PROBATION OFFICERS AND COUNTY EMPLOYMENT
A DISCUSSION AND OVERVIEW OF
EL PASO COUNTY V. SOLORZANO

351 S.W.3d 577 (Tex.App.-El Paso, no pet.)

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State Bar of Texas
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CHAPTER 17

Lisa A. Capers, J.D.

Biographical Information

Lisa Capers is the Senior Director of Administration and Training at the Texas Juvenile Justice Department (TJJD) and manages six program areas including Human Resources, Juvenile Justice Training Academy, Legal Education and Technical Assistance, Support Services, Interstate Compact for Juveniles, and Agency Publications. Prior to the creation of TJJD, she served as the Deputy Executive Director and General Counsel for the Texas Juvenile Probation Commission (TJPC) for 19 years. She has a Bachelor of Science degree in Business Administration and Finance and she received her Doctor of Jurisprudence from the University Of Texas School Of Law at Austin.

Ms. Capers is a past Chair of the Juvenile Law Section of the State Bar of Texas. She was instrumental in the creation of the attorney juvenile law specialization exam in 2000 and served as a member of the Juvenile Law Exam Commission at the Texas Board of Legal Specialization from 2001 to 2007.

After the death of renowned University of Texas Law Professor, Robert Dawson, in 2005, Lisa became the managing editor of *Texas Juvenile Law*, now in its Eighth Edition, originally written by Professor Dawson and published by TJPC. *Texas Juvenile Law* is the most widely used legal reference manual for the Texas juvenile justice system and is used by juvenile justice practitioners and academicians statewide. Lisa is also a frequent contributing author for the publication and has recently written on the constitutional requirements for detained youth in secure juvenile facilities in the Eighth Edition published by TJJD.

Ms. Capers has served as a contributing author to the Juvenile Law Section *Special Legislative Issue* Newsletters since 1995 and the managing editor of the *Legislative Issue* since 2005. She lectures frequently on juvenile law and procedure around the state, testifies before legislative committees on juvenile justice issues and has served as a legal advisor to the former Juvenile Justice and Family Issues Committee of the Texas House of Representatives. She has served as a guest faculty member for the Texas Justice Court Training Center and guest lecturer for the Texas Municipal Courts Education Center. Ms. Capers has been active in training local juvenile justice practitioners on the Prison Rape Elimination Act (PREA) and related constitutional requirements governing facility operations. Beginning in 2009, Lisa served as the project manager over the *Building Capacity Project* at TJPC, a partnership with American University Washington College of Law's *Project on Addressing Prison Rape* headed by Project Director, Brenda V. Smith, Professor of Law and member of the National Prison Rape Elimination Commission. This project developed a comprehensive juvenile specific PREA training curriculum for use in Texas. Lisa has served as a faculty member with *The Project on Addressing Prison Rape* and has trained nationally on juvenile PREA topics related to human resources and administrative investigations.

Early in her career, Lisa was an Assistant County Attorney in Williamson County, Georgetown, Texas where she was responsible for all juvenile court prosecutions in the 277th and 368th Judicial District Courts. Additionally, she represented the Texas Department of Family and Protective Services in child abuse and neglect cases in all courts. Before attending law school, Lisa was employed by Electronic Data Systems Corporation (EDS) in Dallas, Texas as a systems engineer.

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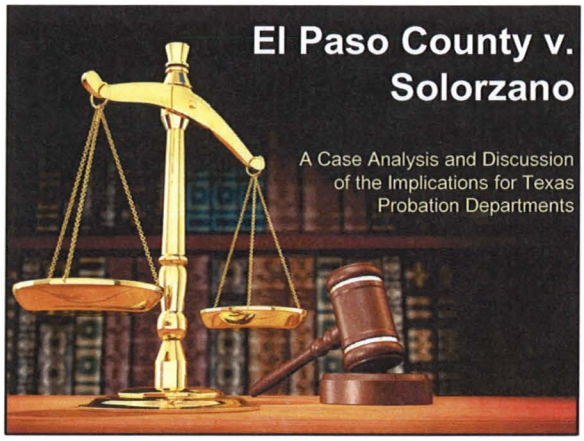
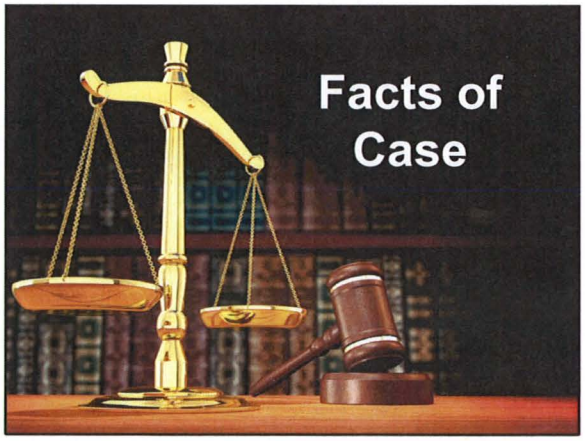


Overview of Discussion

- Review of El Paso County v. Solorzano case
  - Facts of Case
  - Filing of Lawsuit
  - Holding of Appellate Court
- Review of relevant state statutes
- Attorney General Opinions
- Discussion of Implications/Ramifications of holding



El Paso County v. Solorzano

- Facts:
  - February 2006 – Juvenile Daniel Reyes was in Challenge Boot Camp Program under custody of El Paso County Juvenile Probation Department
  - March 6, 2006 – Juvenile reports that JSO struck him in the back with a cell door 7-9 days earlier.
  - JSO employed by the Department when incident occurred but resigned shortly after incident.
  - March 6, 2006 – Facility nurse does medical assessment; youth transported to hospital. Mother, Ms. Solorzano notified of her son's injury.

El Paso County v. Solorzano

- Filing of Lawsuit:
  - February 25, 2008 – Solorzano files suit individually and on behalf of her minor son against **El Paso County.**
  - Suit filed under **Texas Tort Claims Act.**
  - Suit alleged acts of negligence and constitutional violations.

El Paso County v. Solorzano

- Plaintiff alleged:
  - Incident resulted in serious injuries;
  - JSO/Perpetrator was employee of county and acting within the scope of his employment when he committed the act.
  - JSO was negligent; County was negligent in hiring, supervision and training of JSO.
  - County's negligence resulted in waiver of sovereign immunity.

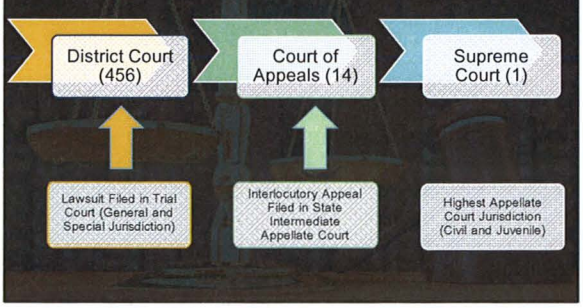
El Paso County v. Solorzano

- Suit alleged violations of the youths civil rights and his Constitutional rights under the **4th** and **14th Amendments** and **42 U.S.C. Section 1983**.
  - County failed to provide reasonable medical care; and
  - County failed to take preventative or remedial measures to guard against alleged misconduct.

El Paso County v. Solorzano

- Solorzano files suit in Texas state court (trial court).
- County files **Plea to the Jurisdiction** challenging the trial court's subject matter jurisdiction.
  - County argues Solorzano failed to plead a cause against the County because **an employee of the JPD is NOT an employee of the county**.
- Trial court denies plea.
- County files **Interlocutory Appeal** to El Paso Court of Appeals.
  - Asking for decision on jurisdiction, not merits of case.
- Appellate Court reverses trial court.

Texas Courts



Appellate Court's Decision

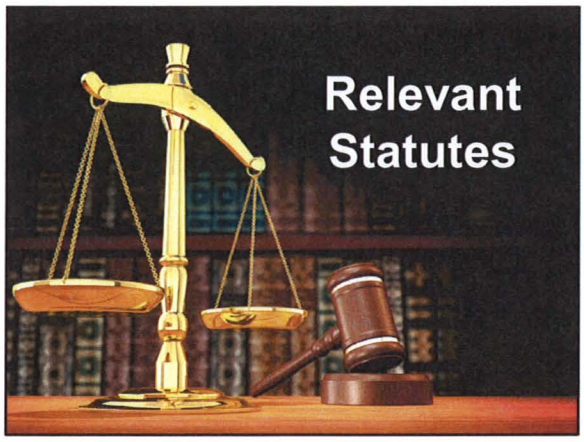
- Trial Court was wrong.
- Trial Court has **NO jurisdiction** (i.e., the County's plea to the jurisdiction should have been sustained and case dismissed at trial court level.
- Case should be dismissed.
- Reason:
  - The JSO was an employee of the JPD;
  - The **JSO was NOT an employee of the County**.
  - Plaintiff failed to state a claim upon which relief could be granted.

Appellate Court's Analysis/Rationale

- The County's Arguments:
  - Proper defendant should be **El Paso County Juvenile Board**, a separate entity apart from County
  - County acknowledges JSO paid by County and receives county benefits
  - County argues that because **County does not have the legal right to control and supervise the JSO**, he is not a County employee.

El Paso Court of Appeals

- Matter of first impression:
  - No Texas Court of Appeals has directly addressed the issue of **whether juvenile probation departments are a separate entity from the county**.
- Court's Analysis:
  - Court first reviewed the relevant statutory provisions
  - Court then looks to Attorney General Opinions
  - AG Opinions **NOT binding but PERSUASIVE.**



Texas Tort Claims Act (TTCA)

- Texas Civil Practices and Remedies Code **Chapter 101**
  - Under certain circumstances, a governmental unit is liable for personal injuries caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable according to Texas law.
  - Under TTCA, a person is **NOT** an employee of a governmental unit **if** the person **"performs tasks the details of which the governmental unit does not have the legal right to control."**

Relevant Statutes - HRC

- Section 152.0771(a)
  - Creates Juvenile Board
- Section 152.0007(a)
  - Juvenile Board duties related to JPD
- Section 142.001
  - Definition of Probation Services
- Section 142.002
  - Board appoint personnel and set title/salary
- Section 141.042 (Now 221.002)
  - TJPC (now TJJD) sets minimum standards for

Relevant Statutes - HRC

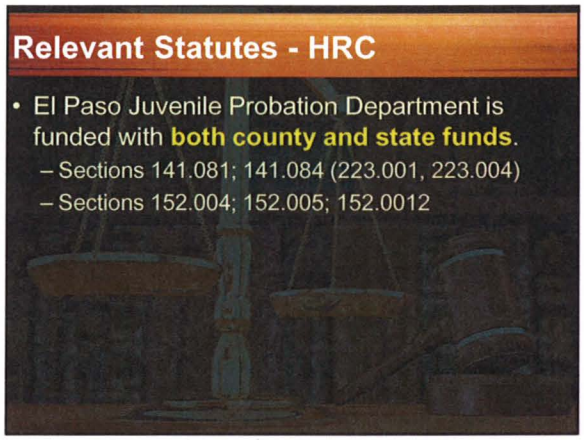
- Section 142.004(b)
  - Juvenile probation **personnel** employed by a political subdivision of the state are **state employees** for the purposes of Chapter 104, Civil Practice and Remedies Code.
    - Chapter 104 – State Liability for Conduct of Public Servants
  - Kicks in if sued in personal capacity.

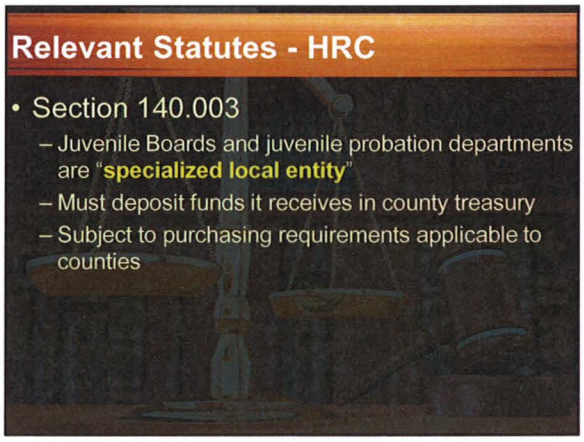
Relevant Statutes Civil P&R Code

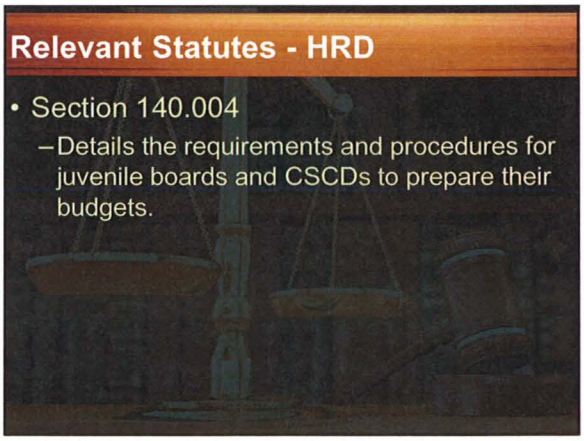
- Chapter 104 - State Liability for Conduct of Public Servants
  - **State shall indemnify employee** based on act or omission in course/scope of employment
  - Conduct covered:
    - » **Negligence** (not willful or wrongful act or gross negligence)
    - » **Deprivation of constitutional right** (not if bad faith, with conscious indifference or reckless disregard)

Relevant Statutes Civil P&R Code

- Section 104.003 – Limits on Amount of Recoverable Damages
  - Injury, death or deprivation of right, privilege, immunity
    - $100,000 to single person
    - $300,000 per single occurrence
  - Property Damage
    - $10,000 each single occurrence


Relevant Statutes - HRC
• El Paso Juvenile Probation Department is funded with both county and state funds.
– Sections 141.081; 141.084 (223.001, 223.004)
– Sections 152.004; 152.005; 152.0012


Relevant Statutes - HRC
• Section 140.003
– Juvenile Boards and juvenile probation departments are "specialized local entity"
– Must deposit funds it receives in county treasury
– Subject to purchasing requirements applicable to counties


Relevant Statutes - HRD
• Section 140.004
– Details the requirements and procedures for juvenile boards and CSCDs to prepare their budgets.

Relevant Statutes – HRC

- Section 152.0772
  - El Paso County Institutions
  - Juvenile board appoints the supervisor of county facilities under jurisdiction of juvenile board
  - Juvenile board appoints facility head
  - Commissioner's court shall provide necessary funds to operate each institution

Relevant Statutes – HRC

- Section 222.006 states:
  - Sec. 222.006. PROBATION OFFICER: COUNTY EMPLOYEE. A juvenile probation officer whose jurisdiction covers only one county is considered to be an employee of that county.
- This statute not discussed by court.

AG Opinion DM-460 (1997)

- AG reviewed the probation department's characteristics, including:
  - –Source of funding
  - –Accountability
  - –Supervision

AG Opinion DM-460 (1997)

- El Paso Juvenile Department is a separate entity and distinct from County of El Paso
- Any contract entered into by JPD not imposing liability on County
- Juvenile Board can enter into contracts without county commissioner's approval

AG Opinion DM-460 (1997)

- AG determined that purpose of JPD:
  - –Provision of juvenile probation services
  - –**Not merely county concern, but state-wide one**, provided in response to and under direction of juvenile court orders and governed by **state regulations**.

