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Assemblywoman April Mastroluca
265 Copper Glow Ct.
Henderson, NV 89074-8744

Assemblywoman Debbie Smith
3270 Wilma Dr.
Sparks, NV 89431-1173

Dear Assemblywomen Mastroluca and Smith:

You have indicated that there has been some apparent confusion as to the appropriate application of section 54 of Assembly Bill No. 562 of the 75th Regular Legislative Session (A.B. 562 (2009)) and have therefore asked this office to clarify the manner in which this provision must be applied. As explained below, because section 54 of A.B. 562 (2009) must be read in harmonious conjunction with all applicable existing law, it is the opinion of this office that section 54 requires the Director of the Nevada Department of Health and Human Services to withhold the money appropriated by A.B. 562 for the integration of child welfare services if the state and local money being used to pay for legal representation of public entities in child protection cases is used to pay for any representation other than of the child welfare agency. We reach this conclusion primarily because the child welfare agencies are the entities with the education, experience and expertise in child development and behavioral sciences and, as such, are the entities identified by the Legislature to carry out the best interests of the public in responding to children in need of protection or other public intervention. Therefore it is clear that, by representing solely the child welfare agencies in these cases, the district attorneys would necessarily be best representing "the public interest," which is the other legal requirement applicable to these circumstances. If the district attorneys were to, instead, represent the interests of the child (as separate from the interests of the child welfare agency) or provide representation in accordance with the district attorneys' own feelings, the public would not be served and the applicable provisions of law would be violated. We proceed now to examine the provisions of NRS 432B.510 and section 54 of A.B. 562 (2009), as these are the provisions which control the answer to your question.

DISCUSSION

The provisions of NRS 432B.510 set forth in relevant part that:

> 1. A petition alleging that a child is in need of protection may be signed only by:
> (a) A representative of an agency which provides child welfare services;
> (b) A law enforcement officer or probation officer; or
> (c) The district attorney.
> 2. The district attorney shall countersign every petition alleging need of protection, and *shall represent the interests of the public* in all proceedings. If the district attorney fails or refuses to countersign the petition, the petitioner may seek a review by the Attorney General. If the Attorney General determines that a petition should be filed, he shall countersign the petition and shall represent the interests of the public in all subsequent proceedings.
> ....

(Emphasis added.)

The language contained in section 54 of A.B. 562 (2009) states the following:

> The appropriation of all of the sums appropriated by section 20 of this act to the Division of Child and Family Services of the Department of Health and Human Services for expenses incurred by Clark County and Washoe County for the integration of child welfare services are dependent upon all funds, whether state or local, being used in a manner *such that the child welfare agencies are the sole client of the district attorneys in each case in which the District Attorney or Deputy District Attorney is serving as the attorney for a child welfare agency*.

See Chapter 388, Statutes of Nevada 2009, at p. 2120 (emphasis added).

At one point during the 2009 Legislative Session, the Legislature considered changing NRS 432B.510 to reiterate the same requirement found in section 54 of A.B. 562 (2009) but, in the end, decided to leave the language in that section intact. *See* section 2.9 of the third reprint of Senate Bill No. 293 of the 75th Regular Legislative Session. This interpretation appears to be consistent with an intent on the part of the Legislature to retain the important statement that public money must be spent to protect the public interest and, additionally, to use section 54 of A.B. 562 (2009) to ensure that the agencies to whom the Legislature has delegated the responsibility of child-protection issues receive appropriate and effective legal representation. As we proceed now to

explain, section 54 of A.B. 562 (2009) makes clear that the appropriation[1] of money to integrate child welfare services in Clark and Washoe Counties is contingent upon the use of all pertinent funds such that, in any case in which a district attorney is representing a child welfare agency, the agency must be the district attorney's sole client. Our answer to the question you have presented is informed by three separate principles of law. We will now explain, and then apply, these principles.

The first such principle is the rule or maxim which states that, when a legislative body enacts a legislative measure, the legislative body is presumed to say what it means and mean what it says. *See, e.g.*, Wieland-Werke AG v. United States, 525 F. Supp. 2d 1353, 1361 (Ct. Int'l Trade 2007) ("The legislature is presumed to say in a statute what it means and mean in a statute what it says there."). In short, it would run counter to both reason and common sense for a legislative body to say in a statute that "X is to take place" if the legislative body does not intend for that to happen. Furthermore, a related principle which applies in the present context is the principle that, "courts generally give 'great deference' to an agency's interpretation of a statute that the agency is charged with enforcing." *See* Meridian Gold Co. v. State ex rel. Dep't of Taxation, 119 Nev. 630, 635 (2003) (citing State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293 (2000)). Here, it is the affected child welfare agencies to whom the provisions of section 54 of A.B. 562 (2009) are directed, thus entitling those agencies to "great deference" in the interpretation of those provisions.

