

Nebraska Ethics Advisory Opinion 02-4

Question Presented--

An employee of the county court and her husband have previously served as foster parents. The employee has now been appointed clerk magistrate of the county court, in a county which does not have a separate juvenile court, and asks the following questions: (1) Is it permissible to provide foster care for children within the judicial district? (2) Is it permissible to provide foster care for children from outside the judicial district? (3) May I provide foster care for a former foster child and adopt that child? (4) May I provide permanent placement in my home for the sibling of my former foster child?

Conclusion

It is axiomatic that the Code of Judicial Conduct controls the professional and personal conduct of a clerk magistrate to the same extent as a judge of the county court. Because a clerk magistrate is authorized to exercise juvenile jurisdiction and to hear cases involving the Department of Health and Human Services, the answer to each of the questions posed must be no. This prohibition would apply regardless of whether compensation is or is not paid for the foster care. Voluntary foster placement by the parent of the child with the clerk magistrate is permissible only if the Department of Health and Human Services is not involved, directly or indirectly, with any placement.

Statement of Facts

An employee of the county court in greater Nebraska, along with that employee's spouse, have served as foster parents for a number of years with the permission of the Court Administrator's Office. The employee has now been promoted to the position of clerk magistrate.

The birth parent of a former foster child has called to advise that her children may be removed from the home. The clerk magistrate wishes to resume foster care for that child, and to adopt that child. The sibling for that former foster child may also be in need of foster placement.

Additionally, the clerk magistrate wishes to continue providing foster care for children from within, as well as from outside, the judicial district.

Because there is no separate juvenile court in the county the clerk magistrate serves, the county court exercises juvenile jurisdiction.

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2B, 3E, 4A, 4D, and "Application of the Code of Judicial Conduct"

References in Addition to Nebraska Code of Judicial Conduct

Neb. Rev. Stat. §§ 24-511 and 24-519 (Reissue 1995) and 43-254 (Cum. Supp. 2000)

Nebraska Ethics Advisory Opinions 96-1, 98-6, and 02-1

In re Interest of R.G., 238 Neb. 405, 470 N.W.2d 780 (1991)

Discussion

The Nebraska Code of Judicial Conduct was amended June 21, 1995, to expressly provide that clerk magistrates shall comply with the Code to the same extent as judges appointed pursuant to the Nebraska Constitution, art. 5, § 21. Prior to that date, the “application” section of the Code excluded clerk magistrates by omission.

The 1990 Model Code of Judicial Conduct drafted by the American Bar Association proposed that the Code of Judicial Conduct apply to “anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as magistrate, court commissioner, special master, or referee.” By accepting the basic premise of the 1990 Model Code that clerk magistrates are judicial officers and not merely administrators or custodians of funds or documents, the Nebraska Supreme Court has clearly established as a matter of judicial policy that clerk magistrates are held to a higher standard than other employees of the county court.

Nebraska Ethics Advisory Opinion 02-1 recently discussed the judicial duties which may be performed by a clerk magistrate pursuant to Neb. Rev. Stat. § 24-519 (Reissue 1995). Those duties include, for purposes of this opinion, determining whether temporary custody of juveniles should be placed with the Department of Health and Human Services. See, Neb. Rev. Stat. § 43-254 (Cum. Supp. 2000); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

Canon 4D provides:

- (1) A judge shall not engage in financial and business dealings that
 - (a) reasonably may be perceived to exploit the judge's judicial position, or
 - (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

According to the commentary under Canon 4D, a judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come before the judge to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification.

Canon 4 is entitled “A Judge Shall So Conduct All Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations,” and provides in part:

- A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not
 - (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
 -
 - (3) interfere with the proper performance of judicial duties.

The committee believes that a bright-line rule applies to the questions presented by the clerk magistrate. The committee recognizes that there is a shortage of foster parents in the State

of Nebraska. The clerk magistrate and her husband are to be commended for the support which they have given to the juvenile court system in the past. Despite this fact, this bright-line rule recognizes that there is an inherent conflict when a clerk magistrate has any type of ongoing extra-judicial relationship in which the Department of Health and Human Services is involved, directly or indirectly.

If a parent wishes to voluntarily place a minor child in the custody of the clerk magistrate, such placement would be permissible if the Department of Health and Human Services is not involved, directly or indirectly, with such placement. However, even if such a placement does not initially involve the Department of Health and Human Services, if the Department of Health and Human Services subsequently becomes involved with such placement, a conflict with the Code would then exist and either the child would be required to be removed from the clerk magistrate's placement or the clerk magistrate could allow the child to remain in the home, but she would have to resign from her position as clerk magistrate.

Disclaimer

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Ethics Advisory Committee.

APPROVED AND ADOPTED
BY THE COMMITTEE ON MARCH 25, 2002

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