with regard to the physical and mental health of persons which it can accept for commitment.

(emphasis added).

It is to be noted at this point the fact that federal Constitutional law requires a due process commitment hearing for an individual prior to his transfer from a detention facility to an institution which cares for the mentally ill. In an Opinion, dated May 2, 1988 we addressed this situation and referenced Section 44-23-210 which states in pertinent part:

> [a] person confined in a state institution or a person confined in a state or private mental health or mental retardation facility may be transferred to another mental health or mental retardation facility if:
>
> (1) the superintendent of a state institution not under the jurisdiction of the Department of Mental Health or the director of a treatment facility under the jurisdiction of the Department of Mental Health requests the admission of a person confined there to a state mental health facility if the person is suspected of being mentally ill. If after full examination by two designated examiners, one of whom must be a licensed physician, the director of the mental health facility is of the opinion that the person is mentally ill, the director shall notify the superintendent of the institution or the director of the facility to which the person was admitted who shall commence proceedings pursuant to Sections 44-17-510 through 44-17-610;

Again, nowhere in Section 44-23-210 is there an indication or suggestion that legal custody is transferred to the Department of Mental Health. The 1988 Opinion also noted that in

> Vitek v. Jones, 445 U.S. 480 (1980), the United States Supreme Court concluded that a transfer during imprisonment to a mental hospital created a liberty interest by state statute and requires adequate notice, an adversary hearing at which the prisoner has the right to call, confront, and cross-examin[e] ... witnesses, an independent decision maker, and a written statement by the factfinder as to the evidence relied upon and the reasons for the decision to allow the transfer. The Supreme Court pointed out that although a conviction extinguished a prisoner's right to freedom from confinement, it did not constitute a determination that the convicted person was mentally ill and could be subjected to involuntary institutional care in a mental health hospital. Such a consequence, said the majority, was 'qualitatively different from the punishment characteristically suffered by a person convicted of a crime.' The Court cited the stigmatizing consequences of being labeled mentally ill. It has been stated that due process may mandate that as in a normal civil commitment, the relevant factual findings be supported by evidence more compelling than that required by a mere preponderance of the evidence standard. Also, it may be that, at least absent the provision of treatment, non-dangerous mentally ill prisoners cannot be transferred to a mental hospital without their consent in a voluntary commitment.

The question which you raise is whether under existing law, legal custody of the juveniles in question must remain in the Juvenile Parole Board until such time as the Board discharges them from its custody. Put another way, does either the Family Court or DJJ or DMH possess the authority to discharge juveniles committed to the legal custody of DJJ, or is such authority reserved exclusively to the Juvenile Parole Board? It is my opinion that such authority to discharge juveniles committed to DJJ resides solely in the Juvenile Parole Board.

The elementary and cardinal rule of statutory construction is that the court must ascertain and effectuate the actual intent of the General Assembly. Horn v. Davis Elec. Constructors, Inc., 415 S.E.2d 634 (1992). A statute as a whole must receive a practical,

reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words used must be given their plain and ordinary meaning. Smith v. Eagle Const. Co., 282 S.C. 140, 318 S.E.2d 8 (1984).

Moreover, the courts will presume that the Legislature intended by its action to accomplish something and not to do a futile thing. State v. ex rel McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). Separate statutes relating to the same subject matter must be construed together and full effect given to each. Columbia Gaslight Co. v. Mobley, 139 S.C. 107, 137 S.E. 211 (1927). It is proper to consider legislation dealing with the same subject matter in construing a statute. Fidelity and Cas. Ins. Co. of New York v. Nationwide Ins. Co., 278 S.C. 332, 295 S.E.2d 783 (1982). The express mention of one specific procedure, implies the omission of all others. See, Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct.App. 1984).

The distinction between "legal custody" and "physical custody" is well-recognized in the law. Our Court of Appeals, in State v. Fowler, 470 S.E.2d 393 (Ct.App. 1996), recently stated that the phrase "legal custody"

> ... indicates one who has custody by virtue of a court order or by operation of law, as opposed to one who simply has physical custody at a particular time or who is in loco parentis.

Citing a number of decisions the Court noted that "[s]everal cases have made a distinction between physical and legal custody." And in Joshua C. v. Western Heights Ind. School Dist., 898 P.2d (Okl. 1995), the Court concluded that "legal custody" is "responsibility for a person according to law." 898 P.2d at 1328 (emphasis in original).