AG Opinion DM-460 (1997)

- Commissioner's Court lacks authority:
  - In creation and composition of juvenile board
  - To appoint personnel as juvenile board hires JPD personnel and sets salaries
  - Over state funds in JPD's budget
  - Limited control over county funds in budget

AG Opinion DM-460 (1997)

- The El Paso County Juvenile Probation Department is an entity **independent of the County**.

Bottom Line of Court's Holding

- An employee of the El Paso Juvenile Probation Department is **NOT an employee of El Paso County** under TTCA because:
  - The employee is **NOT subject to the County's control.**
- Thus, El Paso County was not proper party to sue for Ms. Solorzano and case dismissed for want of jurisdiction

Looks Bleak...But Consider Flores

- Cameron County case from 1988 incident where 14 year old boy dies from broken neck in detention
  - Federal lawsuit in US District Court Southern District of Texas suit against County, Juvenile Board, CJPO, Detention Officers, etc.
  - Ultimate parties were County and JDOS
  - Trial Court awarded $650,000
  - Appealed to 5th Circuit in New Orleans (1996)
  - 92 F.3d 258 (1996)

US Court of Appeals Fifth Circuit

- Federal appeals court
- Holdings not binding on state courts
- El Paso Court did not consider any of the holding in Flores
- While not precedent for state courts, opinions of the 5th Circuit should be extremely **persuasive**.
- Only court above 5th Circuit is USSC

Flores v. Cameron County, etal

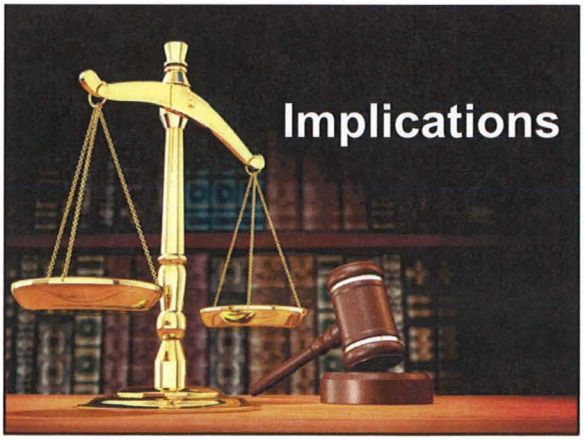
- Holding:
  - Juvenile Board is county agency and not an arm of the state
  - Juvenile Board makes policy for county related to juvenile probation programs, facilities and services
- Hard to argue JPD personnel are not county employees

Flores v. Cameron County, etal

- Discussion
  - AG Opinion JM-410 (1985) which opines that juvenile probation personnel are county employees for purposes of Fair Labor Standards Act.
  - AG Opinion H-1133 (1978) recognizes a duty of the county attorney to represent and provide legal advice to county juvenile board.

Flores v. Cameron County, etal

- Analysis: Test of whether juvenile board was county or state entity looked at 5 factors:
  - Whether state law views entity as arm of state
  - Source of entity's funding
  - Degree of local autonomy retained
  - Whether entity is concerned primarily with local problems
  - Whether entity has authority to sue and be sued
  - Whether entity retains right to hold and use property



JPD Separate From County

- Who is sued? Proper parties to litigation?
- Who represents the JPD, the Juvenile Board and individual officers?
- Must JB hire internal/external legal counsel?
- Who pays judgments?
- Who should purchase liability insurance?
- If county approves/writes/modifies policies of JPD, does this waive their argument they are independent entity? (example: firearms)

JPD Separate From County

- Will TJJD defend JPD or JB?
  - **NO, there is no legal authority for this option.**
  - **AG defends TJJD in litigation**
- Will JPD personnel be indemnified under Chapter 104?
  - Yes if sued in personal capacity

JPD Separate From County

- Is the County really a separate entity?
  - Do most JPDs use county HR departments, HR policies on hiring, etc.?
  - Does county or JPD issue paychecks?
  - Workers Compensation? Does County provide?
  - Vehicle insurance/liability for JPD cars? Who pays?
  - Fair Labor Standards Requirements

JPD Separate From County

- What control does County exercise?
  - Funds overall county contribution although JB has line-item control.
  - Some Commissioner's Courts do exercise more oversight that legally authorized and extensively review county part of JPD budget.
  - County owns buildings, premises and county departments usually maintain property.

JPD Separate From County

- Can state funds be used to purchase liability insurance for juvenile board and/or JPD?
- Can county funds be used for this purpose?
- What is the cost of liability insurance?

Who Does AG Represent?

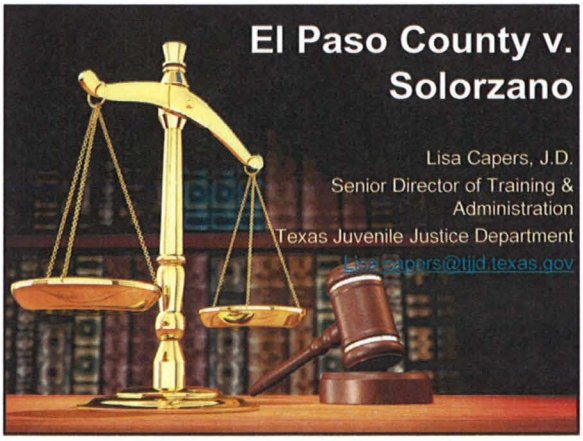
- Under Chapter 104, who does the AG represent?
  - Juvenile probation personnel when sued in their personal capacities for:
    - Tort claims
    - Constitutional claims

What Does All This Mean?

- This case is not binding statewide
  - El Paso Court of Appeals
  - 13 other appellate courts
- No appeal as of yet to Supreme Court
  - Only Supreme Court can make this precedent statewide
- Another appellate court may decide differently
- Strong arguments for different result
- Possible legislative fix may be necessary

What's a Juvenile Board To Do?

- Be aware of this case and discuss.
- Discuss with county or district attorney's office that normally represents county.
  - Local county counsel should continue to represent JPDs and Juvenile Boards if they have done so in the past (argue AG Opinion and Flores factors)
- JB may wish to discuss with Commissioner's Don't panic! Read El Paso case narrowly as it may be just an anomaly.
- Result could be very different in another court



El Paso County v. Solorzano

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Texas Juvenile Justice Department

Synopsis and Analysis of *El Paso County v. Solorzano*
351 S.W.3d 577 (Tex.App.-El Paso, no pet.)

Critical Issue: *Is an Employee of a Juvenile Probation Department an Employee of the County?*
Sub-Issues: *Does County have the right to control employees of the Juvenile Probation Department?*
Are Juvenile Boards and Juvenile Probation Departments separate and distinct entities from the County?

Facts of Case

- February 2006 – Juvenile, Daniel Reyes was participant in Challenge Boot Camp Program while in the custody of the El Paso County Juvenile Probation Department.
- March 6, 2006 – Juvenile alleged that officer LeGrande struck him in the back with a cell door 7-9 days earlier. Medical care was provided on March 6 and the youth was taken to the hospital. Parent, Mrs. Solorzano, was notified.

Posture of Case

- February 2008, Mrs. Solorzano filed suit against El Paso County in state court under the Texas Tort Claims Act (TTCA).
- Suit alleges violations of youth's civil rights and his constitutional rights under 4th and 14th amendments and 42 U.S.C. 1983.
    - Allegation that County failed to provide reasonable medical care.
    - Allegation that County failed to take preventative or remedial measure to guard against alleged misconduct. County was alleged to be negligent in hiring, training and supervision, etc.
- County filed answer and plea to jurisdiction to challenge trial court's subject matter jurisdiction alleging that an employee of the El Paso JPD is not an employee of the County.
- Trial court denied the County's plea to jurisdiction.
- El Paso County filed interlocutory appeal the El Paso Court of Appeals to challenge the trial court's denial of the plea to jurisdiction.

Appellate Court Decision

- Appellate Court reverses trial court decision.
- Trial court had no jurisdiction because Officer LeGrande was an employee of the JPD and NOT an employee of the County. The JPD employee was not subject to County's control for purposes of TTCA.
- County was not proper party in litigation. Proper defendant should be El Paso County Juvenile Board.

Appellate Court Rationale

- Under Texas Tort Claims Act, a person is not an employee of a governmental unit if the person "performs tasks the details of which the governmental unit does not have the legal right to control."
- Court reviewed various statutes related to the authority and duties of local juvenile boards and looked at a number of factors in its analysis:
    - Juvenile board establishes JPD, employs CJPO and adopts budget for JPD. [HRC 152.0007]
    - Juvenile board appoints personnel and sets salaries. Commissioner's Court has limited authority over JPD budget. [HRC 142.002]
    - Juvenile board appoints head of facilities in El Paso County. [HRC 152.0772]
    - AG Opinion DM-460. AG opinion determined provision of juvenile probation services is state-wide concern, under direction of juvenile court orders and governed by state regulations. JPD distinct and independent entity apart from the County (for purposes of entering into contracts).

Implications and Questions Resulting

- Is the juvenile board a separate and distinct entity from the county?
- Are employees of the juvenile probation department considered county employees?
- Will other courts follow this holding by the El Paso Court of Appeals?
- Will county and district attorney's continue to defend the juvenile board and/or the juvenile probation department in litigation in state and federal court?
- Will the juvenile board and juvenile probation department need liability insurance and outside legal counsel?
- Can state funds be used to purchase liability insurance or litigation defense? County funds? Who ultimately pays? Won't it typically be the county regardless?

Other Relevant Cases and Pertinent Information

- *Flores v. Cameron County, Texas, et al., 92F3d258 (1996).* Fifth Circuit Court of Appeals Case that faced a similar and related issue of whether the juvenile board was a county entity, and whether the county could be held liable for the policies made by juvenile board or if the juvenile board was independent of the county, being an arm of the state.
    - Civil rights case filed in federal court in the US District Court for the Southern District of Texas in 1988.
    - Youth in Cameron County Detention Center had his neck broken during a physical restraint by two detention officers and the youth died.
    - Youth's mother filed suit against the detention officers, the CJPO, Cameron County, the County Judge and Commissioners Court, and the juvenile board members all in their individual and official capacities. By the time of trial, only the detention officers and Cameron County remained as defendants.

- *Flores* Court Analysis
    - Fifth Circuit analyzed six factors to determine whether the juvenile board was a state or local entity:
        - Whether state law views the entity as an arm of the state;
        - The source of the entity's funding;
        - The degree of local autonomy retained;
        - Whether the entity is concerned primarily with local, as opposed to statewide, problems;
        - Whether the entity has the authority to sue and be sued in its own name; and
        - Whether the entity retains the right to hold and use property.
    - Court concluded the juvenile board is a county agency rather than an arm of the state; thus, the policies of the local juvenile board are the policies of the county. Implicit in this is that JPD employees are county employees.

Conclusions

- The El Paso Court of Appeals reached their conclusion on this issue. However, the remaining 13 state courts of appeal may analyze the issue differently and can reach a different result. The El Paso Court did not consider nor discuss the *Flores* case.
- The *Flores* case will be binding in federal court where most civil rights litigation will occur. The more in depth analysis of the 5th Circuit on this issue should be persuasive to Texas state appellate courts.
- Is a statutory fix to this issue merited? Possibly.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

EL PASO COUNTY, Appellant, v. LAURA SOLORZANO, INDIVIDUALLY AND AS NEXT FRIEND OF DANIEL REYES, A MINOR Appellee.	§ § § § § §	No. 08-10-00071-CV Appeal from the 205th Judicial District Court of El Paso County, Texas (TC#2008-777)

O P I N I O N

This is an interlocutory appeal by the County of El Paso from the denial of its plea to the jurisdiction of Laura Solorzano's claims under the Texas Tort Claims Act, the Fourth and Fourteenth Amendments of the U.S. Constitution, and 42 U.S.C. § 1983 for personal injury.

In February 2006, Daniel Reyes was a participant in the Samuel F. Santana Challenge Boot Camp Program while under the custody of the El Paso County Juvenile Probation Department ("the Department").[1] On March 6, 2006, Mr. Reyes reported to Challenge Officer Kanaan Pitts that Challenge Officer Jesus LeGrande struck him in the back with a cell door seven to nine days earlier. When the incident occurred, Officer LeGrande was under the Department's employ, but he resigned shortly afterwards. On March 6, 2006, the Department's facility nurse provided Mr. Reyes with a medical assessment, and he was then taken to Thomason Hospital. The Hospital notified Laura Solorzano, Mr. Reyes' mother, of his injury that day.

[1] According to the County, the Challenge Program is a post-adjudication, residential program operated by the El Paso County Juvenile Probation Department.

On February 25, 2008, Ms. Solorzano filed suit individually and on behalf of her minor son, Mr. Reyes, against El Paso County ("the County"), arguing that the February 2006 incident resulted in "serious injuries" to various parts of Mr. Reyes' body. Ms. Solorzano alleged that the perpetrator was an agent, servant, representative, or employee of the County, and was acting within the scope of his employment when he committed the alleged act. In her petition, Ms. Solorzano alleged that Officer LeGrande was negligent in various respects when he closed the door to Mr. Reyes' cell, and that the County was negligent in the officer's hiring, supervision, and training, among other things. Ms. Solorzano also claimed that she had incurred medical care expenses on behalf of Mr. Reyes. She brought her claims under the Texas Tort Claims Act, arguing that the County's negligence in "the use, misuse, or failure to use tangible pieces of property while closing the jail cell door" resulted in its waiver of sovereign immunity, and that the County received actual notice of the incidents in question. She asserted that the County's refusal to provide Mr. Reyes with reasonable medical care after his injuries, as well as its failure to take preventative or remedial measures to guard against the alleged misconduct, violated his civil rights and Constitutional rights under the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983.

After filing its answer, the County filed a plea to the jurisdiction to challenge the trial court's subject-matter jurisdiction, arguing primarily that Ms. Solorzano failed to plead a cause against the County because an employee of the El Paso Juvenile Probation Department is not an employee of the County. Ms. Solorzano then filed a response to the County's plea, and attached to it affidavits by her and Mr. Reyes, photographs of the facility and cell where Mr. Reyes was an inmate, an incident report regarding the alleged incident, an investigation report of the alleged

abuse, Mr. Reyes' complaint, an El Paso County Juvenile Probation Department memorandum to all Challenge Program staff, as well as a Texas Juvenile Probation Commission's notice of investigation findings. The court denied the County's plea. The County now makes the instant interlocutory appeal to challenge that denial.

In its sole issue, the County contends the trial court erred in denying its plea to the jurisdiction. A plea to the jurisdiction based on governmental immunity is a challenge to the trial court's subject-matter jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). Because such a challenge presents a question of law, we review a court's ruling on a plea to the jurisdiction *de novo*. *Holland*, 221 S.W.3d at 642. The pleadings are the central focus of such a review, and they will be construed in the plaintiff's favor, with an eye toward the pleader's intent. *See Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We will consider the pleadings, and any evidence relevant to the jurisdictional issue presented, without regard to the merits of the case itself. *Miranda*, 133 S.W.3d at 226. Our primary inquiry is whether the plaintiff's pleadings allege facts sufficient to demonstrate that jurisdiction exists. *Holland*, 221 S.W.3d at 642–43.