The second such principle is that, where possible, two statutes (or other expressions of law) that potentially conflict, but which may be read in a manner in which they do not conflict, should be read in such a way as to avoid the conflict. *See, e.g.*, Bowyer v. Taack, 107 Nev. 625, 629 (1991) (citing United Nuclear Corp. v. Gen. Atomic Co., 560 P.2d 161, 164 (N.M. 1976)) (explaining that the Nevada Supreme Court should construe one of its rules of procedure in conjunction with a statute so as to avoid a conflict or inconsistency between them). "[T]wo statutes should be harmoniously construed whenever possible." United States v. Dixie Carriers, Inc., 462 F. Supp. 1126, 1130 (E.D. La. 1978) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)).

The third such principle, which is necessarily related to the immediately preceding principle, is that statutes are to be construed "such that no part of the statute is rendered nugatory or turned to mere surplusage." *See* Albios v. Horizon Cmtys., Inc., 122 Nev. 409, 418 (2006) (citing Paramount Ins., Inc. v. Rayson & Smitley, 86 Nev. 644, 649 (1970)). The reason this principle is necessarily related to the rule of—where possible—construing statutes harmoniously rather than in conflict is that if statutes are determined to be in conflict, one of the statutes will typically be held to control over the

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[1] Pursuant to section 20 of A.B. 562 (2009), the amounts appropriated for the integration of child welfare services in Clark and Washoe Counties are as follows: (1) Clark County, FY 2009-2010, $41,313,906; (2) Clark County, FY 2010-2011, $45,767,772; (3) Washoe County, FY 2009-2010, $12,278,544; and (4) Washoe County, FY 2010-2011, $15,321,327. *See* Chapter 388, Statutes of Nevada 2009, at p. 2109.

other, thus rendering the other statute nugatory in whole and not just in part. *See, e.g.*, Boudette v. Barnette, 923 F.2d 754, 757 (9th Cir. 1991) ("When two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will.").

As stated previously, you have asked this office to clarify the manner in which the provisions of section 54 of A.B. 562 (2009) are to be applied. Applying the second principle set forth above, we are bound to construe the provisions of NRS 432B.510 and the provisions of section 54 of A.B. 562 (2009) in a manner that is harmonious if at all possible. In doing so, we note that while "the public interest" is not defined and does not seem to have a universally agreed upon meaning, an ordinary and plain reading of the phrase would suggest that "the public interest" has many facets. It is not one single thing but, rather, a collection of things that serve to benefit the public. Thus, in the context of legal proceedings involving children who are in need of protection, when we attempt to reconcile the notion of a district attorney serving "the public interest" and representing child welfare agencies as the "sole client," there is no reason to view the two things as either conflicting or mutually exclusive. To the contrary, for example, the "mission statement" on the first page of the Internet website maintained by the Clark County Department of Family Services states as follows:

> Every child needs someone who he or she can reach out to and who will respond in a way that keeps the child and the community safe. For the vast majority of children, that someone is their parents and family. For some children, a response outside the family is needed. The reasons for the problems are varied and complex. They include child abuse, neglect, and the need for assistance when parents are not able to care for their children.
>
> This is the realm of child welfare. Child welfare is about keeping children safe, promoting permanent families for children, building healthy families, and fostering caring communities.
>
> ....
>
> The Clark County Department of Family Services is the local public agency whose role is to help keep children safe, as required by the federal Adoption and Safe Families Act. The agency was formed on July 1, 2002 in response to the merger of state and county child welfare services. If you would like more information about the history of child welfare in Nevada and the plan to merge state and county services, please click on the links.[2]

(Emphasis added.) Particularly given the expressed emphasis on keeping both children and the community safe, it is difficult to conceive of such a mission not being in "the

[2] http://www.accessclarkcounty.com/depts/family_services/Pages/home.aspx.

public interest," even if the public interest is a somewhat amorphous concept. Thus, it would appear that "serving as the attorney for a child welfare agency" is effectively a "subset" of serving "the public interest" and, as such, we cannot conclude that the two sets of provisions necessarily conflict.

This conclusion is buttressed by the principle that no part of a statute should be "rendered nugatory or turned to mere surplusage." Albios, 122 Nev. at 418. Quite clearly, if we were to determine that the provisions of NRS 432B.510 and section 54 of A.B. 562 (2009) are in conflict, the likely result is that one of those sections would be turned to "mere surplusage": an outcome not allowed by long-standing principles of statutory construction.