A number of courts have held that "legal custody" is not surrendered simply because an individual's "physical custody" is changed or is moved. In New Mexico v. Brill, 81 N.M. 785, 474 P.2d 77 (1970), for example, the Court held that the defendant remained in the legal custody of the New Mexico Penitentiary even though he was physically in the custody of a federal penitentiary. Likewise, in Sanders v. MacDougall, 244 S.C. 160, 135 S.E.2d 836 (1964), our Supreme Court said this:

> [a] prisoner upon release on parole continues to serve his sentence outside the prison walls. The word parole is used in contra-distinction to suspend[ed] sentence and means a leave of absence from prison during which the prisoner remains in

> legal custody until the expiration of his sentence. ... Every paroled prisoner remaining in the legal custody of the Board [Parole] and may at any time be imprisoned on its order.

135 S.E.2d at 837.

Particularly instructive are two other cases, Frazier v. United States, 339 F.2d 745 (D.C. Ct. App. 1964) and Shobe v. Oregon Women's Correctional Center, 28 Or.App. 657, 560 P.2d 676 (1977). In Frazier, the Court reviewed the D.C. Code which committed convicted offenders to the "custody of the Attorney General" for their "terms of imprisonment." A statute also authorized the Director of the Department of Corrections to "transfer" any person who, while serving his sentence, was certified to be mentally ill, to a hospital for treatment. Pursuant to such statute, a convicted offender was so transferred to the St. Elizabeth's Hospital. He escaped from custody of the Hospital and the issue before the Court was whether the prisoner had escaped "from the custody of the Attorney General" pursuant to the relevant criminal statute.

The Court held that the prisoners remained in the legal custody of the Attorney General notwithstanding transfer to the Hospital for treatment. Said the Court,

> [u]nder 24 D.C. Code § 425 (1961), all persons convicted of crime in the District of Columbia are committed to the custody of the Attorney General for their 'terms of imprisonment.' ... Since the section authorizes assignment of prisoners to institutions 'whether maintained by ... the federal government or otherwise,' it is clear that the 'custody' intended is not limited to actual physical custody, but denotes a type of legal custody which remains in the Attorney General even though the prisoner is assigned to an institution over which the Department of Justice has no control ... . Appellant contends, however, that custody of the Attorney General ended when appellant was transferred to St. Elizabeth pursuant to 24 D.C. Code § 302. We do not agree ... .
>
> 24 D.C. Code § 302 outlines the responsibility of the District of Columbia prison directors with respect to treatment of a prisoner who becomes mentally ill while serving his sentence in a local prison. Transfer of the physical custody of the mentally ill prisoner to a mental hospital under this statute is neither inconsistent with, nor exclusive of, the legal custody

> of the Attorney General under 24 D.C. Code § 425 ... . 24 D.C. Code § 425 specifically authorizes the Attorney General to transfer prisoners committed to his custody 'from one institution to another if, in his judgment, it shall be for the well-being of the prisoner ... .' In 24 D.C. Code § 302 Congress merely provides a safeguard to insure that a prisoner is mentally ill before he is transferred to a mental institution. And 24 D.C. Code § 303 (b) (1961) ... assures his transfer out of a mental institution when the prisoner is 'restored to mental health.' Thus the custody of the Attorney General is continuous as he discharges his responsibility to transfer a prisoner 'from one institution to another ... for the well-being prisoner.' ... 24 D.C. Code § 425.

339 F.2d at 746.

And in Shobe, the Court, quoting Kneefe v. Sullivan, 2 Or. App. 152, 155, 465 P.2d 741, 742 (1970), stated:

> ... [t]he word 'custody' does not always mean the same thing. An officer or agency may have physical custody separate and apart from, or in combination with, the legal custody of a different officer or agency. The term is elastic and may mean actual imprisonment or other physical detention, or it may refer to mere power, legal or physical, of imprisoning or of taking manual possession ... .

Further, the Court recognized that "[p]risoners temporarily outside their usual place of confinement for limited purposes are uniformly held to be still in the legal custody of the penal institution where they were previously confined."

Courts have applied the same reasoning with respect to juveniles committed to youth corrections facilities. In State v. Pritchett, 222 Kan. 719, 567 P.2d 886 (1977), the Kansas Supreme Court addressed a situation where a juvenile was adjudicated delinquent and was admitted to the Youth Center. Having run away from this facility and because of medical problems, he was then transferred to St. Francis Hospital for care and treatment. While at the Hospital, he left the facility without permission.

