

February 14, 2000

OPINION NO. 2000-005

The Honorable William F. Schenck  
Greene County Prosecuting Attorney  
45 N. Detroit Street  
Xenia, Ohio 45385

Dear Prosecutor Schenck:

You have requested an opinion concerning the appointment of a deputy sheriff to the juvenile division of the court of common pleas for Greene County.<sup>1</sup> As explained in your letter:

The juvenile court and the common pleas court are located in two different facilities.<sup>2</sup> Currently, there is a Criminal Bailiff appointed to the general common pleas court under O.R.C. Section 2301.12. There is also a Chief Court Constable appointed to the juvenile court building.

When determining the law enforcement powers of the Chief Court Constable appointed to the juvenile court, the question arose whether he

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<sup>1</sup> R.C. 2301.03(O)(2) provides that one of the judges of the court of common pleas for Greene County is to be elected and designated as judge of the court of common pleas, juvenile division, and vested with the powers and jurisdiction conferred by R.C. Chapter 2151. *See generally* R.C. 2151.011(A)(1) (as used in the Revised Code, “[j]uvenile court’ means the division of the court of common pleas or a juvenile court separately and independently created having jurisdiction under [R.C. Chapter 2151]”); R.C. 2151.07 (“[t]he juvenile court is a court of record and within the division of domestic relations or probate of the court of common pleas, except that the juvenile courts of Cuyahoga county and Hamilton county shall be separate divisions of the court of common pleas”); 1995 Op. Att’y Gen. No. 95-013 (a judge of the juvenile division of a court of common pleas is a judge of the court of common pleas).

<sup>2</sup> R.C. 2151.09 authorizes a board of county commissioners to “provide by purchase, lease, or otherwise a separate building and site to be known as ‘the juvenile court.’”

automatically becomes a deputy sheriff upon appointment based upon O.R.C. Section 2301.12 and [1984 Op. Att’y Gen. No. 84-008].<sup>3</sup> Since there is already a Criminal Bailiff appointed to the common pleas courthouse, can there also be a Chief Court Constable appointed to the juvenile courthouse with the powers of a deputy sheriff as well? (Footnotes added.)

Various statutes authorize a court of common pleas to appoint court personnel. *See, e.g.*, R.C. 2151.13; R.C. 2301.12; R.C. 2301.17; R.C. 2301.18; R.C. 2301.19; R.C. 2301.27; R.C. 2701.07; *see also* 1989 Op. Att’y Gen. No. 89-029 (a court of common pleas has the inherent power to hire and employ such personnel as the proper and efficient administration of justice requires). However, as stated in 1984 Op. Att’y Gen. No. 84-008 at 2-22: “The authority of a court of common pleas to appoint deputy sheriffs is very limited.” *See generally* 1987 Op. Att’y Gen. No. 87-063 at 2-390 (“[p]ast Attorneys General have consistently found the powers of courts of common pleas with regard to the employment of court personnel to be limited to those granted by statute”); 1938 Op. Att’y Gen. No. 2308, vol. II, p. 821, at 824 (judges of a court of common pleas “when acting in a judicial capacity have some inherent power, but when acting in an administrative capacity they are pure creatures of the statute, having such power as is expressly delegated by the General Assembly together with such implied power as is necessary to carry into effect the power expressly delegated”). In this regard, R.C. 2301.12 provides as follows:

The court of common pleas of a county may appoint:

....

(B) A criminal bailiff, who shall be a deputy sheriff and hold his position at the will of such court....

(C) In counties where there are four or more judges of the court of common pleas, the judges of such court in joint session shall, instead of a criminal bailiff as provided in division (B), appoint a chief court constable.... Said chief court constable, who shall be a deputy sheriff, shall perform all the duties and

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<sup>3</sup> 1984 Op. Att’y Gen. No. 84-008 at 2-22 and 2-23 examined R.C. 2301.12, and stated that, “pursuant to R.C. 2301.12(B) and (C), a court of common pleas may appoint either a criminal bailiff or a chief court constable and upon such appointment the appointee automatically becomes a deputy sheriff.” *Accord* 1931 Op. Att’y Gen. No. 2959, vol. I, p. 261; 1917 Op. Att’y Gen. No. 367, vol. I, p. 984. *See generally* R.C. 145.01(AA) (as used in R.C. Chapter 145 (public employees retirement system), “[d]eputy sheriff” means ... any person deputized by the sheriff of any county and employed pursuant to [R.C. 2301.12] as a criminal bailiff or court constable who has received a certificate attesting to the person’s satisfactory completion of the peace officer training school as required by [R.C. 109.77] and whose primary duties are to preserve the peace, protect life and property, and enforce the laws of this state”).

give a bond required to be performed and given by a criminal bailiff, and perform such other duties as the court directs.

The plain language of R.C. 2301.12(B) unequivocally provides that a court of common pleas may appoint a criminal bailiff who upon appointment becomes a deputy sheriff. 1984 Op. Att’y Gen. No. 84-008 at 2-23; 1931 Op. Att’y Gen. No. 2959, vol. I, p. 261; 1917 Op. Att’y Gen. No. 367, vol. I, p. 984; *see also* R.C. 2301.15 (duties of criminal bailiff). However, pursuant to R.C. 2301.12(C), if a court of common pleas has more than three judges, the court “shall, instead of a criminal bailiff as provided in [R.C. 2301.12(B)], appoint a chief court constable,” who upon appointment becomes a deputy sheriff. (Emphasis added.) 1984 Op. Att’y Gen. No. 84-008 at 2-23.

