

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

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IN REPLY REFER TO:

August 13, 2002

OPINION OF THE CORPORATION COUNSEL

SUBJECT: Whether an Agency Other than OCC May
Make Final Decisions Regarding the Filing
Of Petitions in Abuse and Neglect Cases

The purpose of this opinion is to consider whether any statutory requirement or ethical rule would be violated if a government employee or official other than an attorney employed by the Office of the Corporation Counsel ("OCC") makes the final decision regarding the filing and dismissing of petitions in abuse and neglect cases under D.C. Official Code §§ 16-2301 *et seq.* In considering this issue, we reviewed the Consent Order, filed October 23, 2000, in *LaShawn v. Williams*, C.A. No. 89-1754 (D.D.C.), the Modified Final Order, dated November 18, 1993 and filed in the same case, and the relevant statutory provisions.

SUMMARY

For the reasons described below, we conclude that the Corporation Counsel is not vested by statute with the exclusive decision-making authority for filing and dismissal decisions based on grounds other than sufficiency of the evidence, or for other decisions relating to the abuse and neglect proceeding that do not raise purely legal issues. However, under D.C. Official Code § 16-2305(c), the Corporation Counsel is vested with the exclusive authority to make the final decisions with respect to the filing and dismissal of abuse and neglect petitions where this decision is based on a good faith belief regarding the sufficiency of the evidence.

ANALYSIS

D.C. Official Code § 16-2305(c) expressly recognizes that there may be circumstances where the Director of the Child and Family Services Agency ("CFSA") may reach a conclusion contrary to the Corporation Counsel with respect to the filing of a neglect petition. Significantly, this provision specifically grants the Corporation Counsel the authority to make the final decision regarding the filing of this petition. It provides that:

[e]ach petition shall be prepared by the Corporation Counsel after an inquiry into the facts and a determination of the legal basis for the petition. If the Director of Social Services has refused to recommend the filing of a delinquency petition, or the Director of the [Child and Family Services Agency] has refused to recommend the filing of a neglect petition, the Corporation Counsel, on request of the complainant, shall review the facts presented and shall prepare and file a petition if he believes such action is necessary to protect the community or the interests of the child. Any decision of the Corporation Counsel on whether to file a petition shall be final.

The scope of this statutory provision was at issue in *In re J.J.Z.*, 630 A.2d 186, 191 (D.C. 1993), *cert. denied*, 511 U.S. 1072 (1994). In this case, which was a consolidated appeal of two different cases, the Corporation Counsel filed neglect petitions for several minor children, but moved to dismiss the petitions in one of the cases pretrial based upon its good faith determination that its proof was insufficient to sustain the charges. The guardian *ad litem* opposed this motion, contending in part that both the court and the guardian *ad litem* have a *parens patriae* responsibility to ascertain and act in the best interest of the children in spite of the government's decision not to proceed.

The D.C. Court of Appeals ruled that the statutory scheme, as reflected in D.C. Official Code §§ 16-2305(c), "clearly shows that at least the initial decision to file neglect petition rests exclusively with the District through its Corporation Counsel, who has wide discretion in making that determination..." *Id.* at 191. The court noted that "[t]he extent to which others may participate in initiating [a neglect petition] is specified and limited by statute."¹ *Id.* at 190. The court also ruled that:

the prosecutorial function explicitly reserved to the Corporation Counsel by statute, supports the implicit, concomitant authority of the designated governmental official to exercise discretion in determining prior to trial whether to proceed with any petition which he deems to be unsupportable.

Id. at 192. The court further noted that "the Rules of Professional Responsibility preclude an attorney from knowingly advancing a claim unsupportable by existing law, absent a good faith argument for its extension, modification, or reversal."² *Id.* at 193. Finally, the court observed that:

¹ The abuse and neglect statute was amended recently to create a statutory role for the Director of the Child and Family Services Agency in conducting the preliminary inquiry into a complaint alleging neglect and in deciding whether the best interests of the child or the public require that a petition be filed. See § 3(a)(2) and (3) of D.C. Law 13-277, effective April 4, 2001, the "Child and Family Services Agency Establishment Amendment Act of 2000". Significantly, the statute retains the final decision-making role of the Corporation Counsel with respect to the filing of neglect petitions.