Absent the unit's consent, governmental immunity deprives a trial court of subject-matter jurisdiction over suits against the State, and certain governmental entities. *Miranda*, 133 S.W.3d at 224. The Texas Tort Claims Act ("TTCA") provides a limited waiver of governmental immunity, under which a governmental unit's immunity from suit exists side-by-side with its immunity from liability. *See* TEX.CIV.PRAC.&REM.CODE ANN. §§ 101.001–101.109 (West 2011); *Miranda*, 133 S.W.3d at 224–25. As the standard of review reflects, it is the plaintiff's burden to demonstrate a waiver of governmental liability provided by the TTCA. *Dallas Area*

Rapid Transit v. Whitley, 104 S.W.3d 540, 542 (Tex. 2003). To determine whether the plaintiff has met its burden, we consider the facts alleged in the petition, and to the extent it is relevant to the jurisdictional question presented, evidence submitted by the parties. *Id*.

The first argument the County raises is that the court erred in not granting the County's plea to the jurisdiction because the proper defendant should be the El Paso County Juvenile Board, which it claims to be a separate entity apart from the County, and so the trial court lacked subject-matter jurisdiction over this case. Although the County concedes that El Paso Juvenile Probation Department personnel are paid by and receive certain employment benefits from El Paso County, it contends that because the County does not have the legal right to control and supervise the details of juvenile probation personnel such as Officer LeGrande, these personnel are not County employees. In response, Ms. Solorzano contends the County failed to offer any evidence at trial to support its arguments, whereas she offered ample evidence to contradict the County's assertions. Ms. Solorzano asserts that she presented evidence at trial to show that Mr. Reyes was an inmate at a County facility when he was injured, that the cell door which caused his injuries was owned and maintained by the County, and that Mr. Reyes was in the County's custody when he was injured. On the other hand, according to Ms. Solorzano, the County did not present any evidence "as to how, why, or by what entity" the El Paso Juvenile Probation Department was created, "nor as to any of the other allegations" made by the County.

At the outset, we recognize that no Texas court of appeals has directly addressed whether the El Paso Juvenile Probation Department is a separate entity apart from El Paso County. Therefore, we are presented with a matter of first impression. In conducting our analysis, we will first review the relevant statutory provisions before turning to Texas Attorney General's

opinions, which although are not binding on an appellate court, are considered persuasive. *Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 82 (Tex. 1997).

Under certain circumstances, the State or a governmental unit of the State is liable for personal injuries caused "by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX.CIV.PRAC.&REM.CODE ANN. § 101.021(2). "Employee," as defined by the TTCA, means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control. TEX.CIV.PRAC.&REM.CODE ANN. § 101.001(2). Under the TTCA, a person is not an employee of a governmental unit if the person "performs tasks the details of which the governmental unit does not have the legal right to control." *See Murk v. Scheele*, 120 S.W.3d 865, 866 (Tex. 2003), *quoting* TEX.CIV.PRAC.&REM.CODE ANN. § 101.001(2). The statutory definition requires "control *and* paid employment to invoke the Tort Claim Act's waiver of immunity." *Adkins v. Furey*, 2 S.W.3d 346, 348 (Tex.App.--San Antonio 1999, no pet.).

The juvenile board of El Paso County ("the Board") is composed of the county judge, each family district judge, each juvenile court judge, up to five judges on the El Paso County of Judges elected by a majority vote of the council, a municipal judge selected by the chairman of the board, and a justice of peace selected by the chairman of the board.[2] TEX.HUM.RES.CODE

[2] Juvenile boards in Texas are statutorily created entities comprised of members designated by statute, and are entities with an existence separate and apart from their counties and commissioners courts. TEX.ATT'Y GEN.OP. No. JC-0209 (April 12, 2000).

ANN. § 152.0771(a). The Board is statutorily obligated to:

> (1) establish a juvenile probation department and employ a chief probation officer who meets the standards set by the Texas Juvenile Probation Commission; and
>
> (2) adopt a budget and establish policies, including financial policies, for juvenile services within the jurisdiction of the board.

TEX.HUM.RES.CODE ANN. § 152.0007(a)(West Supp. 2010). "Juvenile probation services" encompass "services provided by or under the direction of a juvenile probation officer in response to an order issued by a juvenile court and under the court's direction," as well as "services provided by a juvenile probation department that are related to the operation of a preadjudication or post-adjudication juvenile facility." TEX.HUM.RES.CODE ANN. § 142.001. The Texas Juvenile Probation Commission sets minimum standards for personnel, staffing, case loads, programs, facilities, record keeping, equipment, and other aspects of the Board's operations, which "are necessary to provide adequate and effective probation services." TEX.HUM.RES.CODE ANN. § 141.042.

With the commissioners court's advice and consent, the Board hires probation officers and other personnel "necessary to provide juvenile probation services according to the standards established by the Texas Juvenile Probation Commission and the local need as determined by the juvenile board." TEX.HUM.RES.CODE ANN. § 142.002. Furthermore, the Board "may, with the advice and consent of the commissioners court, designate the titles of the employees and set their salaries." TEX.HUM.RES.CODE ANN. § 142.002. The commissioners court is statutorily obligated to pay the salaries of juvenile probation personnel "and other expenses certified as necessary by the juvenile board chairman from the general funds of the county."

TEX.HUM.RES.CODE ANN. § 152.0004. Juvenile probation personnel are considered state employees for the purposes of governmental liability under Chapter 104 of the Civil Practice and Remedies Code. TEX.HUM.RES.CODE ANN. § 142.004(b).

The El Paso Juvenile Probation Department is funded with both county and state funds. *See* TEX.HUM.RES.CODE ANN. §§ 141.081, 141.084, 152.0004, 152.0005, 152.0012; *see* LOCAL GOV'T CODE ANN. § 111.094 (West 2008). Section 152.0012 of the Code provides:

> The juvenile board shall prepare a budget for the juvenile probation department and the other facilities and programs under the jurisdiction of the juvenile board. The commissioners court shall review and consider only the amount of county funds derived from county taxes, fees, and other county sources in the budget. The commissioners court may not review any part of the budget derived from state funds.

TEX.HUM.RES.CODE ANN. § 152.0012. As such, the commissioners court's authority over the Department's budget is limited. *See id.* Under Section 140.003 of the Local Government Code, the Department is a "specialized local entity" that is required to deposit funds it receives in the county treasury.[3] LOCAL GOV'T CODE ANN. § 140.003(a), (f). It is also subject to the purchasing requirements applicable to the county under subchapter C of Chapter 262 of the Local Government Code. LOCAL GOV'T CODE ANN. § 140.003(b).

Section 152.0772 of the Human Resources Code provides for El Paso County Institutions specifically. The El Paso County Juvenile Board appoints a person to supervise the county

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[3] Once the county funds budgeted for the Department are transferred to the Department, they are deposited in a special account in the county treasury, along with state funds allocated to the Department. The funds then become the Department's funds to be disbursed as directed by the Board, and lose their character as county funds. Although disbursements from the account are subject to the county auditor's review, the commissioners court does not have authority to review the Department's expenditures. TEX.ATT'Y GEN.OP. No. JC-0209, *citing* LOCAL GOV'T CODE ANN. §§ 140.003(f), (g); TEX.ATT'Y GEN.OP. Nos. JC-0085 (Aug. 9, 1999), DM-460 (Dec. 17, 1997), DM-257 (Sept. 15, 1993).

facilities under the Board's jurisdiction, and this supervisor also directs the policies and conduct of each institution.[4] TEX.HUM.RES.CODE ANN. § 152.0772(a). The Board appoints the head of each facility, and the facility head may hire employees that the Board determines are necessary. TEX.HUM.RES.CODE ANN. § 152.0772(b).

In arguing that the Department is a separate entity apart from the County, the County directs us to an Attorney General's Opinion, No. DM-460. TEX.ATT'Y GEN.OP. No. DM-460 (Dec. 17, 1997). Because no statutory provision clearly addresses whether the El Paso Juvenile Probation Department is a separate entity or a part of El Paso County, the Attorney General in that opinion reviewed the Department's characteristics, including its source of funding, accountability, and supervision to answer this question. TEX.ATT'Y GEN.OP. No. DM-460, *quoting Lohec v. Galveston County Comm'rs Court*, 841 S.W.2d 361, 363 (Tex. 1992). Based on the relevant statutory provisions, the Attorney General determined that "[t]he purpose of the department, the provision of juvenile probation services, is not merely a county concern, but a state-wide one, provided in response to and under the direction of juvenile court orders and governed by state regulations." TEX.ATT'Y GEN.OP. No. DM-460, *citing* TEX.HUM.RES.CODE ANN. §§ 141.042, 142.001, 152.0007. Moreover, the commissioners court lacks authority in the "creation and composition of the [B]oard" because the Board is a statutorily created entity consisting of statutorily-designated members. *Id*., *citing* TEX.HUM.RES.CODE ANN. § 152.0771.

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[4] Section 152.0008 of the Texas Human Resources Code provides that the chief juvenile probation officer may, "within the budget adopted by the [B]oard," employ officers who qualify under the standards set by the Texas Juvenile Probation Commission, and "other necessary personnel." TEX.HUM.RES.CODE ANN. § 152.0008(a). This Section further provides that "[j]uvenile probation officers serve at the pleasure of the appointing authority." TEX.HUM.RES.CODE ANN. § 152.0008(b).

The Board hires the Department's personnel, sets their salaries, without any supervision by the commissioners court. *Id*., *citing* TEX.HUM.RES.CODE ANN. §§ 142.002(b), 152.0007(a). Additionally, Department personnel are considered state employees for purposes of state liability and indemnification for acts of negligence and criminal prosecution. *Id*., *citing* TEX.HUM.RES. CODE ANN. § 142.004(b). Even though the Department's budget includes both county and state funds, the commissioners court has limited control even over portion of the budget funded by the county.[5] *Id*., *citing* TEX.HUM.RES.CODE ANN. §§ 142.002(b), 152.0004, 152.0012. Finally, the Attorney General determined that the Board or the Department, is specifically empowered, without an express provision for County oversight, to enter into certain contracts. *Id*., *citing* TEX.HUM.RES.CODE ANN. §§ 141.0432(d), (e), 142.003(b), 152.0011. Although the Department was subject to some County supervision in the deposit and disbursement of Department funds, the Attorney General stated that it did not believe this requirement indicated that the Department is part of the County. *Id*., *citing* LOCAL GOV'T CODE ANN. § 140.003. The Attorney General stated that this instead "indicates that the [D]epartment is distinct from the [C]ounty," reasoning that if the Department was part of the County, "there would be no need to require the deposit of [D]epartment funds in the [C]ounty treasury and disbursement by the [C]ounty." TEX.ATT'Y GEN.OP. No. DM-460. Based on the foregoing factors, the Attorney General concluded that the Department is an entity independent of the County. *Id*.

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[5] In explaining Section 152.0012's restriction on the commissioners court's review to the part of the budget derived from county funds, the Attorney General's Opinion cited to the legislative purpose of the provision, stating: "Representative Goodman . . . has stated that the purpose was to allow the commissioners court to review the budget in order to adequately prepare for the level of county funding that will be necessary; it was not to give veto power over the budget." TEX.ATT'Y GEN.OP. No. DM-460, *citing* Debate on H.B. 327 on the Floor of the House, 74th Leg., R.S. (May 25, 1995).

After reviewing the relevant laws and persuasive authorities, we conclude an employee of the El Paso Juvenile Probation Department is not an "employee" of the El Paso County under the TTCA because he is not subject to the County's control. *See Murk*, 120 S.W.3d at 866, *quoting* TEX.CIV.PRAC.&REM.CODE ANN. § 101.001(2); *Adkins*, 2 S.W.3d at 348. Because the County's immunity from suit was not waived under the TTCA, the trial court lacked subject-matter jurisdiction over Ms. Solorzano's cause of action. *See Adkins*, 2 S.W.3d at 348. We sustain Issue One to the extent of the County's first argument. Having determined that the trial court erred in denying the County's plea to the jurisdiction with respect to Ms. Solorzano's claims under the TTCA on this basis, we need not address the County's second argument that the court erred in denying the plea because Ms. Solorzano failed to provide the County with notice as required by the Act.

The County's final argument pertains to Ms. Solorzano's Section 1983 claim. The County first argues that her claim must fail because she lacked standing to bring any such claims against the County where an employee of the Department, and not the County, committed the alleged acts underlying her claim.

A cause of action under 42 U.S.C. § 1983 requires (1) the conduct complained-of to be committed by a person acting under color of state law, and (2) the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *County of El Paso v. Dorado*, 180 S.W.3d 854, 862 (Tex.App.--El Paso 2005, pet. denied.). Having determined that the El Paso Juvenile Probation Department is a separate governmental entity apart from the County, we conclude that El Paso County was not a proper party to Ms. Solorzano's Section 1983 claim. Therefore, we need not address the County's argument that

Ms. Solorzano failed to allege a cognizable Section 1983 claim. Because El Paso County is a separate entity, Ms. Solorzano has failed to state a claim in the instant case upon which relief may be granted. Accordingly, we sustain the County's sole issue that the trial court lacked jurisdiction over this case and erred in denying the County's plea to the jurisdiction.[6]

Having sustained the County's issue, we reverse the trial court's order denying the plea to jurisdiction and dismiss this suit for want of jurisdiction.

September 21, 2011

DAVID WELLINGTON CHEW, Chief Justice

Before Chew, C.J., McClure, and Rivera, JJ.

[6] Upon reflection, I do not understand why the failure to state a proper 1983 claim or to sue the proper party is a jurisdictional defect that can be properly raised in a plea to the jurisdiction. But it appears to be the consensus in Texas and this Court has so held. *Gomez v. Housing Authority of the City of El Paso*, 148 S.W.3d 471 (Tex.App.--El Paso 2004, pet.denied).

92 F.3d 258
United States Court of Appeals,
Fifth Circuit.

Natalia FLORES, Plaintiff-Appellee Cross-Appellant,
v.
CAMERON COUNTY, TEXAS, et al., Defendants,
Cameron County, Texas, Defendant-Appellant Cross-Appellee.

No. 94-60262. | Aug. 6, 1996. | Rehearing Denied Sept. 11, 1996.

Mother of juvenile brought civil rights action against county alleging use of excessive force which resulted in his death. The United States District Court for the Southern District of Texas, Filemon B. Vela, J., entered judgment on jury verdict in favor of mother, and county appealed. The Court of Appeals, King, Circuit Judge, held that: (1) juvenile probation board was agency of county, not state, so that county could be held liable for civil rights violation resulting from its policy; (2) chief juvenile probation officer was not a policy-making official; (3) instruction on deliberate indifference was adequate; (4) complaint adequately claimed damages for lost support services; and (5) mother's filing of notice of appointment as administrator of estate would be treated as motion to amend complaint which related back to the filing of the complaint, thus making claim by the estate timely.

Vacated and remanded in part and dismissed in part.