Perhaps the most compelling evidence, however, as to why the two sections are intended to operate harmoniously lies within the text of section 54 of A.B. 562 (2009), itself. Our examination of historical precedent reveals that A.B. 562 (2009) was at least the third bill in recent years to appropriate money toward the "integration" in Clark and Washoe Counties of operations of the Division of Child and Family Services of the Department of Human Resources (now the Division of Child and Family Services of the Department of Health and Human Services). *See, e.g.*, Chapter 510, Statutes of Nevada 2005, at p. 2913; chapter 350, Statutes of Nevada 2007, at p. 1697. Unlike A.B. 562 (2009), neither of these previous appropriations bills contained language similar to that set forth in section 54 of A.B. 562 (2009) which, as noted above, states unambiguously that, "[t]he appropriation of all of the sums appropriated by section 20 of this act . . . are dependent upon all funds, whether state or local, being used in a manner such that the child welfare agencies are the ***sole client*** of the district attorneys in each case in which the District Attorney or Deputy District Attorney is serving as the attorney for a child welfare agency." Chapter 388, Statutes of Nevada 2009, at p. 2120. Applying the principle that the Legislature is presumed to say what it means and mean what it says, the inclusion within A.B. 562 (2009) of the immediately preceding underscored text would appear to mean only one thing: that, as stated, child welfare agencies are the sole client of the district attorneys in each case in which the district attorney or deputy district attorney is serving as the attorney for a child welfare agency. Significantly, as noted above, the child welfare agencies in question—as the agencies to whom the provisions of section 54 of A.B. 562 (2009) are directed—are entitled to considerable deference in determining the meaning of those provisions.

The primary counter argument one would expect in response to the preceding determination is one which states that the Legislature cannot, by way of the provisions of an appropriations bill, alter the operation of a codified provision of the Nevada Revised Statutes. *See, e.g.*, State ex rel. Abel v. Eggers, 36 Nev. 372, 375 (1913) (explaining that appropriation bills "are passed for the support of the state government, and are not legislative acts changing the substantive or general laws of the state."). In other words, under the reasoning set forth in Eggers, if the Legislature intended to modify the

operation of NRS 432B.510, it would have to amend NRS 432B.510 and could not effect a modification of the provisions of that statute by enacting a different section within an appropriations bill.

The flaw with the preceding counter argument, however, is twofold. First, it is clear beyond any reasonable contradiction that the Legislature controls the public purse. *See, e.g.*, S.N.E.A. v. Daines, 108 Nev. 15, 21 (1992) (citing State v. Fairbanks N. Star Borough, 736 P.2d 1140 (Alaska 1987)) ("[I]t is well established that the power of controlling the public purse lies within legislative, not executive authority."). As a component of this authority to control the public purse, a legislative body is entitled to impose reasonable restrictions on the manner in which appropriated money may be expended. *See, e.g.*, Ass'n of Metro. Water Agencies v. Browner, 24 F. Supp. 2d 83, 87 (D.D.C. 1998) (describing how the United States Congress made an appropriation which was conditional upon the happening of other, external events). Second, in addition to the fact that the Legislature controls the public purse and may, in connection therewith, condition the expenditure of appropriated funds, the reasoning set forth in Eggers appears to presume a state of affairs in which the Legislature is attempting to use one provision of law to control (or countermand) a different provision of law. Here, that is not the case because the provisions of section 54 of A.B. 562 (2009) do not conflict with, but may be read in harmony with, the provisions of NRS 432B.510.

CONCLUSION

In summary, it is the opinion of this office that it is clear statutorily, if a district attorney is serving in a given case as the attorney for a child welfare agency, the district attorney must represent the child welfare agency as a "sole client." The plain and unambiguous text of section 54 of A.B. 562 admits of no other reasonable conclusion. Further, it is the opinion of this office that the provisions of NRS 432B.510 and the provisions of section 54 of A.B. 562 (2009) not only may be read together in a manner that is harmonious, but in fact must be read together in a manner that is harmonious. Reading the two provisions in a harmonious manner, we are of the opinion that the most reasonable, sensible and defensible interpretation of them is one in which the ultimate conclusion is that, in the context of legal proceedings involving children who are in need of protection, the applicable district attorney is to serve the public interest ***by*** representing the interests of the pertinent child welfare agency. As noted above, the interests of the pertinent child welfare agency are undoubtedly a subset of the broader "public interest"; thus, by representing the interests of that agency, the applicable district attorney is, in fact, serving the public interest and, therefore, is simultaneously giving meaning to and obeying both the provisions of NRS 432B.510 and the provisions of section 54 of A.B. 562 (2009).

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By _____
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