

OFFICIAL OPINION NO. 38

August 16, 1961

Honorable James S. Hunter  
State Representative  
3910 Carey Street  
East Chicago, Indiana

Dear Representative Hunter:

This is in answer to your recent request for an Official Opinion. In your letter you state, in part, as follows:

"I am asking your assistance to interpret and clarify the application of the law of our state in connection with the emergency and interim care of the mentally ill, particularly acute cases requiring protective custody before and during court proceedings or civil inquest and acceptance by the superintendent of the Dr. Norman M. Beatty Hospital, at Westville.

\* \* \*

"I am particularly interested in the applications of Chapter 311 and also Chapter 238 of the Acts of 1951 and of the 1957 Mental Health Law.

"It is my understanding that Chapter 311, Acts of 1951 may, by virtue of classification, no longer be applicable to Lake County, because of the 1960 census. \* \* \* Would you advise me, if it is still an effective Act.

\* \* \*

"I should further like to ask your opinion concerning the general provisions of the Acts of 1957. \* \* \* Would you kindly advise me if existing Statutes do not mandate local officials to assume some responsibility for the temporary care of these unfortunate victims of mental illness. \* \* \*"

In regard to the Acts of 1951, Ch. 311, *supra*, Secs. 1 to 5 inclusive are found in Burns' (1961 Supp.), Sections 22-1230 to 22-1234, inclusive. Section 6 was the emergency clause of said act. This act makes provisions for temporary placement

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of mentally ill persons in the county home in the county in which the judge having jurisdiction presides; makes it mandatory for the board of commissioners of any such county to meet needs of such persons pending acceptance by the institution to which they have been legally committed; makes provisions therein for separate private rooms; provides for employment of special attendants in the county home and Sec. 5, as found in Burns' 22-1234, *supra*, provides as follows:

"No persons who are alleged to be insane and for whom the filing of petitions as to civil inquest into insanity is intended, and no persons who have been found by the court to be insane and are waiting admittance into an appropriate state or federal institution shall be confined in the county and city jails. Such persons shall be confined in the county home in the facilities required to be provided by the board of county commissioners and therein receive the proper medical, nursing and physical care."

Your first question pertains to whether Lake County is still within the population range of classification which is provided in Burns' 22-1230, *supra*. This section makes said act applicable "in counties having a population of not less than three hundred sixty thousand [360,000] nor more than four hundred thousand [400,000] according to the last preceding United States census." The Compiler's Note, under Burns' 22-1230, *supra*, reads as follows:

"By the 1950 (preliminary) census, Lake County was the only county of between 360,000 and 400,000 inhabitants."

Burns' 22-1230, *supra*, was not amended by the 1961 General Assembly. This section on classification of population range remains as the act was originally enacted in 1951. I have been advised by the Auditor of State that the 1960 advance census report shows the population of Lake County to be 568,152.

Therefore, in answer to your first question, it will be seen that due to population increase Lake County no longer comes within the population range provided for in Burns' 22-1230, *supra*.

You state your interest in the application of the Acts of 1951, Ch. 238. The first four sections of this act are found in Burns' (1961 Supp.), Sections 9-1704a, 9-1706a, 9-2217a and 22-4134. Section 5 of said Act contains a repealing clause and Section 6 an emergency clause. This act is *not* limited to Lake County in its application.

The Acts of 1951, Ch. 238, *supra*, is the only act referred to in your letter wherein specific mention is made to "Dr. Norman M. Beatty Memorial Hospital." The first three sections of the act as found in Burns' 9-1704a, 9-1706a and 9-2217a, *supra*, pertain to insanity in criminal cases only. I have been advised by the Commissioner of Mental Health that: "These cases are relatively infrequent, are rapidly admitted to the Maximum Security Division and have to do only with the criminally insane." Section 4 of the Act as found in Burns' 22-4134, *supra*, provides for the temporary admission to Dr. Norman M. Beatty Memorial Hospital, for persons believed to be mentally ill and who, because of such illness, should not be allowed to go unrestrained. This section provides, in part, as follows:

"\* \* \* The superintendent of Dr. Norman M. Beatty Memorial Hospital *may* accept such person for admission to the hospital for a period of observation not to exceed fifteen [15] days \* \* \*." (Our emphasis)