West Headnotes (14)

1 **Civil Rights** Governmental Ordinance, Policy, Practice, or Custom

Governmental body is liable for damages under federal civil rights statute for constitutional violations resulting from official policy or custom; local government is responsible when execution of government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent the official policy, inflicts injury, but local government may not be held liable for unconstitutional acts of its nonpolicy-making employees, and thus, may not be held liable on theory of respondeat superior. 42 U.S.C.A. § 1983.

16 Cases that cite this headnote

2 **Federal Courts** Constitutional and civil rights in general; waiver

Whether particular official has final policy-making authority, so that governmental unit may be held liable for violations of civil rights pursuant to that policy, is a question of state law, which may include valid local ordinances and regulations. 42 U.S.C.A. § 1983.

5 Cases that cite this headnote

3 **Civil Rights** Questions of Law or Fact

Identification of those officials whose decisions represent official policy of local governmental unit, for which it may be held responsible under federal civil rights statute, is a legal question to be resolved by the trial judge before

the case is submitted to the jury. 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

4 **Civil Rights**Governmental Ordinance, Policy, Practice, or Custom

County may be held liable for policies established by bodies or persons other than the governing body of the county, and power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. 42 U.S.C.A. § 1983.

5 **Civil Rights**Criminal law enforcement; prisons

County juvenile probation board was county agency rather than arm of the state, so that county could be held liable for civil rights violation based on policy of the board; state law tended to perceive the board as county agency, county, rather than state, was the major source of funding, board was primarily concerned with local, as opposed to statewide, problems, and board could set higher standards for operation of detention center than those set by state juvenile probation commission, which set minimum standards. 42 U.S.C.A. § 1983; V.T.C.A., Human Resources Code § 141.002.

2 Cases that cite this headnote

6 **Civil Rights**Governmental Ordinance, Policy, Practice, or Custom

Fact that municipal employee exercises discretion in making decisions is not enough to establish his policy-making authority so as to allow municipality to be held liable for violations of civil rights pursuant to that policy. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

7 **Civil Rights**Criminal law enforcement; prisons

Although chief juvenile probation officer of county may have become de facto policymaker with respect to the juvenile detention facility, he had not been delegated final policy-making authority and county could not be held liable for civil rights violations resulting from his decisions. 42 U.S.C.A. § 1983.

9 Cases that cite this headnote

8 **Civil Rights**Criminal law enforcement; prisons

Instruction that both juvenile board and chief juvenile probation officer were policymakers for county required reversal of judgment against county in civil rights action where only the board was shown to be an official policymaker. 42 U.S.C.A. § 1983.

9 **Federal Civil Procedure**Particular issues and cases

Court was not required to instruct jurors to find by preponderance of the evidence that county or some policy-making official made a conscious choice or was deliberately indifferent to establishing custom which caused deprivation of juvenile detainee's constitutional rights where it did instruct that inadequacy of detention officers' training could provide a basis for liability only where failure to train or supervise them amounted to deliberate indifference or the failure to train represented deliberate or conscious choice by the county. 42 U.S.C.A. § 1983.

7 Cases that cite this headnote

10 **Civil Rights**Particular Causes of Action

Civil rights complaint which requested recovery for "mental anguish and suffering and loss of companionship, contribution, society, affection, and comfort" adequately pled claim for damages for the victim's mother in her own right. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

11 **Civil Rights**Time to Sue
Federal Courts Computation and tolling

Federal courts adopt forum state's general personal injury limitations period in civil rights actions, and apply state tolling provisions to determine whether the limitations period has expired. 42 U.S.C.A. § 1983.

7 Cases that cite this headnote

12 **Federal Courts**Amendments and additional proofs

Filing with district court of notice of mother's appointment as administrator of juvenile detainee's estate would be treated as amendment of the complaint allowed by the district court which, if it related back to the original complaint, would show that survival action was brought by the administrator as required by state law. V.T.C.A., Civil Practice & Remedies Code § 71.021.

7 Cases that cite this headnote

13 **Limitation of Actions**Amendment of defects

Notice of plaintiff's appointment as administrator of estate of deceased juvenile detainee, which was treated as amendment to complaint, related back to the filing of the complaint, so that there was, as required by state law, a survival action brought by the administrator of the estate within the limitations period. 42 U.S.C.A. § 1983; V.T.C.A., Civil Practice & Remedies Code § 71.021; Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

17 Cases that cite this headnote

14 **Evidence**Effect of introducing part of document or record

Detention center logbook showing that juvenile detainee suffered bleeding rectum during previous incarceration in

the detention center and suggested that injury possibly resulted from sexual abuse was admissible, under the rule of optional completeness, in civil rights action based on alleged use of excessive force against the detainee, where county, with warning of the court's ruling, offered into evidence all other logbooks covering the juvenile's stays at the detention center. Fed.Rules Evid.Rule 106, 28 U.S.C.A.

1 Cases that cite this headnote

Attorneys and Law Firms

***260** Charles Willette, Jr., Mark Sossi, Willette & Trevino, Brownsville, TX, for Appellant.

Lawrence A. Walsh, Brownsville, TX, J. Patrick Wiseman, Wiseman, Durst & Tuddenham, Austin, TX, for Flores.

Lisa Powell, Atlas & Hall, McAllen, TX, for Garza, Hester, et al.

Appeals from the United States District Court for the Southern District of Texas.

Before KING, DeMOSS and STEWART, Circuit Judges.

Opinion

KING, Circuit Judge:

Natalia Flores, individually and as the administratrix of the estate of Juan Manuel Castillo-Flores, sued Cameron County and other defendants under 42 U.S.C. § 1983, seeking damages for the alleged violation of Juan Manuel Castillo-Flores's constitutional rights resulting in his death while he was detained in the Cameron County Juvenile Detention Center. After a jury trial, the district court entered judgment for Natalia Flores based on the verdict. Cameron County appeals the district court's judgment and Natalia Flores cross-appeals. We vacate the judgment against Cameron County and remand for a new trial.

I. BACKGROUND

A. FACTS

On June 2, 1988, fourteen-year-old Juan Manuel Castillo-Flores ("Juan") was detained at the Cameron County Juvenile Detention Center (the "detention center"), having been arrested for the burglary of a building. The detention center routinely had two detention center guards on duty to supervise up to twenty-one juveniles during the day, and only one guard during the night shift. Although the maximum capacity of the detention center was twenty-one juveniles, on some occasions, including the day of Juan's death, the detention center housed more than twenty-one juveniles.[1] The male portion of the detention center consisted of a central recreation room, adjacent to which individual rooms were located.

Early in the day while confined to his cell, Juan began banging his head against the door, apparently to attract the guards' attention. The guards on duty, Porfirio Ramirez ("Ramirez") and Servando Betancourt ("Betancourt"), attempted to dissuade Juan from banging on the door. When they were unsuccessful, they obtained permission from the detention center superintendent, Thelma Sullivan, to shackle him to his bed with foot cuffs. The first shackling was uneventful, and eventually the foot cuffs were removed. That evening, Juan began banging his head against the door again, and Ramirez and Betancourt decided to restrain him again.

Ramirez knelt at the foot of Juan's bed with the foot cuffs, his back to Juan, intending to secure his feet to the bedpost. Betancourt stood in the doorway to Juan's room. Betancourt was responsible for controlling Juan while Ramirez applied the foot cuffs. Betancourt had to remain in the doorway, however, because otherwise the cell door would automatically close and

lock. As Betancourt and Ramirez were the only guards at the detention center, if the cell door locked them inside Juan's cell, the other juveniles could escape from the detention center because there would be no one to enter the control room and reopen the cell door.[2] Additionally, Betancourt was responsible for observing and controlling the juveniles in the main recreation room. Therefore, he continually had to look back and forth between the recreation room and Juan's room.

While standing in the doorway, Betancourt saw Juan suddenly move forward. Fearing that Juan was reaching to strike Ramirez, ***261** Betancourt lunged forward to grab Juan. In doing so, Betancourt applied his entire weight onto Juan's back, pushing his head forward and breaking his neck. The guards testified that they did not realize at the time that Juan had been injured. Ramirez then applied the foot cuffs, and the guards stood to leave. Ramirez testified that as they left Juan uttered an obscenity. Juan was found dead in his cell the next morning. Medical testimony indicated that Juan could have remained conscious for fifteen minutes to two hours before he died.

B. PROCEDURE

On October 21, 1988, Natalia Flores ("Flores"), Juan's mother, filed suit against the following defendants: (1) Betancourt, (2) Ramirez, (3) Amador Rodriguez, Jr. ("Rodriguez"), the Chief Juvenile Probation Officer, (4) Cameron County, (5) the County Judge and Commissioners of Cameron County, (6) the Cameron County Juvenile Probation Board (the "Juvenile Board") and (7) the individual members of the Juvenile Board. All individual defendants were sued in both their individual and their official capacities. Flores's original complaint alleged that Juan's death was caused by the defendants' use of excessive force, deliberately indifferent failure to supervise and train the detention center guards, and deliberately indifferent failure to provide medical care in violation of 42 U.S.C. § 1983. The complaint also alleged related pendent state law claims. To remedy the violations of § 1983, the complaint sought damages for Juan's pain and suffering, analogous to Texas law survival damages, as well as for Flores's own pain and suffering and loss of support and services, analogous to Texas law wrongful death damages.

On January 23, 1989, the district court dismissed Flores's claims against the following defendants: (1) the Juvenile Board on the basis of Eleventh Amendment immunity; (2) the members of the Juvenile Board in their official capacity because of the dismissal of the Juvenile Board and in their individual capacity on the basis of legislative immunity; (3) Rodriguez because Flores's complaint did not meet the heightened pleading required in cases against individuals protected by qualified immunity; and (4) the County Judge and Commissioners of Cameron County in their official capacities because those claims were duplicative of the claims against the County and in their individual capacities based on legislative immunity. Although the court granted Flores's motion to reconsider the dismissal of the Juvenile Board, it again dismissed the Juvenile Board on Eleventh Amendment immunity grounds in an order dated May 1, 1989.

Flores filed an amended complaint on October 29, 1989, raising the same claims as the original complaint against Cameron County, Rodriguez, Thelma Gonzalez Sullivan ("Sullivan"), the superintendent of the detention center, Betancourt, and Ramirez. On August 25, 1992, the district court granted summary judgment to Rodriguez and Sullivan in their individual capacities on qualified immunity grounds, and dismissed the claims against them in their official capacities as redundant with the claims against Cameron County.

Thus, by the time of trial, the district court had dismissed all defendants except for Betancourt, Ramirez, and Cameron County.[3] After a seven-day trial, the jury returned its verdict on February 23, 1994. The jury found that (1) Betancourt's use of excessive force proximately caused Juan's death, and (2) Cameron County's policy of failing to adequately train its juvenile detention officers proximately caused Juan's death. The jury found no liability for Ramirez. The jury awarded damages of $250,000 for Juan's pain and suffering, $50,000 for lost support and services, and $350,000 for Flores's mental pain and suffering. On April 5, 1994, the district court ordered the payment of attorneys' fees to Flores's counsel and entered final judgment on the jury's verdict. Both Cameron County and Flores filed notices of appeal.

II. DISCUSSION

On appeal, Cameron County raises the following ten points of error: (1) the district ***262** court erred in instructing the jury that Rodriguez and the Juvenile Board are the policymakers for Cameron County; (2) the district court erred in instructing the jury on the standard for use of excessive force on a pretrial detainee; (3) the district court erred in refusing to submit Cameron County's proposed interrogatory concerning county liability; (4) the district court erred in submitting an interrogatory to the

jury requesting damages for Flores's personal injuries; (5) the Texas statute of limitations bars Flores's claims on behalf of Juan's estate; (6) the district court erred by testifying from the bench and making prejudicial remarks to the jury; (7) the district court erred in admitting evidence of a prior sexual assault on Juan; (8) insufficient evidence exists to show that Cameron County acted with deliberate indifference; (9) insufficient evidence exists to show that any failure to train by Cameron County caused Juan's death; and (10) the district court erred in denying the County's motion for remittitur because the jury verdict was excessive.

Flores raises two points of error on cross-appeal[4]: (1) the district court erred in calculating the award of attorneys' fees at the rate of $125 per hour; and (2) if we conclude that the district court erred in instructing the jury that the Juvenile Board was the policymaker for the County, then it also erred in dismissing the Juvenile Board on the grounds of Eleventh Amendment immunity.
We begin by addressing Cameron County's argument that the district court erred in instructing the jury that the Juvenile Board and Rodriguez are policymakers for Cameron County. Because we conclude that the policymaker instruction is reversible error, we will only address further the issues which are likely to come up again upon retrial.[5]

A. JURY INSTRUCTIONS

Cameron County raises four challenges to the district court's jury instructions. Specifically, the County contends that the district court erred by: (1) instructing the jury that Rodriguez and the Juvenile Board are the policymakers for Cameron County; (2) instructing the jury on an incorrect standard for the excessive force claim; (3) refusing to submit to the jury the County's proposed interrogatory Number 4; and (4) submitting an interrogatory concerning damages for Flores's pain and suffering and lost support and services.

In *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir.1994), we set forth the standard of review for challenges to the district court's jury instructions:

> First, the challenges must demonstrate that the charge as a whole creates "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. If a party wishes to complain on appeal of the district court's refusal to give a proffered instruction, that party must show as a threshold matter that the proposed instruction correctly stated the law.

Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1216 (5th Cir.1995) (quoting *Mijalis*, 15 F.3d at 1318).

1. The Policymaker Instruction

Cameron County argues that the district court erred in instructing the jury that the Cameron County Juvenile Probation Board "and/or" Amador Rodriguez were policymakers for whose policies the County could be ***263** held liable. The district court instructed the jury as follows:

> Amador Rodriguez, the Executive Director of the Cameron County Juvenile Probation and/or the Cameron County Juvenile Probation Board is the official whose acts constitute final official policy of Cameron County for the actions in question here. Therefore, if you find that the acts of Amador Rodriguez and/or the Cameron County Juvenile Probation Board deprived the plaintiff of constitutional rights, Cameron County is liable for such deprivations.

Cameron County argues that this instruction was erroneous because neither the Juvenile Board nor Rodriguez are policymakers for Cameron County. Because the district court instructed the jury that the Juvenile Board and/or Rodriguez are policymakers, this instruction is only correct if both the Juvenile Board and Rodriguez are policymakers, because we cannot know on which policymakers' acts the jury based its finding of County liability.

The County challenges this instruction on two grounds. First, the County contends that the Juvenile Board, which the County concedes sets official policy for the detention center, does so on behalf of the State of Texas, rather than Cameron County, because the Juvenile Board is an agency of the State. Second, the County argues that, even if the Juvenile Board establishes detention center policy on behalf of the County, Rodriguez cannot be considered a county policymaker because the Juvenile Board did not delegate policymaking authority to him. Flores counters that the Juvenile Board is an agency of Cameron County rather than a state entity, and that the Juvenile Board delegated policymaking authority with respect to training of

detention center personnel to Rodriguez. In addressing the County's arguments, we shall first review the law governing municipal liability for constitutional violations under § 1983. Then we shall determine whether the Juvenile Board and Rodriguez were policymakers for Cameron County.

a. Municipal Liability under § 1983

1 It is well settled that a local governmental body such as Cameron County is liable for damages under § 1983 for constitutional violations resulting from official county policy or custom. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978). A local government is responsible under § 1983 "when execution of [the] government's policy or custom, whether made by its lawmakers or by *those whose edicts or acts may fairly be said to represent official policy*, inflicts the injury...." *Id.* at 694, 98 S.Ct. at 2037 (emphasis added). However, a local government may not be held liable under § 1983 for the unconstitutional acts of its non-policymaking employees-i.e., county liability may not rest on a theory of respondeat superior. *Id.* at 691, 98 S.Ct. at 2036.