A Kansas statute deemed it to be aggravated delinquency if a child was committed to the State Department of Social Welfare and ran away from an institution or facility

after having run away or escaped one or more times. The defendant argued that he could not be convicted for aggravated delinquency after he was placed in St. Francis Hospital because he was no longer under the control or jurisdiction of the State Department of Social Welfare.

The Kansas Supreme Court rejected this argument. Citing a number of cases in support of its position, the Court stated:

> [t]he common thread which runs through these cases is the idea that custody contemplates intent on the part of prison officials to exercise actual or constructive control of the prisoner and that in some manner the prisoner's liberty is restrained. ... There is no requirement that the prisoner be constantly supervised or watched over by prison officials ... . The key factor is that prison official have not evidenced an intent to abandon or give up their prisoner, leaving him free to go on his way.
>
> We conclude that a boy confined in the Youth Center, who runs away or escapes the second time, is guilty of aggravated juvenile delinquency. The fact that the second escape is from a hospital where he has been placed for medical treatment without any of the Youth Center personnel in attendance is not a defense to the charge.

Indeed, the General Assembly itself has recognized in Section 44-24-260 that judicial commitment of a child to the Department of Mental Health does not alter his "legal custody". [child has a right to communicate and consult with "the agency or individual having legal custody of him ...."] Likewise, as I read the various statutes, relevant here, "transfer" to a facility of the Department of Mental Health of a juvenile who has been committed to the Department of Juvenile Justice does not authorize either DMH to discharge the juvenile upon completion of treatment, nor permit DJJ to agree to such discharge. Executive agencies of the State cannot override statutory law. We must read all the statutes together as a whole and may not, unless absolutely required, deem one statute as impliedly repealing any other. No implied repeal is here indicated. Indeed, the statute relating to juvenile parole, Section 20-7-8305, was reenacted this year by Act No. 383 of 1996.

First of all, Section 20-7-7815, relied upon by the Family Court, simply requires that a juvenile who is seriously handicapped by mental illness or mental retardation, may

not be committed to a DJJ institution. Thus, if the Family Court initially determines that the juvenile is mentally ill or mentally retarded, the Court should not commit the juvenile to DJJ, but instead should divert him for treatment in the proper and appropriate setting. In this instance, it is my understanding that the juveniles in question were committed by the Family Court to DJJ for an indeterminate period of time.

However, once a juvenile is committed to DJJ, the situation is much different. The juvenile still must receive treatment if it is determined he is mentally ill, but at that point, the juvenile is in the legal custody of DJJ. Thus, the statute provides that DJJ, the legal custodian, may "institute necessary legal action" to accomplish the "transfer" of the juvenile to another state institution for treatment of the mental illness or retardation.

In State v. Doe, 566 P.2d 121 (1977), the New Mexico Court of Appeals faced a situation similar to here. Certain children who were committed as delinquents to the Department of Corrections at Springer were in need of treatment for mental illness. The Children's Court ordered that the children receive psychiatric treatment from the Department of Hospitals and Institutions. The Court further ordered that the juveniles not be released from the Boy's School without prior approval from the Children's Court and that the children appear before the Children's Court prior to release from custody. The Court of Appeals held that the Order was invalid in this respect. Said the Court,

> [t]he authority of the Children's Court over the children terminated when it transferred these delinquent children to the Boy's School for care and rehabilitation. [citations omitted] ... Under these circumstances, the Boy's School "has the exclusive power to parole or release the child."

566 P.2d at 124. The only difference in this case and the one at hand is that here, the Family Court delegated in its Order the authority of release to the Department of Mental Health while, in Doe, such authority remained in the Children's Court. In both situations, the statute governing juvenile paroles is controlling.

It is apparent and evident to me what the General Assembly intended here. Just as was the case in the decisions referenced above, to my mind, the term "transfer" as used in Section 20-7-7815, is referring only to "physical custody", not a change of "legal custody" from DJJ to DMH. After the juvenile has been committed to DJJ and placed in that agency's legal custody by the Family Court for an indeterminate period - many times for serious offenses such as here, murder, criminal sexual conduct, carjacking, armed robbery, kidnapping and burglary - such agency does not have the authority to agree to "turn over" legal custody of such juvenile to the Department of Mental Health. And

Section 20-7-7815 does not intend to give such authority. It is incomprehensible to me to think that the General Assembly intended that a civil commitment to DMH for treatment of the juvenile's mental illness, a procedure that is constitutionally required under Vitek v. Jones, could, in and of itself, serve also to transfer "legal custody" to DMH so that DMH was then free to discharge the juvenile upon its finding that the individual was no longer mentally ill and in need of treatment. If so, not only would such destroy the underlying determination of the Family Court which committed the juvenile to DJJ for the commission of a particular offense, but it would also destroy the legislative mandate that a juvenile committed to DJJ for an indeterminate period could be discharged only pursuant to certain statutory procedures and only for certain statutory reasons.

