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Ruth Ann Panepinto, Ph.D.
Secretary
Department of Health and Human Resources
Building 3, Room 206
Capitol Complex
Charleston, West Virginia 25305-0500

Dear Dr. Panepinto:

We are responding to your request for an opinion "as to whether the Child Advocate Office must execute a \$100.00 bond before the clerk of the court at the time it files a complaint against a nonresident, pursuant to West Virginia Code § 56-3-33." Our opinion is that the Child Advocate Office is not required to post such a nonresident bond.

We observe that the question presented comes to us in the abstract. Inasmuch as we render opinions in the abstract without memoranda or argument representing diverse points of view, we are constrained to approach matters conservatively. Courts may construe facts and argument differently and apply them to the law in a fashion not contemplated by an abstract opinion. Unless and until that occurs, however, our formal opinion has the force and effect of law. Our reasoning with respect to this matter follows.

West Virginia Code section 56-3-33(c) provides as follows:

At the time of filing a complaint and before a summons is issued thereon, the plaintiff, or someone for him, shall execute a bond in the sum of one hundred dollars before the clerk of the court, with surety to be approved by said clerk, conditioned that on failure of the plaintiff to prevail in the action or proceeding that he will reimburse the defendant, or cause him to be reimbursed, the necessary taxable costs incurred by him in and about the defense of the action or proceeding in this State, and upon the issuance of a summons, the clerk shall certify thereon that such bond has been given and approved. (Emphasis added.)

The purpose of the statutory nonresident bond requirement is to provide security against the defense of frivolous or vexatious lawsuits. It secures the reimbursement of costs. As applied to agencies of the State of West Virginia, the

nonresident bond requirement must not be read in a vacuum. The law plainly is that unless expressly provided for by statute, costs will not be assessed against the State of West Virginia in a suit in which the State is a party. Rule 54(d) of the West Virginia Rules of Civil Procedure explicitly provides as follows:

Except when express provision therefor is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law. (Emphasis added.)

The Child Advocate Office is an agency of the State. In creating the Child Advocate Office, the Legislature recognized the "paramount interest of the state in the establishment and enforcement of family obligations as a function of the state in protecting the health and welfare" of our citizens and in encouraging and requiring parents to meet the obligation of providing children "with adequate food, shelter, clothing, education, and health and child care." W. Va. Code §§ 48A-3-3a and 48A-1-2 (1992 Repl. Vol.). To meet that paramount interest, the Legislature provided that the State is, "by operation of law, a party in actions and proceedings arising from the rights and obligations of persons involved in family law issues. The Legislature recognizes that the children's advocates, with the duties assigned to them under the provisions of [Chapter 48A], represent the interests of the state in carrying out such duties." W. Va. Code § 48A-3-3a (1992 Repl. Vol.).

A review of the West Virginia Code reveals that there is no provision allowing for attorney fees or costs to be assessed against the Child Advocate Office in the paternity or child support actions it has a statutory responsibility to file. W. Va. Code § 48A-2-2(b) (1992 Repl. Vol.), State ex rel. Division of Human Services, on behalf of Breezy R.M. v. Benjamin P.B., (Slip Op. No. 21605, Oct. 18, 1993).

As an agency of the State, the Child Advocate Office cannot be assessed costs to reimburse the nonresident defendant. Thus, the filing of a bond to secure such costs is of no purpose or value. The nonresident bond requirement must be read in pari materia with Rule 54(d) of the West Virginia Rules of Civil Procedure, which exempts the State, its officers and agencies from paying costs. We therefore conclude that the Child Advocate Office is not required to post the bond prescribed by West Virginia Code § 56-3-33(c).

Thank you for the opportunity to render an opinion on this matter.

Very truly yours,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

By 
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