2 Our task here is to determine which persons' edicts or acts represent the official policy of Cameron County with respect to the training of employees at the Cameron County Juvenile Detention Center. The Supreme Court has provided some guidance in determining "where policymaking authority lies for purposes of § 1983." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (1989); *see City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). First, "whether a particular official has 'final policymaking authority' is a question of state law." *Jett*, 491 U.S. at 737, 109 S.Ct. at 2723; *Praprotnik*, 485 U.S. at 123, 108 S.Ct. at 924; *Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1299. "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority." *Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1299. "[S]tate law (which may include valid local ordinances and regulations) will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Praprotnik*, 485 U.S. at 125, 108 S.Ct. at 925.

3 Second, "the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial ***264** judge *before* the case is submitted to the jury." *Jett*, 491 U.S. at 737, 109 S.Ct. at 2724.

> Reviewing the relevant legal materials, including state and local positive law, as well as custom or usage having the force of law, the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.

Id. (internal quotations and citations omitted).

4 Cameron County contends that only policies established by the Cameron County Commissioners' Court, the governing body of Cameron County, are official county policies for which the County may be held liable under § 1983. However, "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell* 's language makes clear that it expressly envisioned other officials 'whose acts or edicts may fairly be said to represent official policy,' and whose decisions therefore may give rise to municipal liability under § 1983." *Pembaur*, 475 U.S. at 480, 106 S.Ct. at 1298 (citations omitted). "[M]unicipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances." *Id.* at 483, 106 S.Ct. at 1300.

The district court concluded that the Cameron County Juvenile Probation Board "and/or" the Chief Juvenile Probation Officer, Amador Rodriguez, establishes the official policy of the County with respect to training of detention center employees. For this instruction to be correct, we must find that both the Juvenile Board and Rodriguez are policymakers for Cameron County. First we shall examine whether the Juvenile Board is a policymaker for Cameron County.

b. The Juvenile Board: County or State Entity?

5 The County concedes that the Juvenile Board establishes the official policy for the detention center. Additionally, state law supports the conclusion that the Juvenile Board possesses authority to establish official policy for the detention center. *See*

Tex.Hum.Res.Code Ann. § 152.0372[6] ; *see also* Tex.Rev.Civ.Stat.Ann. art. 5142c (providing that the juvenile board "shall have direction and control over all Juvenile Officers and may make rules and regulations relating thereto" and providing that juvenile boards in counties the size of Cameron County shall control and supervise "all homes, schools, farms, and any and all other institutions or places of housing maintained and used chiefly by the county for the training, education, and support or correction of juveniles").

However, Cameron County argues that the official policy established by the Juvenile Board for the detention center is not Cameron County's policy, but the policy of the State of Texas, because the Juvenile Board is an agency of the State, and not a county entity. Therefore, we must determine whether the Juvenile Board is an agency of the State of Texas or of Cameron County. If we conclude that the Juvenile Board is an agency of Cameron County, then we shall also conclude that the Juvenile Board established official policy for the detention center on behalf of Cameron County, and thus that the district court did not err in instructing the jury that the Juvenile Board was a policymaker for Cameron County.

Whether a particular governmental body is a state or local entity is a question usually addressed in the context of determining Eleventh Amendment immunity. *See, e.g., Minton v. St. Bernard Parish Sch. Bd.,* 803 F.2d 129, 131 (5th Cir.1986); ***265** *Clark v. Tarrant County,* 798 F.2d 736, 744 (5th Cir.1986). To draw this distinction, "we must examine the particular entity in question and its powers and characteristics as created by state law...." *Minton,* 803 F.2d at 131 (internal quotations and citations omitted). We consider the following relevant factors:

> (1) whether state law views the entity as an arm of the state; (2) the source of the entity's funding; (3) the degree of local autonomy retained; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity retains the right to hold and use property.

Stem v. Ahearn, 908 F.2d 1, 4 (5th Cir.1990), *cert. denied,* 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991); *see Clark,* 798 F.2d at 744-45.

Analyzing the Juvenile Board in light of these factors, we conclude that it is a county agency rather than an arm of the State of Texas. First, Texas law appears to view county juvenile boards as local rather than state entities. Chapter 141 of the Human Resources Code establishes the Texas Juvenile Probation Commission (the "Commission"), a state agency entirely separate from the Juvenile Board, and sets forth its purposes and responsibilities. By juxtaposing the Commission with county juvenile boards, chapter 141 suggests that juvenile boards are county agencies created as a means by which counties can provide juvenile probation services to their populations. A juvenile board is defined as "a body established by law to provide juvenile probation services to a county." Tex.Hum.Res.Code Ann. § 141.002 (formerly § 75.002). Section 141.041 (formerly § 75.062) provides that the Commission shall "assist counties in providing probation and juvenile detention services by encouraging the continued operation of county and multi-county juvenile boards...." Tex.Hum.Res.Code Ann. § 141.041. Similarly, section 141.043 mandates that the Commission shall provide training and assistance to local authorities, including counties, juvenile boards, and probation offices, to improve juvenile probation and detention services. Tex.Hum.Res.Code Ann. § 141.043 (formerly § 75.043).

Chapter 142 of the Human Resources Code provides general rules governing county juvenile boards that also suggest that the Texas legislature intended juvenile boards to be county rather than state entities. Section 142.002 and a precodification statute, Texas Revised Civil Statutes article 5142c, establish that a juvenile board may set salaries of probation officers with approval of the county Commissioners' Court. Tex.Hum.Res.Code Ann. § 142.002; Tex.Rev.Civ.Stat.Ann. art. 5142c § 2. These statutes also require approval of the Commissioners' Court for appointment or employment of probation officers and other personnel. *Id.* Although section 142.004 of the Human Resources Code states that juvenile probation personnel employed by a political subdivision of the State are state employees for purposes of chapter 104 of the Texas Civil Practices and Remedies Code (concerning tort liability limitations), Tex.Hum.Res.Code Ann. § 142.004, section 141.067 provides that "a juvenile probation officer whose jurisdiction covers only one county is considered to be an employee of that county." Tex.Hum.Res.Code Ann. § 141.067 (formerly § 75.065).

Additionally, the opinions of the Texas Attorney General and other Texas statutes referencing county juvenile boards suggest that they are local rather than state entities. The Texas Attorney General has determined that juvenile probation personnel are county employees for purposes of the wage and hours requirements of the Fair Labor Standards Act. Op.Tex. Att'y Gen. No. JM-410 (1985). The Texas Attorney General has also recognized a duty of the county attorney to represent and provide legal advice to the county juvenile board. Op.Tex. Att'y Gen. No. H-1133 (1978).[7] Additionally, the Texas Local Government Code identifies a county juvenile board as a "specialized local entity." Tex. Local Gov't Code Ann. § 140.003(a).

***266** The statutes dealing more specifically with the Cameron County Juvenile Board also indicate that it is a county agency rather than an arm of the state. The Cameron County Juvenile Board is established by Texas Human Resources Code section 152.0371 and its predecessor statutes, articles 5139 and 5139B of the Texas Revised Civil Statutes. Tex.Hum.Res.Code Ann. § 152.0371; Tex.Rev.Civ.Stat.Ann. art. 5139 and 5139B. In 1988, the members of the Juvenile Board included the five state district judges who sit in Cameron County, and the county judge, the chief executive officer of Cameron County. Tex.Rev.Civ.Stat.Ann. art. 5139. Since that time, the two county-court-at-law judges in Cameron County have been added to the membership of the Juvenile Board. Tex.Hum.Res.Code.Ann. § 152.0371. The members of the Juvenile Board are paid an annual compensation by the Cameron County Commissioners' Court for their service on the Juvenile Board. *Id.;* Tex.Rev.Civ.Stat.Ann. art. 5139.

Section 152.0372 of the Texas Human Resources Code, and its predecessor statute, Texas Revised Civil Statutes article 5142c, describe the functions of the Cameron County Juvenile Board. Tex.Hum.Res.Code Ann. § 152.0372; Tex.Rev.Civ.Stat.Ann. art. 5142c §§ 7, 10 and 14. The Juvenile Board "controls and supervises each county facility used for the detention of juveniles." *Id.* The Juvenile Board may adopt rules and regulations relating to the welfare of juveniles in the county facility. *Id.* The Juvenile Board and its juvenile probation officers are entitled to legal representation by an attorney from the Cameron County district attorney's office. *Id.* Therefore, we conclude that the first relevant factor, whether state law perceives the Juvenile Board as a county or state entity, weighs in favor of the conclusion that the Juvenile Board is a county agency.

The second relevant factor in determining whether a particular governmental body is a state or a county entity is the source of the entity's funding. Rodriguez testified at trial that the Juvenile Board receives funds from three sources: allocations by the Cameron County Commissioners' Court, state aid from the Commission, and state grants from the Texas Department of Criminal Justice. Several witnesses testified that two thirds or seventy percent of the Juvenile Board's funding is provided by the County. The state funding for the Juvenile Board is paid to the county auditor of Cameron County, who then disburses the funds to the Juvenile Board as part of its budget. The Cameron County Commissioners' Court and the county budget officer prepare the annual operating budget of Cameron County, including the Juvenile Board's budget within the general budget category of law enforcement, although the Juvenile Board prepares a budget proposal which is considered by the county officials in determining the budget. Although the source of funding is not dispositive, the fact that the bulk of the Juvenile Board's funding is provided by Cameron County rather than the State is persuasive evidence that the Juvenile Board is a county agency.

The third relevant factor is the degree of local autonomy retained by the entity. The Texas Juvenile Probation Commission sets minimum standards for the operation of juvenile detention facilities with which the Juvenile Board must comply. Tex.Hum.Res.Code Ann. § 141.042 (formerly § 75.041). The Juvenile Board is also required by law to provide financial and statistical records to the Commission when requested, and the law allows the Commission to inspect and evaluate the Juvenile Board and audit its financial records. Tex.Hum.Res.Code Ann. §§ 141.044 (formerly § 75.044) and 141.046 (formerly § 75.047(a)). However, the only penalty for the Juvenile Board's non-compliance with these standards and regulations is the withdrawal by the Commission of state financial aid. *See* Tex.Hum.Res.Code Ann. § 141.085 (formerly § 75.068). Because state aid from the Commission and state grants from the Texas Department of Corrections together make up only 30% of the Juvenile Board's budget, it is possible that the Juvenile Board could continue to provide probation services and operate the detention center although it failed to comply with or disregarded the Commission's standards. Additionally, the standards set by the Commission are minimum standards; the Juvenile Board may set higher standards for the operation of the Cameron County Juvenile ***267** Detention Center. Therefore, we conclude that the degree of local autonomy retained by the Juvenile Board weighs in favor of viewing the Juvenile Board as a county entity.

The fourth factor to be considered is whether the entity is concerned primarily with local, as opposed to statewide, problems. The County relies heavily on Texas Human Resources Code section 141.001 in support of its argument that the Juvenile Board is a state entity, contending that this statute establishes that the Juvenile Board is concerned primarily with statewide problems. Section 141.001 provides:

> The purposes of *this chapter* are to: (1) make probation services available to juveniles throughout the state; (2) improve the effectiveness of juvenile probation services; (3) provide alternatives to the commitment of juveniles by providing financial aid *to juvenile boards* to establish and improve probation services; (4) establish uniform probation administration standards; and (5) improve communications among state and local entities within the juvenile justice system.

Tex.Hum.Res.Code Ann. § 141.001 (emphasis added). "This chapter" refers to Chapter 141 of the Texas Human Resources

Code, entitled Texas Juvenile Probation Commission, which concerns the establishment and formation of the Commission and its powers and duties. While section 141.001 most certainly supports the conclusion that the Commission is primarily concerned with a statewide problem of improving juvenile services, the Commission is not the entity whose character we are trying to discern.

The Cameron County Juvenile Board is established by section 152.0371 of the Texas Human Resources Code, in chapter 152, entitled Juvenile Boards, and its predecessor statutes, to provide juvenile probation services to Cameron County. Tex.Hum.Res.Code Ann. § 152.0371; Tex.Rev.Civ.Stat.Ann. arts. 5139, 5139B. Section 142.001 and its predecessor statute define juvenile probation services to include "services provided by a juvenile probation department that [are] related to the operation of a juvenile detention facility." Tex.Hum.Res.Code Ann. § 142.001(2); Tex.Rev.Civ.Stat.Ann. art. 5138d. The Juvenile Board maintains a detention center in Cameron County, provides supervision to juvenile detainees in that center and probation services to juvenile offenders in Cameron County. We conclude that the Juvenile Board is concerned primarily with local problems, namely, the provision of juvenile probation services to the inhabitants of Cameron County.

Neither the statutory scheme nor the evidence presented in this case clarifies whether the Juvenile Board has the authority to sue or be sued in its own name or whether it retains the right to hold and use property, the fifth and sixth factors of the test. We have concluded that the first, second, third, and fourth factors suggest that the Juvenile Board is a county entity. Several miscellaneous facts also weigh in favor of finding the Juvenile Board to be a county agency. Cameron County built, owns and maintains the physical plant of the detention center run by the Juvenile Board. Also, Cameron County contracts with other counties to house their juvenile offenders in the detention center. The Cameron County Commissioners' Court approves these contracts. The other counties pay Cameron County for this service and the fees are deposited into the County's general fund. The Cameron County Juvenile Detention Center personnel standards identify the detention center personnel as county employees.

The district court conducted this county/state entity analysis in addressing the Juvenile Board's pre-trial motion for dismissal on grounds of Eleventh Amendment immunity. Relying heavily on *Clark v. Tarrant County,* 798 F.2d 736 (5th Cir.1986), the court concluded that, because the Juvenile Board was analogous to the Adult Probation Department granted Eleventh Amendment immunity in *Clark,* the Juvenile Board was also a state entity entitled to Eleventh Amendment immunity. Accordingly, the district court dismissed Flores's claims against the Juvenile Board.

In *Clark,* we considered the question whether the Tarrant County Adult Probation Department was "an arm of the state such that under the Eleventh Amendment there is ***268** a lack of subject matter jurisdiction over the section 1983 claims against it." 798 F.2d at 739. After examining the statutory structure governing the Adult Probation Department, Tex.Code Crim.Proc.Ann. art. 42.12, and considering the six relevant factors, we concluded that the Adult Probation Department was an arm of the state entitled to Eleventh Amendment Immunity. *Id.* at 744-45. We consider *Clark* to be distinguishable for several reasons.

First, we note that analogies between like entities cannot replace consideration of the six relevant factors. *See McDonald v. Board of Mississippi Levee Commissioners,* 832 F.2d 901, 908 (5th Cir.1987) (rejecting the Levee Board's argument that because it performed functions similar to those of the Mississippi State Highway Department, which has Eleventh Amendment immunity, it should also be immune, by stating that "such sweeping comparisons cannot substitute for a careful examination of the entity at issue").