It is an established rule of statutory construction that the word “shall” is to be given its common, ordinary meaning, unless the context of a statute clearly conveys a contrary intention. *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d 31, 34, 372 N.E.2d 339, 341 (1978); *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834, 837 (1971). *See generally* R.C. 1.42 (words and phrases shall be construed according to the rules of grammar and common usage). As stated in *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d at 107-08, 271 N.E.2d at 837-38:

The statutory use of the word “may” is generally construed to make the provision in which it is contained optional, permissive, or discretionary, at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation.

The word “shall” is usually interpreted to make the provision in which it is contained mandatory, especially if frequently repeated.

Ordinarily, the words “shall” and “may,” when used in statutes, are not used interchangeably or synonymously.

However, in order to serve the basic aim of construction of a statute—to arrive at and give effect to the intent of the General Assembly—it is sometimes necessary to give to the words “may” and “shall” as used in a statute, meanings different from those given them in ordinary usage, and one may be construed to have the meaning of the other.

But when this construction is necessary, the intention of the General Assembly that they shall be so construed must clearly appear from a general view of the statute under consideration, as where the manifest sense and intent of the statute require the one to be substituted for the other. (Citations omitted.)

Nothing in R.C. 2301.12(C) indicates an intention by the General Assembly to make the provisions contained therein permissive or discretionary, rather than mandatory. To the contrary, it appears that the term “shall,” as used in R.C. 2301.12(C), is to be accorded its common, ordinary meaning.

An examination of R.C. 2301.12 discloses that the General Assembly used both “shall” and “may” when providing for the appointment of criminal bailiffs and chief court constables. The proximity of these terms within R.C. 2301.12 raises a presumption that these terms are to be accorded their common, ordinary meanings. *See Siegel v. Thoman*, 156 U.S. 353, 360 (1895); *Federal Land Bank of Springfield v. Hansen*, 113 F.2d 82, 84 (2nd Cir. 1940); *United States v. Tapor-Ideal Dairy Co.*, 175 F. Supp. 678, 682 (N.D. Ohio 1959), *aff’d*, 283 F.2d 869 (6th Cir. 1960); 1999 Op. Att’y Gen. No. 99-038 at 2-242. In addition, since it is presumed that the General Assembly uses words in a statutory scheme advisedly, *see Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370, 374 (1948), the use of both of these terms in the same statute indicates further that these terms are to be construed according to the rules of common usage.

As stated above, the word “shall” makes the provision in which it is used mandatory. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d at 107-08, 271 N.E.2d at 837-38. Therefore, R.C. 2301.12(C) requires a court of common pleas that has four or more judges to appoint a chief court constable, “instead of a criminal bailiff as provided in [R.C. 2301.12(B)].”

Reading the provisions of R.C. 2301.12(B) and (C) together, it is further evident that the General Assembly did not intend for a court of common pleas to appoint both a criminal bailiff and a chief court constable. *See generally State v. Parks*, 13 Ohio App. 3d 85, 86, 468 N.E.2d 104, 107 (Franklin County 1983) (sections of a statute that relate to the same subject are to be construed together so as to give full force and effect to the legislative intent). R.C. 2301.12(B) provides that a court of common pleas may appoint a criminal bailiff, while R.C. 2301.12(C) states that, if a court of common pleas has four or more judges, the court “shall, *instead of a criminal bailiff as provided in [R.C. 2301.12(B)],* appoint a chief court constable.” (Emphasis added.)

The term “instead” is defined in *Webster’s New World Dictionary* 730 (2nd college ed. 1986) as follows: “in place of the person or thing mentioned: as an alternative or substitute ... —**instead of** in place of.” The use of the term “instead” in R.C. 2301.12(C) clearly indicates that, in a court of common pleas that has four or more judges, the position of chief court constable replaces the position of criminal bailiff. A court of common pleas thus may not appoint both a criminal bailiff pursuant to R.C. 2301.12(B) and a chief court constable pursuant to R.C. 2301.12(C). *See generally* 1957 Op. Att’y Gen. No. 188, p. 54 (syllabus) (“[s]ection 2301.12, Revised Code, provides for the compensation and appointment by the common pleas court of only one regular criminal bailiff, and such court is without authority under that section to appoint two such bailiffs and to divide such compensation between them”). Accordingly, pursuant to R.C. 2301.12(C), a court of common pleas that has four or more judges is required to appoint, in lieu of a criminal bailiff, a chief court constable, who upon appointment becomes a deputy sheriff.

With respect to your specific question, although the juvenile court for Greene County is not located in the same building as the general division of the court of common pleas for Greene

County, *see* note two, *infra*, the juvenile court remains a division of the court of common pleas for Greene County, *see* R.C. 2301.03(O)(2). Consequently, the authority of the juvenile division of the court of common pleas for Greene County to appoint deputy sheriffs is limited to that which is set forth in R.C. 2301.12. *See* 1984 Op. Att’y Gen. No. 84-008 at 2-22.

Because the court of common pleas for Greene County has four judges, R.C. 2301.02(B), the appointment of deputy sheriffs by the court is governed by R.C. 2301.12(C). As explained previously, pursuant to this division, a court of common pleas that has four or more judges may only appoint one chief court constable, who upon appointment becomes a deputy sheriff.

Thus, in light of the foregoing, it is my opinion, and you are hereby advised that the court of common pleas for Greene County may not appoint a criminal bailiff, who upon appointment becomes a deputy sheriff, for its general division, and a chief court constable, who upon appointment becomes a deputy sheriff, for its juvenile division. The court may appoint only one chief court constable for the entire court, who upon appointment becomes a deputy sheriff.

Respectfully,

BETTY D. MONTGOMERY  
Attorney General

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The Honorable William F. Schenck  
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SYLLABUS:

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