² The court cited Rule 3.1 of the D.C. Rules of Professional Conduct ("RPC"), which states in part:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law....

It also cited DR 7-102(A)(2), now codified as Rule 1.3(a) of the RPC, which states that "[a] lawyer shall represent a client zealously and diligently within the bounds of the law."

[i]n neglect proceedings, both the court and the Corporation Counsel have a *parens patriae* role which requires each to act to assure the best interest of the minor child at every stage of the proceeding.³

Id. at 194. Based on the foregoing, the court concluded that the Corporation Counsel's motion to dismiss must be granted even over the objection of the guardian *ad litem* where the motion is "based on insufficient evidence" and "in the absence of an objection based on a lack of good faith." *Id.* at 193.

In the second case that was part of the appeal in *J.J.Z.*, *supra*, the Corporation Counsel had moved the trial court to dismiss the petitions, not based upon a good faith belief that the evidence was insufficient, but due to a belief that the parent had been rehabilitated subsequent to the filing of the petition. The D.C. Court of Appeals ruled that in this case the trial court must not defer to Corporation Counsel's prosecutorial discretion, but must make an appropriate inquiry, including an evidentiary one if necessary, to determine whether the best interests of the child will be served by dismissal. *Id.* at 187. Thus, for decisions not based on the sufficiency of the evidence, the Corporation Counsel is not vested by statute with exclusive decision-making authority.

In light of the above, I conclude that it would violate the present statutory scheme if a government official or employee other than an attorney employed by the Corporation Counsel makes the final decision with respect to the filing and dismissal of neglect petitions where the attorney's decision is based on a good faith belief regarding the sufficiency of the evidence. In making these decisions, the attorney in OCC must make "an inquiry into the facts and a determination of the legal basis for the petition", including whether the filing of the petition is "necessary to protect...the best interests of the child." See D.C. Official Code § 16-2305(c). The attorneys in OCC shall be guided in making these decisions by the relevant caselaw and the protocols developed by OCC for the preparation of the petitions.

For filing and dismissal decisions based on other grounds, or for other decisions relating to the neglect proceeding that do not raise purely legal issues, it would not violate any statutory requirement for a government official or employee other than an attorney employed by OCC to make these decisions.⁴ If it is necessary to advocate these latter decisions in court, the attorney in

³ This language suggests that the Corporation Counsel is acting in a broader role in neglect proceedings than in other matters where the attorney is representing the interests of a government agency or employee only, making the issue of exactly who the government lawyer is representing in these cases less than clear. The D.C. Rules of Professional Conduct do not specifically address to whom the lawyer's responsibilities are directed in this unique role. In comment 7 to Rule 1.13 of the RPC, which identifies who the lawyer represents when employed or retained by an organization, the D.C. Bar observed that "[b]ecause the government agency which employs the government lawyer is the lawyer's client, the lawyer represents the agency acting through its duly authorized constituents". The attorneys responsible for filing and prosecuting neglect petitions are employed by the Office of the Corporation Counsel and, thus, this rule sheds no further light on the issue. If there is a disagreement between the attorneys and the staff of the Child and Family Services Agency with respect to any decision relating to an abuse and neglect case, the Corporation Counsel and the Child and Family Services Agency have agreed to a dispute resolution process that shall be followed to resolve any disagreements between the staff of the respective agencies.

⁴ To the extent that any of these latter decisions require an expert opinion, the attorney would not be able to make the decision without such opinion.

OCC would be restrained only by the Rules of Professional Conduct, which preclude an attorney from knowingly advancing a claim unsupported by existing law absent a good faith argument for its extension, modification, or reversal.



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(AL-01-750; MID 43943)