Second, although on first impression an adult probation department and a juvenile probation department appear identical, under Texas law, the two entities serve different functions and are governed by different statutory schemes. *See* Tex.Code Crim.Proc.Ann. art. 42.12; Tex.Hum.Res.Code Ann. chs. 142, 152. The Juvenile Board, like all county juvenile boards, provides juvenile probation services to a county. Tex.Hum.Res.Code Ann. § 152.0372. Juvenile probation services are statutorily defined to include not only traditional probation services for adjudicated offenders, but also the operation of juvenile detention centers. Tex.Hum.Res.Code Ann. § 142.001. Adult probation departments provide only traditional probation services-i.e., adult probation officers, under the supervision of the district courts, assist adult offenders in complying with conditions and sanctions set by a court as punishment. *See* Tex.Code Crim.Proc.Ann. art. 42.12 § 2. Therefore, county juvenile boards perform the functions of both adult probation departments and the county jails with respect to juveniles.
Third, the factors supporting the finding in *Clark* that the Adult Probation Department is a state entity simply do not exist in relation to the Juvenile Board. In *Clark,* we relied on the Texas Attorney General's opinions that the legislature intended article 42.12 to give control of adult probation departments to state judicial districts and that adult probation officers are state employees. *Id.* at 744. As noted above, the Texas Attorney General considers juvenile probation officers to be county

employees. In analyzing the Adult Probation Department's sources of funding, we noted that it receives funds from the State and probationer's fees; notably, the Tarrant County Adult Probation Department considered in *Clark* received no funding from Tarrant County. *Id.* Whereas in *Clark* we recognized that the establishment of adult probation departments is tied to judicial districts, *id.*, the establishment of juvenile boards and specifically of the Cameron County Juvenile Board is tied to the County. *See* Tex.Hum.Res.Code Ann. § 152.0371; *see generally* Tex.Hum.Res.Code Ann. ch. 152. We noted in *Clark* that the statute governing adult probation departments does not require the County Commissioners' Court to approve the department's budget, *Clark*, 798 F.2d at 744-45; however, the evidence in this case demonstrated that the Cameron County Commissioners' Court and county budget officer prepare the Juvenile Board's annual budget. Additionally, we note that the express statutory language of article 42.12, governing adult probation departments, provides that its purpose is to "place wholly within the state courts" the responsibility for formulating and supervising adult probation. Tex.Code Crim.Proc.Ann. art. 42.12 § 1. No comparable statutory expression of purpose exists in relation to county juvenile boards. For these reasons, we consider our analysis and decision in *Clark* to be distinguishable from the facts presented in this case. Accordingly, we conclude that the district court incorrectly relied on our decision in *Clark* in determining that the Juvenile Board is a state agency entitled to Eleventh Amendment immunity and incorrectly dismissed Flores's claims against the Juvenile Board.[8]

***269** Considering the characteristics of the Juvenile Board under state law and all of the relevant factors, we conclude that the Juvenile Board is a county agency rather than an arm of the state. As such, the Juvenile Board formulates policy for the detention center on behalf of Cameron County. Therefore, the district court did not err in instructing the jury that the Juvenile Board was a policymaker for Cameron County.

c. Is Rodriguez a Policymaker for the County?

The district court instructed the jury that the Cameron County Juvenile Board "and/or" Amador Rodriguez, the Chief Probation Officer and supervisor of the detention center, are policymakers for Cameron County. For this instruction to be correct, both the Juvenile Board and Rodriguez must have policymaking authority for the County with respect to the establishment of personnel training policies at the detention center. Cameron County argues that even if the Juvenile Board exercises policymaking authority on behalf of the County, Rodriguez is not a policymaker. Flores responds that Rodriguez established the detention center's policy with respect to training of personnel, and that the Juvenile Board had delegated policymaking authority with respect to training of personnel to Rodriguez.

The Supreme Court has stated that official policymaking authority "may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority." *Pembaur*, 475 U.S. at 483, 106 S.Ct. at 1300. As we determined above, state law provides that the Juvenile Board possesses the authority to establish Cameron County's official policies with respect to the detention center. Our task here is to determine whether the Juvenile Board has delegated that authority to Rodriguez, at least with respect to the training of detention center personnel.

6 "Special difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official." *Praprotnik*, 485 U.S. at 126, 108 S.Ct. at 926. "The authority to make municipal policy is necessarily the authority to make final policy." *Id.* at 127, 108 S.Ct. at 926. The fact that a municipal employee exercises discretion in making decisions is not enough to establish policymaking authority. *Id.* at 126, 108 S.Ct. at 925. Furthermore, the fact that the official policymaker simply goes along with a subordinate's discretionary decisions is not a delegation of policymaking authority. *Id.* at 130, 108 S.Ct. at 928. The Supreme Court has precluded the possibility of finding a county employee to possess "de facto policymaking authority." *See id.* at 131, 108 S.Ct. at 928 (stating that "except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior*, ad hoc searches for officials possessing such '*de facto* ' authority would serve primarily to foster needless unpredictability in the application of § 1983").

However, a different situation arises where "a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker." *Id.* at 130, 108 S.Ct. at 928. Also, a series of decisions by a subordinate official could constitute a "custom or usage" of which the supervisor must have been aware. *Id.* In either situation, "the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower ranking official." *Id.*

7 Although the record contains some evidence that Rodriguez actually established the detention center's policies with respect to training of its employees, there is insufficient evidence to support the conclusion that the Juvenile Board delegated official policymaking authority to Rodriguez. Rodriguez testified that the Juvenile Board had given him full authority to establish

training programs. However, Rodriguez also testified that he maintained almost daily contact with Judge Garza, the chairperson of the Juvenile Board. Judge Garza testified that the Juvenile Board sets the general policy for the Cameron County juvenile department. He stated that the full Juvenile Board met rarely, if at all, and that the other members of the Juvenile Board relied on him to establish policy regarding the operation of the detention center. Judge Garza testified that he in turn ***270** relied on Rodriguez to formulate the Cameron County Juvenile Probation Department's policies and procedures, but that he and Rodriguez would discuss these policies before they were published to the staff of the detention center. Judge Garza testified that he delegated virtually everything related to the detention center to Rodriguez. Judge Garza's general lack of knowledge about the detention center's training policies further indicates that, in fact, Rodriguez set the official policy regarding training of personnel. However, at most, this evidence supports the impermissible conclusion that Rodriguez was a "de facto" policymaker for the County. *See Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1247 (5th Cir.1993) (recognizing the Supreme Court's rejection of "de facto final policymaking authority"). The evidence does not support the conclusion that the Juvenile Board delegated final policymaking authority to Rodriguez. Accordingly, we conclude that the district court erred in instructing the jury that Rodriguez established final official policy for which Cameron County could be held liable.

8 Because the district court's instruction allowed the jury to base Cameron County's liability on policy established either by the Juvenile Board or Rodriguez or both, we cannot conclude that the challenged instruction could not have affected the outcome of the case. *See Mijalis,* 15 F.3d at 1318. Therefore, we must reverse and remand for a new trial to determine whether Cameron County had a deliberately indifferent policy of failing to train its detention center guards which caused Juan's death. On remand, the district court should instruct the jury that the Juvenile Board is the official policymaker for Cameron County with respect to the establishment of personnel training policies at the detention center.

Next we shall address Cameron County's remaining challenges to the jury instructions.

2. The Excessive Force Standard

Cameron County argues that the district court instructed the jury incorrectly regarding the standard for determining whether Betancourt and Ramirez violated Juan's constitutional rights by using excessive force.9 The jury found that both Betancourt and Ramirez used excessive force against Juan, and that Betancourt's use of excessive force proximately caused Juan's death. Based on this finding, the district court entered judgment against Betancourt and in favor of Ramirez. Neither Betancourt nor Ramirez appeals. Therefore, the judgment against Betancourt, based on the finding of the use of excessive force, is unchallenged and remains in effect.

3. The Deliberate Indifference Instruction

9 Cameron County next argues that the district court erred in failing to submit its proposed interrogatory on county liability for failure to train, contending that the interrogatory used by the court did not require the jury to find deliberate indifference. We note first that Cameron County did not object to the district court's instructions or interrogatories on county liability, so we need not review this challenge. Nevertheless, we conclude that the district court did not abuse its discretion in failing to use Cameron County's proposed interrogatory No. 4.

Cameron County's proposed interrogatory No. 4 asked:

> Did Plaintiff prove by a preponderance of the evidence that Cameron County Commissioners Court or some policy making official to whom the Commissioners Court had delegated authority made a conscious choice, or was deliberately indifferent in establishing a custom or policy on behalf of Cameron County, Texas, which caused a deprivation of Juan Manuel Castillo-Flores' federally guaranteed constitutional rights?

***271** The district court's charge asked whether Cameron County, through its policy making officials, "had a settled custom and/or policy of failing to adequately train its juvenile detention center officers," which "proximately caused [Juan's] death." The district court additionally instructed the jury as follows:

> The inadequacy of detention officers' training and supervision may serve as the basis for liability only where the failure to train or supervise in a relevant respect amounts to deliberate indifference to the constitutional rights of persons with whom the officers come in contact. Only where a failure to train reflects a deliberate or conscious choice by the county can the failure be properly thought of as an

actionable county policy.

Because the district court's instructions as a whole adequately advised the jury of the necessity to find a deliberately indifferent policy of failing to train before holding Cameron County liable, we conclude that the district court did not abuse its discretion in failing to use Cameron County's proposed interrogatory No. 4. *See City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989) (holding that municipal liability for a failure to adequately train may only be found where the failure to train is deliberately indifferent-i.e., "where the failure to train reflects a deliberate and conscious choice").

4. Damages for Flores's Personal Injuries

10 Cameron County also contends that the district court erred in submitting an interrogatory requesting damages for Flores's mental pain and suffering and lost support and services, because Flores only sued for violation of her son's constitutional rights and failed to allege damages in her own right. However, Flores's amended complaint clearly requests recovery for the "mental anguish and suffering and loss of companionship, contribution, society, affection and comfort which [Juan] would have furnished his parent had he lived." We have consistently held that a parent may recover damages analogous to state law wrongful death damages in a § 1983 action based on the violation of her child's civil rights. *See, e.g., Rhyne v. Henderson County*, 973 F.2d 386, 391 (5th Cir.1992). Therefore, the County's argument is without merit.

B. THE STATUTE OF LIMITATIONS

Because Cameron County's arguments concerning the application of the statute of limitations would affect further proceedings on remand in this case, we shall address them here. Cameron County contends that all claims made on behalf of Juan's estate are barred by the statute of limitations. The County argues that Flores did not allege a survival claim on behalf of Juan's estate in her original or amended complaint. Furthermore, the County argues that Flores did not have capacity to bring suit on behalf of the estate under Texas law because she was neither Juan's sole heir nor the administrator of his estate either at the time she filed her complaint or at any time before the expiration of the limitations period.

Flores responds that her original and amended complaint alleged survival claims on behalf of Juan's estate. She claims that her appointment as administrator of the estate was an amendment to the complaint which relates back to the date of filing of the original complaint under Federal Rule of Civil Procedure 15(c).
11 Because Congress has not provided a statute of limitations for civil rights actions brought under § 1983, federal courts adopt the forum state's general personal injury limitations period. *Owens v. Okure*, 488 U.S. 235, 249-50, 109 S.Ct. 573, 581-82, 102 L.Ed.2d 594 (1989); *Piotrowski v. City of Houston*, 51 F.3d 512, 514 n. 5 (5th Cir.1995). In Texas, the pertinent limitations period is two years. Tex.Civ.Prac. & Rem.Code Ann. § 16.003(a) (Vernon 1986); *Piotrowski*, 51 F.3d at 514 n. 5; *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir.1992). Texas law also provides that the death of a person who may bring a cause of action suspends the running of the statute of limitations for one year. ***272** Tex.Civ.Prac. & Rem.Code Ann. § 16.062 (Vernon 1986).[10]

Juan's death occurred, and therefore his estate's § 1983 action accrued, on June 2, 1988. Thus, the statute of limitations expired at the latest on June 2, 1991. Flores filed her original complaint on October 21, 1988. Although the original complaint did not expressly state that Flores was suing in her representative capacity on behalf of Juan's estate, the complaint, as well as the October 29, 1989 amended complaint, alleged that a violation of Juan's constitutional rights at the detention center caused his death, and requested damages for Juan's conscious pain and suffering prior to his death.[11] These allegations were sufficient to allege a survival action on behalf of Juan's estate. *See Felan v. Ramos*, 857 S.W.2d 113, 118 (Tex.App.-Corpus Christi 1993, writ denied) ("The actionable wrong in a survival action is that which the decedent suffered before death. The damages recoverable are those which the decedent sustained while alive." (citations omitted)). Therefore, we reject Cameron County's argument that the original complaint did not allege a § 1983 claim for Juan's survival damages.

12 Additionally, Cameron County contends that Flores did not have capacity to bring a survival suit on behalf of the estate. The Texas survival statute provides that "a personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person." Tex.Civ.Prac. & Rem.Code Ann. § 71.021 (Vernon 1986). Cameron County argues that Texas law requires a survival action to be brought by either all heirs of the decedent or the administrator of the decedent's estate. Cameron County claims that Flores could not bring a survival action on behalf of the estate because when the complaint was filed, she was neither the sole heir (because Juan's father was living) nor the administrator of the estate. We

need not decide whether Texas law requires the joinder of all heirs to bring a survival action because we conclude that Flores was administrator of Juan's estate.

Flores applied to be and was appointed temporary administrator of Juan's estate on February 11, 1994, and filed a notice of her appointment as temporary administrator with the district court on February 14, 1994. After trial, the district court granted Flores leave to amend her pleadings to show her representative capacity as temporary administrator of Juan's estate. We shall construe the February 14, 1994 filing with the district court of the notice of Flores's appointment as administrator as the amendment of Flores's complaint allowed by the district court. *See Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561, 569 (2d Cir.1995) (noting that court of appeals has discretionary power under certain circumstances to deem pleadings amended); *cf. Molett v. Penrod Drilling Co.*, 872 F.2d 1221, 1228 (5th Cir.) (allowing pleading amendments on appeal to allege diversity jurisdiction where such jurisdiction is clear from the record), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 563, 107 L.Ed.2d 558 (1989). If the amendment relates back to the date of the original complaint, then the estate's survival action is not barred by the statute of limitations.

Federal Rule of Civil Procedure 15(c) provides that "an amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...." Fed.R.Civ.P. 15(c). "The rationale of the rule is that, once litigation involving a particular transaction has been instituted, the parties should not be protected [by the statute of limitations] from later asserted claims that arose out of the same conduct set forth in the original pleadings." ***273** *Kansa Reinsurance Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366-67 (5th Cir.1994) (citing 6A Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure § 1496 (1990)).