Your second question is directed to the Mental Health Act of 1957, which is the Acts of 1957, Ch. 359, as found in Burns' (1961 Supp.), Sections 22-4701 *et seq.* There are four sections in said act which are in point in a consideration of your question. These are Sections 702, 703, 709 and 710, as found in Burns' (1961 Supp.), Sections 22-4721, 22-4722, 22-4728 and 22-4729, respectively. These sections read, in part, as follows:

22-4721. "If any person is found to be mentally ill and is committed to a psychiatric hospital, the clerk of the circuit court of the county in which the proceedings were held *shall consult with the attending physician in determining the method of taking care of such mentally ill person pending his admission to the psychiatric hospital to which he*

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*has been committed. If all things necessary for the comfort and proper care of such mentally ill person be not otherwise provided by the relatives or friends or from the estate of such mentally ill person, if any there be, it shall be the duty of the clerk of the circuit court to furnish them, \* \* \*. Under no circumstances shall any mentally ill person be confined in the county jail, unless he is found to be dangerous and violent, and then only on order of the judge of the court."* (Our emphasis)

22-4722. "If, at or subsequent to the time of filing the statement provided for in section 502 of this act, a complaint, on oath, shall be made before the judge of the circuit or superior court, by whom hearing was held, that the person alleged to be mentally ill *will be dangerous to the community* if suffered to remain at large, such judge shall issue a warrant to the sheriff of the county, commanding him to apprehend forthwith \* \* \*. As soon as such person so alleged to be mentally ill is brought before such judge, the judge shall subject such person to a preliminary examination, *and if, upon examination of such person, it shall appear to the judge that there is danger to the community in permitting such person to remain at large, the judge shall make such order [for] the safekeeping of such person, pending admission to a psychiatric hospital if temporary commitment is ordered, or pending the trial if regular commitment proceedings are to be held, as hereinbefore provided, either by commitment to the county jail, or to some suitable place of detention as the judge may determine and order \* \* \*."* (Our emphasis)

22-4728. "Any judge of a circuit or superior court, having jurisdiction under the laws of this state to commit persons to any psychiatric hospital of this state, *may order the temporary placement of any such person so committed in the county home*

*of the county in which such judge presides, pending the admission of such person to the psychiatric hospital to which he was committed, subject to the following conditions.*

“(1) In the event admittance to said hospital is denied or is delayed because of lack of facilities to care for such person in such hospital; and

“(2) In the event the judge is of the opinion that the conditions and facilities of such county home are adequate to care for and maintain such person pending his admission to such hospital.

“\* \* \* *Provided, That no person be retained in a county home, pending his admission to a psychiatric hospital, for a period in excess of thirty [30] days, without a further order of the court.*” (Our emphasis)

22-4729. “*No person, committed by a court to a psychiatric hospital, shall be confined in a county or city jail or lock-up unless the mental condition of such person either at the time of his commitment, or at a later time pending his admission to a psychiatric hospital, is such, that in the opinion of the court it might cause such person to perform acts harmful to his own life or to the life of others. If the committing court is of the opinion that, for the best interests of the person and the protection of other persons it is necessary that such person be confined in a county or city jail or lock-up, he can order the placement of such person into the custody of the sheriff of said county until he is admitted to the psychiatric hospital to which he was committed \* \* \*.*” (Our emphasis)

In a determination of the legislative intent expressed in the sections of the Acts of 1957, Ch. 359, *supra*, it should first be noted that, in 2 R. S. 1852, Ch. 17, Sec. 1, as found in Burns' (1946 Repl.), Section 1-201, it is stated, in part, as follows:

“The construction of all statutes of this state shall be by the following rules, unless such construction be

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plainly repugnant to the intent of the legislature or of the context of the same statute:

“First. Words and phrases shall be taken in their plain, ordinary and usual, sense. \* \* \*”

The Supreme Court in the case of Board of Commissioners of County of Marion v. Board of School Commissioners of City of Indianapolis (1960), — Ind. —, 166 N. E. (2d) 880, 884, stated, in part, as follows:

“There are many principles of statutory interpretation stated in the opinions of our courts. The one principle which we believe should be considered before any others may be resorted to, however, is that a statute which is clear and unambiguous must be given its apparent or obvious meaning. *Cheney v. State ex rel. Risk*, 1905, 165 Ind. 121, 74 N. E. 892; *Reome v. Edwards*, 1948, 226 Ind. 229, 79 N. E. 2d 389. Where there are such statutes, the courts have no power to supply supposed defects or omissions, or to resort to construction for the purpose of limiting or extending its operation. *Taelman v. Board of Finance of School City of South Bend*, 1937, 212 Ind. 26, 6 N. E. 2d 557 \* \* \*”

See also:

Indiana Law Encyclopedia, Vol. 26, Statutes, § 116;

Sutherland, Statutory Construction, 3rd Ed., Vol. 2, Sec. 4502;

1953 O. A. G., pages 81, 84, No. 17.

In Indiana Law Encyclopedia, Vol. 26, Statutes § 135, it is said: “Whether a statute is mandatory or directory depends upon the legislative intent as revealed by an examination of the whole act.” In the case of *Blackburn et al. v. Koehler, etc.*, (1957), 127 Ind. App. 397, 399, 140 N. E. (2d) 763, the Court said, in part:

“\* \* \* As a general rule of statutory interpretation, the presumption is that the word, ‘shall’, as used in any given law, is to be construed in an imperative

sense, rather than directory, and this presumption will control, unless it appears clearly from the context, or from the manifest purpose of the Act as a whole that the Legislature intended in the particular instance that a different construction should be given to the word \* \* \*.”

It is also interesting to note the language used in *The Board of Commissioners of Vigo County v. Davis et al.* (1893), 136 Ind. 503, 507, 36 N. E. 141, wherein it is said:

“\* \* \* The word *may* has, in some instances, been construed as the equivalent of the word *shall*, but in no instance, to which our attention has been called, where it was evident that the act, from other points of view, conferred discretionary powers, nor where it was not evident from the whole act, that the legislative direction was mandatory \* \* \*.”

My examination of the Acts of 1957, Ch. 359, *supra*, including the particular sections set forth herein, namely, Burns' 22-4721, 22-4722, 22-4728 and 22-4729, *supra*, indicates that the statute is clear and unambiguous.

In conclusion, therefore, it is my opinion that Ch. 311 of the Acts of 1951, *supra*, no longer has application to Lake County because of the limited population classification in that act and the increase in population of Lake County as shown by the 1960 United States census; that Ch. 238 of the Acts of 1951, *supra*, still has application and that the following officials, in all counties, are mandated by the provisions of Ch. 359, Acts of 1957, *supra*, as follows:

*The Clerk of the Circuit Court:*

- A. After the person is found to be mentally ill, and
- B. After the person has been committed to a psychiatric hospital,
- C. The Clerk must consult with the attending physician as to the care of the person pending his admission;
- D. And if all things necessary for the comfort and proper care of the person are not otherwise pro-

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vided by relatives or friends or estate of the mentally ill person,

E. The Clerk must furnish them.

*The Judge of the Circuit or Superior Court:*

If it appears upon the examination of such person that there is danger to the community in permitting such person to remain at large, the Judge must make an order for safekeeping of the person, either by commitment to the county jail or some other place of detention determined by the Judge.

(The Judge *may* order the person confined in the county or city jail or lock-up if the Judge believes that his mental condition might cause him to perform acts harmful to his own life or to the life of others; and the Judge *may* order the person temporarily placed in the county home, pending admission to the psychiatric hospital, but such temporary placement cannot exceed thirty (30) days without further order of the court.)

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### OFFICIAL OPINION NO. 39

August 17, 1961

Mr. Mark D. Miltenberger, Chairman  
Indiana Real Estate Commission  
1022 State Office Building  
100 N. Senate Avenue  
Indianapolis, Indiana

Dear Mr. Miltenberger:

This is in answer to your request for an Official Opinion concerning the Acts of 1949, Ch. 44, and particularly the provisions thereof concerning the licensing of real estate brokers and salesmen. As stated in your letter, the question is as follows:

“Basically the question concerned is whether a non-licensed person can sell such real estate located outside of the State of Indiana to Indiana residents, and a broker licensed in Indiana can employ non-licensed