In other words, Section 20-7-7815 must be construed in light of the requirements of Sections 20-7-8305 and 20-7-7810 (D). Section 20-7-7810 (D) expressly states that " ... the child may be committed for an indeterminate period until the child has reached age twenty-one or until sooner released by the Board of Juvenile Parole under its discretional powers or released by order of a judge of the Supreme Court or the circuit court of this State ... in a proceeding in the nature of an application for a writ of habeas corpus." To interpret Section 20-7-7815 as authorizing a transfer of legal custody to DMH simply upon placement of the juvenile in a DMH facility for treatment, would be tantamount to an abolition of the authority of the Juvenile Parole Board to discharge a juvenile. It would amount to an implied repeal of the Juvenile Parole Board's authority in this type of situation. This, I do not believe the General Assembly has intended.

Moreover, simple release by DMH on the basis of no longer being mentally ill and in need of treatment does not square with the standards set forth by the General Assembly for discharge of a juvenile from DJJ. Section 20-7-8305 (B) states that "[i]n the determination of the type of discharges or conditional releases granted, the parole board shall consider the interests of the person involved and the interests of society and shall employ the services of and consult with the personnel of the Reception and Evaluation Center." (emphasis added). Thus, the Parole Board, not DMH or DJJ, is to determine, based upon foregoing criteria, discharges or conditional releases.

In summary, neither DMH nor DJJ possesses the authority to discharge a juvenile committed to DJJ from DJJ's legal custody or to agree to such discharge. Such authority is, by statute, expressly reserved to the Juvenile Parole Board. Section 20-7-7815 in no way alters this authority, but merely authorizes DJJ to transfer physical custody of a juvenile determined to be mentally ill or retarded to another institution for treatment. Nor does the Robert K. Consent Order purport to alter legal custody, noting that "security requirements ... of the Department of Youth Services" must be adhered to while a juvenile is at DMH.

The Order signed by Judge Strom is, as I read it, in essence a consent order. It is well-recognized that while a "consent judgment" possesses the characteristics of both a contract and a judgment, it is not strictly a judicial decree; instead, a consent judgment represents an agreement of the parties and is subject to many of the rules relating to interpretation and enforcement of contracts as well as those governing the form, entry and effect of judgment. Regan v. Regan, 582 A.2d 1330 (N.J. 1990).

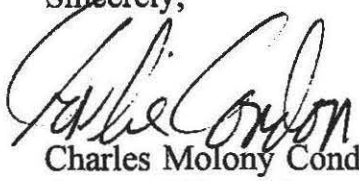
Moreover, a state official must have sufficient authority to enter into a consent decree. Such official cannot accomplish through a consent judgment what he has no power to accomplish, period. As has been stated.

> [t]he decree's force comes from consent not a resolution of the merits, and it creates obligations no broader than those to which the signatories have actual authority to give assent.

Bates v. Johnson, 901 F.2d 1424, 1426 (7th Cir. 1990).

Under the Victim's Bill of Rights, a victim of crime has a right to be notified when an offender receives a temporary, provisional or final release from custody. See, Section 16-5-1530. Presumably, no such notice was ever given to these victims for these offenses. It is thus my opinion that neither DJJ nor DMH possessed the requisite authority under state law to enter into any agreement that the juveniles in question could be discharged from the legal custody of DJJ. Such discharge may come only from the Juvenile Parole Board or from the Supreme Court or Circuit Court pursuant to a writ of habeas corpus. It is my opinion that the appropriate procedure in this instance, upon DMH's determination that the juveniles are no longer in need of treatment for mental illness, is to return physical custody of the juveniles to DJJ. And in view of the above, it is my advice that DJJ should forthwith go back before Judge Strom and seek a modification of the decree on the basis that it did not have the requisite legal authority to agree to a discharge from custody of the juveniles in question. Absent such modification, this Office will move before the appropriate court to have the Order set aside.

Sincerely,



Charles Molony Condon
Attorney General

CMC/ph