"[I]f a plaintiff seeks to correct a technical difficulty, state a new legal theory of relief, or amplify the facts alleged in a prior complaint, then relation back is allowed." *F.D.I.C. v. Conner*, 20 F.3d 1376, 1386 (5th Cir.1994). "Notice is the critical element involved in Rule 15(c) determinations." *Williams v. United States*, 405 F.2d 234, 236 (5th Cir.1968). We have previously allowed relation back of amendments that change the capacity in which the plaintiff brings suit, for example, from her individual capacity to her representative capacity as administrator of an estate. *Tidewater Marine Towing, Inc. v. Dow Chem. Co.*, 689 F.2d 1251, 1253-54 (5th Cir.1982) (noting that substitution of the personal representative of an estate for the surviving parent of the decedent as plaintiff is not the commencement of a new suit and allowing relation back of the amended complaint); *Williams*, 405 F.2d at 239 (allowing mother, who brought suit as next friend for minor son who had suffered personal injuries, to amend complaint to allege claim on her own behalf as parent, and holding that amended complaint relates back to date of original complaint); *Longbottom v. Swaby*, 397 F.2d 45, 48 (5th Cir.1968); *see also Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U.S. 570, 573-74, 33 S.Ct. 135, 136-37, 57 L.Ed. 355 (1913) (holding that district court may allow amendment of complaint by plaintiff who sued in her individual capacity to allege claim in her representative capacity as administratrix of estate; amendment was not equivalent to commencement of a new action so as to subject it to the statute of limitations).

13 14 Applying Rule 15(c) to the present case, we find that the estate's claim for survival damages arises out of the same events and conduct which were described in the original complaint. Additionally, although Flores may not have had the capacity to bring suit on behalf of the estate at the time, the original complaint alleged a survival action and requested survival damages, notifying Cameron County that it would be required to defend against such an action. The amendment to the complaint merely "seeks to correct a technical difficulty" with the original complaint-to formally allege that Flores seeks damages in her representative capacity as administrator of Juan's estate. *See Conner*, 20 F.3d at 1386. The purposes of Rule 15(c) are satisfied by allowing Flores's appointment as temporary administrator to relate back to the filing of the original complaint. We hold that Flores's amendment to her complaint stating her status as temporary administrator of Juan's estate relates back to the filing of her original complaint. Therefore, the § 1983 claims for survival damages asserted by Flores on behalf of Juan's estate are not barred by the statute of limitations.[12]

III. CONCLUSION

For the foregoing reasons, we VACATE the judgment of the district court against Cameron County and REMAND for further proceedings consistent with this opinion. We DISMISS Flores's cross-appeal against the following individual defendants: the Estate of the Honorable Jack Goolsby; D.J. Lerma; Mike P. Cortinas, Jr.; Adolph Phomae, Jr.; Natividad Valencia; Judge Robert Garza; Judge Gilberto Hinojosa; Judge Darrell B. Hester; Judge Jane Akin Brasch; Judge Rogelio Valdez; Armando Rodriguez; and Thelma Gonzalez Sullivan. Costs shall be borne by Flores.

Footnotes

1 On June 2, 1988, the detention center housed 22 male juveniles.

2 Experience demonstrated this necessity. On more than one occasion, juveniles had escaped while the detention center guards were locked in a cell with an automatically locking door.

3 The district court also dismissed all of Flores's pendent state law claims prior to trial.

4 Flores also noticed a cross-appeal against the following individual defendants: the Estate of the Honorable Jack Goolsby; D.J. Lerma; Mike P. Cortinas, Jr.; Adolph Phomae, Jr.; Natividad Valencia; Judge Robert Garza; Judge Gilberto Hinojosa; Judge Darrell B. Hester; Judge Jane Akin Brasch; Judge Rogelio Valdez; Armando Rodriguez; and Thelma Gonzalez Sullivan. However, Flores did not pursue her cross-appeal against these individuals in her appellate brief or at oral argument. Accordingly, the cross-appeal against these individual defendants is dismissed.

5 Specifically, we do not reach Cameron County's arguments concerning the district court's comments from the bench, the sufficiency of the evidence, or the excessiveness of damages. We also do not address Flores's argument on cross-appeal challenging the attorney's fee award.

6 The statutory scheme governing the Juvenile Board and county juvenile boards generally has existed in at least three formulations-as precodification statutes and in two codifications, as chapter 75 of the Human Resources Code and, currently, as chapters 142 and 152 of the Human Resources Code. We shall cite to the current law when it has not changed in substance from the law in effect in June 1988, when Juan was killed, as well as to the law in effect at that time.

7 In fact, Rodriguez testified that he and the Cameron County Juvenile Board do rely on the Cameron County attorney for legal advice.

8 Flores recognizes that her claims against the Juvenile Board are redundant of her claims against Cameron County.

9 The district court derived the instruction concerning the excessive force standard almost verbatim from Cameron County's proposed jury instructions and special interrogatories. Furthermore, Cameron County did not object to this instruction. Therefore, the invited error doctrine ordinarily would preclude our review of this instruction. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 753 (5th Cir.1993); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 606 (5th Cir.1991); *United States v. Gray*, 626 F.2d 494, 501 (5th Cir.1980).

10 In § 1983 actions, we apply state tolling provisions to determine whether the limitations period has expired. *Pete v. Metcalfe*, 8 F.3d 214, 217 (5th Cir.1993).

11 The complaints alleged:

> [Juan] experienced conscience [sic] pain and suffering for which he would be entitled to recover from the defendants, both actual as well as exemplary damages, had he lived. The federal and state causes of action for these damages survived and upon his death, accrued to his heirs at law under Chapter 71 of the Texas Civil Practices and Remedies Code [establishing a survival cause of action].

12 Cameron County also argues that the district court erred in admitting into evidence Plaintiff's Exhibit 20-the detention center log books for June 19, 1987 through July 1, 1987, which recorded that Juan suffered a bleeding rectum during a previous incarceration in the detention center and suggested that his injury possibly resulted from sexual abuse. The district court admitted Exhibit 20 under the rule of optional completeness after Cameron County, over the district court's warning that it would apply Rule 106, offered into evidence Defendant's Exhibits 37, 38, and 39-all other log books covering Juan's stays at the detention center. We conclude that this ruling was not an abuse of discretion. *See* Fed.R.Evid. 106; *Beech Aircraft v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 451, 102 L.Ed.2d 445 (1988).

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Juvenile Board Considerations in Light of the El Paso v. Solorzano Case

Frequently Asked Questions
Prepared by Nydia Thomas, J.D.

QUESTION - Are there any statutes that grant immunity from liability for the juvenile board, chief juvenile officer and/or the local juvenile probation department?

There are a variety of statutes that grant immunity from liability to juvenile boards, juvenile probation personnel and/or juvenile probation departments including, but not limited to:

- Human Resources Code §152.0013 [Immunity from Liability]
  A juvenile board member is not liable (qualified immunity) for damages arising from an act or omission committed while performing duties as a board member.

  Also See --
  - Education Code §37.011 [Juvenile Justice Alternative Education Program];
  - Human Resources Code §142.004 [Juvenile Probation Personnel]; *(Community Service)*
  - Human Resources Code § 142.005 [Administration of Medication; Immunity from Liability]
  - Family Code §57.005 [Liability]; *(Victim's Rights)*
  - Code of Criminal Procedure §62.008 [General Immunity]; *(Sex Offender Registration)*

QUESTION – What are the juvenile board's responsibilities regarding the budget?

- The statutory authority is well settled regarding the juvenile board's budgeting powers and duties. Section 152.007 of the Human Resources Code authorizes the juvenile board to adopt a budget and to determine the level of funding required to provide support for the local juvenile justice system. In addition, the juvenile board is the county-level entity responsible for executing the State Financial Assistance Contract and adopting the resolution to accept receipt of state funding.

- The juvenile board's authority is subject to limited review by the commissioners court. The commissioners court determines the portion of the general revenue that will be allocated for juvenile justice programs, services and facilities at the county level.

QUESTION - As referenced in Human Resources Code §142.002, what does "advice and consent" of commissioners court mean?

- In describing the commissioners court's decision-making role and the responsibilities of the juvenile board, the original drafters of Section 142.002 of the Human Resources Code appear to have borrowed the use of the phrase "advice and consent" but provided little guidance on its meaning. There have been a number of Attorney General Opinions that have attempted to provide clarity as to the interaction between the two entities. Specifically, the Attorney General has determined that "advice and consent" authority is extremely narrow and the legislature enacted Section 152. 0012 of the Human Resources Code to clarify the commissioners court's purview of juvenile justice matters.

- In the context of juvenile justice, the phrase "advice and consent" seems to suggest that the juvenile board should engage in deliberations with the commissioners court regarding the employment and designation of personnel responsible for providing juvenile services. Over the years, the statutes, AG opinions and other legal authority have evolved with regard to budgeting matters between the juvenile board and the commissioners court. It is clear that the phrase does not mean that each

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juvenile board action must be reviewed and approved by the commissioners court. In fact, the law has limited the commissioners court scope of oversight to matters regarding the level of general revenue funding allocated for the provision of juvenile services. Most importantly, it can be argued that the commissioners court has a broader view of the available resources and needs of the county and therefore retains the ability to authorize (i.e., "consent to") the level of general revenue funding it allocates.

- Therefore, the commissioner court must, by necessity, be engaged in deliberations regarding the reasonableness of the juvenile board's budget proposals and the portion of the general revenue allocated for juvenile services. Nevertheless, the commissioners court is authorized only to determine the total dollar amount of county funds allocated to the probation department and may not determine the particular purpose or amount to be spent from the county funds or other funding sources. [AG DM-460]. The commissioners court does not have authority to review any part of the budget derived from state funds.

May the county exercise a line item veto control over the budget?

- The statutes and AG opinions suggest that the commissioners court does not have line item veto authority over items in the proposed juvenile probation budget. In some counties, a "back door line-item" approach occurs when the commissioners reduce the total juvenile budget by the specific amount of a particular line item. It is, nevertheless, within the purview of the juvenile board to determine how the total budget will be allocated.

There have been recent court cases that may impact the relationship between county government and the local juvenile probation department. Recently, our county judge advised that the commissioners court will no longer approve contracts with vendors. This will now be the responsibility of the juvenile board. Is the juvenile board authorized to approve contracts without commissioners court involvement?

- Regarding the power to enter into contracts and to approve vendors, the juvenile board is the statutory administrative authority for local juvenile probation services. The juvenile board has always had the authority to enter contracts without express commissioners court oversight or involvement. [Sec. 140.003(b) Local Government Code] (juvenile board may purchase items) [Section 262.022 Local Government Code), (including services); [Government Code Sec. 2254.002] (legal services may be purchased).

- Attorney General Opinion DM 460 (1997) suggests that "the [juvenile] board or the juvenile probation department is specifically empowered, without any express provision for county oversight, to enter into contracts." Although the department is subject to county supervision with respect to the deposit and disbursement of funds, the juvenile board is authorized to perform this function.

- Therefore, it may be reasonable to conclude that the El Paso case has no bearing on what was essentially a local practice.

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How should juvenile boards and chiefs interpret the statutes in light of the recent litigation?

- Since the El Paso decision was rendered, much of the response statewide has been a "wait and see approach". However, there are a range of ideas and interpretations about the impact of the El Paso v. Solorzano case which have been circulating on blogs, conferences and professional discussions between chiefs, county prosecutors and county organizations. Most counties have determined that matters will be handled as usual. There are a few counties that have questioned local practices or have considered ceasing the performance of functional support services (i.e., legal representation) on behalf of the juvenile probation department. See El Paso County v. Solorzano, 351 S.W.3d 577, 581 n. 2 (Tex.App.-El Paso 2011, no pet.).

- As these local decisions are made, it is important to consider the legal impact of persuasive versus mandatory appellate decisions. Counties served by the El Paso Appellate Court should assess local practices, liability concerns, litigation support, and the relationship between the county, the juvenile board and the juvenile probation department. For all other counties, this case is only persuasive in nature. To date, the procedural posture of the El Paso case is that no appeal to the Texas Supreme Court has been filed that would yield a decision of statewide impact.

- Flores v. Cameron County is a Fifth Circuit case that should be reviewed to assist in a comparative analysis of the holding in the El Paso case. Generally, the *Flores* case is a civil rights violation case that outlines with more clarity the issues regarding the status of the juvenile board and the juvenile probation officer as an employee of the county. [Flores v. Cameron County, Tex., 92 F.3d 258 (1996)].

Our juvenile probation department is in the process of deciding whether we need to need to purchase individual liability insurance for our board members, chief and juvenile probation department. May liability insurance be purchased with state funds?

Liability insurance may be purchased with state funds. State funds, however, cannot be used to cover the cost of damages and settlements. It may be helpful to review the State Financial Assistance Contract Expenditure Guidelines for direction on the authorized use of funds.

- **Yes. Insurance and Indemnification #27** – Cost of insurance in connection with the general conduct of activities are ALLOWABLE.

- **SFA Expenditure Guidelines -- #21**. Fines, penalties, damages or other settlements resulting from violations of the law or the failure to comply with the law are UNALLOWABLE.

- **Rider #4** --Limitations on new Texas Juvenile Justice Department Rider 4 in the General Appropriations Act does not allow the use of state funds for the purchase of expenses relating to the juvenile board. The Rider is however, silent on the Directors Liability Insurance. It may be necessary to evaluate whether that is considered a board expense.

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Also See –

Human Resources Code §152.0014 [Indemnification by State]
The state shall indemnify a juvenile board member in the same manner and under the same conditions that it indemnifies an officer of a state agency under 104, Civil Practice and Remedies Code.

May the juvenile board use funds from the department's budget without county commissioners authorization?

- Yes, for reasons discussed earlier, the commissioners court has authority only in matters deemed to be an abuse of discretion.

- The law is well-settled that once county funds are transferred into the department's special account the funds they are no longer "county funds". The county merely holds the funds on behalf of the department/juvenile board. Also, state funds/federal funds lose their separate character – all funds are considered integrated funds. The commissioners court only has fiscal review authority when it believes that the juvenile board abused its discretion with respect to county-derived funds. [AG Opinion MW – 587]. Therefore, no county commissioners authorization is necessary.

Does the juvenile board have the right to hire outside counsel concerning any litigation?

- Section 101.103(b) of the Civil Practice and Remedies Code is relevant to the juvenile board. In its status as a specialized local entity under §140.003 of the Local Government Code, (i.e., a political subdivision with jurisdiction smaller that the entire state) the juvenile board would be required to employ its own counsel, unless it has insurance coverage.

- The juvenile probation department, therefore, is considered an agency of the juvenile board/specialized local entity and may be subject to the same requirements.

- The State Financial Assistance Contract prohibits the use of state funds to cover the cost of the defense and prosecution of certain legal matters. See SFA Expenditure Guidelines --#15 – Defense and Prosecution of Criminal and Civil Proceedings and Claims. This provision makes the cost incurred in defense of any criminal fraud proceeding or similar proceedings UNALLOWABLE.

Is the county attorney responsible for representing the juvenile board, chief or employees? Or, is the AG's Office responsible for representing the juvenile board?

- Regarding legal representation, Section 101.103 of the Civil Practice and Remedies Code should be reviewed. The Attorney General is required to defend each action against a governmental unit that has statewide authority**.** The AG may be assisted by counsel provided by an insurance carrier.

- Since the juvenile board and juvenile probation departments do not have statewide jurisdiction, the juvenile board (individually and collectively) would likely not be represented by the AG's Office.

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- Also consider Section 142.004 of the Human Resources Code. The chief and juvenile probation personnel are considered employees of the state for purposes of the Civil Practice and Remedies Code. As such, there is statutory authority for the AG to provide representation.

- As it relates to the county, which has no statewide jurisdiction, the county attorney or legal counsel provided by an insurance carrier may provide representation for the county.

Is there currently a system in place whereby counties may enter into a co-operative arrangement in order to obtain better insurance rates?

- Juvenile probation regions and probation departments may seek to leverage the buying power of the juvenile boards and departments. Departments may wish to brainstorm on a range of creative approaches to this issue and subsequently engage in with the Texas Association of Counties and other insurance carriers.

Will amendments be filed during the 83rd Legislative Session in 2013 that will modify or supersede the holding in the El Paso case?

- It is unknown whether legislation will be filed to amend Title 12 of the Human Resources Code and related provisions to address the issue of whether juvenile probation officers are considered state or county employees.

1. **Attorney General Opinion V-1093 (1950)**

   Juvenile or adult probation officer is an appointive county officer, eligible to the benefits of the Retirement, Disability, and Death Compensation Fund provided for in the Texas Constitution, Article XVI, Section 62, subdivision (b).

2. **Attorney General Opinion M-1088 (1975)**
   Adult probation officers are not within the application of the County Civil Service Act because the court, as part of its responsibility in supervising probationers in Article 42.12 of Code of Criminal Procedures, is responsible for employment of probation officers. The Civil Service Commission has the power to make, publish, and enforce rules relating to the selection and classification of county employees; to competitive examinations; to promotions, seniority, and tenure; to layoffs and dismissals; to disciplinary actions, grievance procedures, and other procedural and substantive rights of employees; and to other matters having to do with the selection of employees and their advancements, rights, benefits, and working conditions.

3. **Attorney General Opinion H-672 (1975)**
   Juvenile Probation officers are not subject to the County Civil Service Act because the judges on the Juvenile Board exercise a degree of control over them that is inconsistent with the powers of a County Civil Service Commission.

4. **Attorney General Opinion H-942 (1977)**
   Juvenile Board management over juvenile probation office extends to secretaries and clerks; they are not subject to the County Civil Service Act.

5. **Attorney General Opinion H-1133 (1978)**
   County attorney has a duty to represent and advise the juvenile board.

6. **Attorney General Opinion H-1296 (1978)**
   CCP 42.12 contains language placing authority for adult probation officers wholly in the court, requiring commissioners court to approve salaries. Language in Article 5142d related to juvenile probation officers is different. It does not place the authority with the judiciary. It instead indicates they are to be "recommended" by a juvenile board, not fixed by them. Therefore, the commissioners' court is not required to approve the salary recommended.

7. **Attorney General Opinion MW-15 (1979)**
   Commissioners court has the authority under 5142b to decline to approve a budget for the compensation of juvenile probation officers submitted by the juvenile board.

8. **Attorney General Opinion MW-587 (1982)**
   In 1981, the legislature acted to improve juvenile probation services throughout the state. TJPC was created to provide state aid to local juvenile boards and to set standards for probation officers. The legislature provided for the establishment of county juvenile probation departments by enacting article 5138d, which in part read that the juvenile board (or juvenile court if no board) could, with the advice and consent of commissioners court, employ and designate the titles and fix the salaries of probation officers. The determined salary, if inconsistent with salaries established by laws governing the creation of a juvenile probation department, superseded and controlled over the statutory provisions.

   This was almost identical to the language in 42.12 that was in effect for Commissioners Court of Lubbock County v. Martin, 471 S.W.2d 100 (Tex. Civ. App. – Amarillo 1971, writ ref'd n.r.e.) and Commissioners Court of Hays County v. District Judge, 506 S.W.2d 630 (Tex.Civ.App. – Austin 1974, writ ref'd n.r.e.). The courts concluded that the language required the judges to merely consult with the commissioners' court in preparing the probation services budget but that the commissioners' court was not authorized to reject the

budget unless it was so unreasonable, arbitrary, or capricious as to amount to an abuse of the judges' discretion.

In enacting legislation, the legislature is presumed to have taken notice of court decisions construing prior analogous statutes and judicial construction of similar language will be read into subsequent statutes. Therefore, the new legislation requires the commissioners court to budget and pay the salary of the juvenile probation officers as set by the juvenile board, absent a clear abuse of discretion.

9. **Attorney General Opinion JM-410 (1985)**
   A juvenile probation department employee is a county employee for the purposes of the Fair Labor Standards Act.

10. **Attorney General Opinion JC-0085 (1999)**
    Juvenile probation board is an independent entity whose acts are subject to very limited scrutiny by the commissioners' court. Commissioners' court's role in budgeting is limited to setting the dollar amount of county funds in the department's budget and reviewing that portion of the budget on an abuse of discretion standard.

    Juvenile board has authority over the employment decisions, travel policies, and general management and financial decisions regarding a juvenile probation department. Because the board is an independent entity, its policy decisions are not within the jurisdiction of the commissioners' court.

11. **Attorney General Opinion JC-0254 (2000)**
    Local Government Code 158.007 allows certain counties to expand their civil-service system to cover adult and juvenile probation officers and their assistants. AG opinions and cases prior to the passage of 158.007 held that adult probation officers are not county employees and may not be included in a civil service system. Supervision of adult probation departments is not with the county but with the local district or courts. The district judge or judges establish the department and employ personnel. See Tex. Gov't Code Chapter 76. Adult probation departments receive funding from county and from judicial district. The judicial district is responsible for employee compensation and benefits. In *Shore v. Howard*, 414 F. Supp. 379 (N.D. Tex. 1976), federal court agreed with AG rationale and determined adult probation officers not county employees. The rationale remains persuasive. After the opinions, the legislature changed the law to allow the civil-service system to include adult probation officers. However, because they are not employees, they cannot be included. (Note: the opinion did not address juvenile probation officers. Additionally, despite this opinion, the law remains unchanged).

12. **Attorney General Opinion GA-0799 (2010)**
    Commissioners court has authority to establish, increase, decrease, or eliminate the amount of compensation to be paid to the judges serving on the juvenile board.

13. **Clark v. Tarrant County, 608 F. Supp. 209 (N.D. Tex. 1985)**
    County could not be sued for employment discrimination in county probation department (adult) where there was no significant relationship between the department and the county because the department was creation of the state and extension of state judiciary, not arm of the county. Article 42.12 of CCP requires state district judges to establish a probation office and employ the necessary district personnel. Funds are paid from the state judicial district. District judges appoint chief probation officers, who then appoint other probation officers. Principal source of income is from the state. Fees paid by probationers supply the remainder. County does not hire, fire, supervise, or pay the salaries of the adult probation officers. Only

involvement of County is with Adult Probation Department is requirement to provide physical facilities, equipment, and utilities as well as enter into contract with district judges to allow probation officers to participate in county's group insurance or self-insurance programs and in retirement plan.

Because Adult Probation Department is a creation of the State of Texas and an extension of the state judiciary, a lawsuit against Adult Probation Department is a lawsuit against the state. Under the 11th Amendment and judicial interpretation, the state is immune from lawsuits brought by its own citizens unless the state expressly consent or Congress has expressly abrogated its immunity by federal statute. Title VII and Section 1983 limit a state's sovereign immunity. Title VII affords relief to an employee who claims discrimination from an "employer" as both terms are defined in statute. Employee is defined narrowly for such purposes. Probation officers within adult county probation department are not county employees; they are members of the "personal staff" of elected official within meaning of personal staff exemption to Title VII where probation officers were part of judge's personal staff.

14. **Flores v. Cameron County, 92 F.3d 258 (5th Cir. 1996)**
Juvenile probation board is an agency of the county, not of the state. County may be held liable for civil rights violation resulting from its policy. In determining if a governmental body is a state or local entity, following factors are considered:

    1. Whether state law views the entity as an arm of the state (State law appears to view county juvenile boards as local rather than state entities. Attorney General opinions and other Texas statutes referencing county juvenile boards suggest they are local rather than state entities.);
    2. The source of the entity's funding (bulk provided by county);
    3. The degree of local autonomy retained (because state aid is only 30%, possible that a juvenile board could provide probation services and operate a detention center even if it failed to comply with TJPC standards);
    4. Whether the entity is concerned primarily with local, as opposed to statewide, problems (provide probation services to individual counties);
    5. Whether the entity has the authority to sue and be sued in its own name; and
    6. Whether the entity retains right to hold and use property.

    Opinion differentiated adult and juvenile probation departments. Adult provide only traditional services. Juvenile provide that plus detention functions, akin to county jail. Adults in Clark case did not receive any funding from county. Language in 42.12 with adults said the purpose was to place "wholly within state courts." Juvenile does not have that language.

Westlaw

36 TXPRAC § 24.4
36 Tex. Prac., County And Special District Law § 24.4 (2d ed.)

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§ 24.4. Juvenile probation departments

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C.J.S., Infants §§ 69 to 85

Juvenile probation departments are organized and operated under the aegis of the juvenile board in conjunction with state rules and regulations adopted by the Texas Juvenile Probation Commission. As with the makeup of juvenile boards, a juvenile probation department may have its own special statute under which it functions. Legislation passed in 1981 requires the juvenile board of every county to employ and determine the salaries of juvenile probation officers with the advice and consent of the commissioners court.[1] The board is required to select "discreet persons" to serve as juvenile officers for two-year terms subject to removal at will by the board.[2] A probation officer is given the powers of a peace officer, although he does not have to be so certified; however, he lacks the authority to carry a handgun.[3] A juvenile probation officer has been found not to be a public official for purposes of the constitutional requirement that all public officers account for their fees of office.[4]

The commissioners court, under the general statutes, is required to approve the budget and salaries for the juvenile probation department.[5] The attorney general has ruled that the commissioners court is under a ministerial duty to approve the salaries for a child support office set by the juvenile board unless such salaries constituted an abuse of discretion. This opinion concerned Orange County in which the juvenile board gave a nine percent raise, whereas the commissioners court sought a six percent raise for these juvenile probation department personnel.[6]

The attorney general has also ruled that a commissioners court could not direct that child support collection efforts be transferred from the juvenile probation department, under the control of the juvenile board, to the Domestic Relations Office, which was under the control of the commissioners court.[7]

Under provisions of the Human Resources Code counties are permitted to contract among themselves and with the Texas Youth Commission for the furnishing of juvenile probation services.[8] A juvenile probation department

may also contract with a private non-profit agency for the care of delinquents.[9]

At one time, a juvenile probation officer could not also serve as an adult probation officer.[10]

Legislation enacted in 1989 declares juvenile probation personnel to be state employees for purposes of state liability and indemnification for acts of negligence and criminal prosecution,[11] although elsewhere it provides that a juvenile probation officer serving a single county should be "considered to be an employee of that county."[12]

A 1991 law confers immunity on juvenile probation personnel for damages arising out of child labor so long as there is no wanton negligence or reckless disregard of safety.[13]

In a wrongful termination suit brought by an employee of a juvenile probation department, the appeals court upheld a jury verdict in favor of the employee, awarding damages exceeding $200,000. The lawsuit implicated a statutory requirement in the Family Code reporting child abuse.[14]

[FNa0] Of The Texas Bar.

[FN1] V.T.C.A., Human Resources Code § 142.002. The statute also provides that in counties where the caseload is insufficient to warrant a separate juvenile probation department that the board may contract with the adult probation department or with adjacent counties to furnish juvenile probation services.

See, Op. Tex. Att'y Gen. No. DM-79 (1992) (chief juvenile probation officer hires department personnel subject to juvenile board approval; personnel serve at pleasure of board; construing Human Resources Code §§ 152.0007; (.0008)).

[FN2] V.T.C.A., Human Resources Code § 152.0008. At one time, juvenile probation departments were created by statute on the basis of population. The statutes were generally repealed with the adoption of chapter 152 of the Human Resources Code, specifically naming counties regardless of population. See, e.g., Vernon's Ann. Civ. St., arts. 5142a [repealed] (probation departments in counties over 350,000 population); 5142b (probation departments in counties of 225,000 to 390.000); 5142c [repealed] (probation departments in counties of 190,000 to 224,000); 5142d [repealed] (salaries of probation officers in counties under 190,000 population).

[FN3] V.T.C.A., Human Resources Code § 141.065.

Op. Tex. Att'y Gen. Nos. MW-491 (1982) (juvenile officers have authority as peace officers but may not carry guns); H-1157 (1978) (juvenile probation officer has status as peace officer but not required to be state certified); O-7332 (1946) (authority of juvenile probation officer under prior law to carry handgun).

[FN4] Harris County v. Schoenbacher, 594 S.W.2d 106 (Tex.Civ.App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (chief juvenile probation officer not required to account for uncollected fees of office); but see, Op. Tex. Att'y Gen. No. C-386 (1965) (article 5142, authorizing the appointment of school attendance officers to be appointed as juvenile probation officers, would constitute a dual officeholding violation).

[FN5] V.T.C.A., Human Resources Code §§ 142.002; 152.003a(b). The budget statutes were amended in 1997 to require the commissioners court to prepare a budget of county funds to be allocated for the juvenile probation department. V.T.C.A., Local Government Code § 111.094. Op. Tex. Att'y Gen. Nos. MW-587

36 TXPRAC § 24.4
36 Tex. Prac., County And Special District Law § 24.4 (2d ed.)

(1982) (commissioners court required to approve juvenile probation department budget under article 5138, absent abuse of discretion by juvenile board). Under prior law the juvenile probation department budget was subject to approval by the commissioners court. See, Op. Tex. Att'y Gen. Nos. MW-15 (1979) (budget subject to approval by commissioners court under article 5142d); M-1056 (1972) (budget for Harris County Juvenile Probation Department and Homes prepared by chief probation officer, not county auditor, and subject to commissioners court approval).

[FN6] Op. Tex. Att'y Gen. No. JM-1150 (1990) (construing V.T.C.A., Human Resources Code § 152.1872).

[FN7] Op. Tex. Att'y Gen. No. JM-247 (1984) (construing Vernon's Ann. Civ. St. arts. 2338-1e, 5139VV, 5142a-1).

[FN8] V.T.C.A., Human Resources Code §§ 61.083; 62.002. See also, V.T.C.A., Human Resources Code § 142.003 (authority to contract for juvenile probation services).

[FN9] Op. Tex. Att'y Gen. No. M-843 (1971) (agency may be under supervision of either juvenile court or juvenile probation department and compensated by county).

[FN10] Vernon's Ann. C.C.P. art. 42.12, § 10(e) [repealed].

[FN11] V.T.C.A., Human Resources Code § 142.004(b).

[FN12] Id., § 141.067.

[FN13] Id., § 142.004(c). See also, V.T.C.A., Education Code § 37.011(j) (immunity of county, commissioners court, and juvenile board in matters relating to juvenile justice alternative education programs).

[FN14] Harris County v. Norris, 240 S.W.3d 255 (Tex. App. — Houston [1st Dist.] 2006, no pet.) (V.T.C.A., Family Code §§ 261.101 et seq.).

36 TXPRAC § 24.4

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