

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 01-770

DISQUALIFICATION OF PROBATE JUDGE TO HEAR CASES DUE TO PAST SERVICE AS PARTY'S GUARDIAN OR FEDERAL FIDUCIARY/PAYEE; APPOINTMENT OF FORMER LAW FIRM ASSOCIATE AS GENERAL CONSERVATOR

ISSUES

I. Is a probate judge disqualified to hear a case involving a party where he previously served as the party's guardian or federal fiduciary/payee? **Answer:** The judge should not hear such a case for a period of two years and, in any event, may not hear such a case if it involves a matter previously litigated while he served in either capacity, if he has a personal bias or prejudice, or if he has personal knowledge of disputed evidentiary facts.

II. May a probate judge reappoint as the general conservator for his county an individual who is associated with the law firm of which he was a member before he became the probate judge? **Answer:** Yes.

FACTS

A new probate judge has served in the past as the guardian of certain persons, by appointment of the probate court. Many of these individuals have been patients at Searcy Hospital. In this role as guardian, he did not serve as the protected person's lawyer. His function was to make decisions regarding medical care and treatment when called upon to do so.

The judge also has previously served in a number of cases as a federal fiduciary/payee by designation from the United States Social Security Administration and/or the United States Administration for Veteran Affairs. In this capacity, he received and distributed the funds of the protected persons under the supervision of the Social Security Administration or the Department of Veteran Affairs. In some cases, he provided legal assistance to persons for whom he was serving as fiduciary/payee.

The new judge served as the general conservator for the county for about two-and-a-half years, by appointment by the former probate judge. About two months before the new judge took office, the former probate judge appointed another lawyer to serve as the general conservator. The person the former probate judge appointed is associated with the law firm of which the new probate judge was a member prior to becoming the probate judge. By statute, the term of office of a general conservator ends with the term of the appointing probate judge unless he or she is reappointed. The new probate judge wishes to reappoint the lawyer his predecessor appointed in November.

A statutory scheme provides a list of persons eligible to serve as conservator in an individual case. Typically, family members serve in this position and, generally speaking, the closer the relationship the person has to the person to be protected, the higher priority that person has in terms of being named conservator. By statute, the general conservator is appointed by the probate judge

to serve as the conservator when no other fit person applies for appointment and qualifies.

There is no compensation to a general conservator simply for serving in that position. However, if appointed in an individual case, the general conservator is entitled to a commission for services performed. In the county in question, the amount of the commission has traditionally been determined by applying a formula of 2.5% of the cash assets coming into the estate during the conservator's tenure and 2.5% of the cash disbursements during the conservator's tenure, excluding any transfers between accounts. In addition, the conservator is authorized to hire professionals to perform services on behalf of the protected person and to pay those persons a reasonable amount for services rendered; if the conservator is a lawyer, he can hire himself to provide legal services. In the county in question, there has been an understanding, which the new judge intends to continue, that the rate the general conservator charges for legal services will not exceed \$150 per hour.

Alabama law requires a conservator to submit a partial settlement every three years in a conservatorship case, as well as a final settlement when the conservatorship proceeding terminates. In this process, a complete audit of the conservator's accounts is performed and presented to the probate court for review, with notice to the surety and all interested parties. A guardian ad litem is also appointed to represent the interests of the protected person in the settlement process, during which the probate court will consider and approve or disapprove the conservator's commissions and expenditures. The probate court can order the conservator to reimburse

the estate for the amount of any expenditure it finds to have been improvident. At the time of the final settlement, the probate court can correct any error that is found to have occurred at any time during the conservatorship proceeding.

Before his resignation from his former law firm, the new judge arranged to sever his financial ties with the firm. When he resigned from the firm before taking office, his interest in the firm's 401K retirement plan became fixed. He is not eligible to receive any additional contributions from the law firm, and will be able to receive his interest in the plan on or about April 1, 2001. He had no ongoing financial interest in the firm at the time he took office.

The judge intends to recuse himself from all matters involving his former law firm for a period of one year. By statute, the chief clerk of a probate court may hear uncontested matters. Because there are too many cases in the county for one probate judge to hear, there already is a system in place of attorneys who regularly hear probate cases as special judges.

DISCUSSION

Canon 3C(1) provides, in pertinent part, as follows:

A judge should disqualify himself in a proceeding in which his impartiality... might reasonably be questioned, including but not limited to instances where:

- (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed

evidentiary facts concerning the proceeding;

(b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it; . . .

Under Canon 3C(1)(a), a judge is disqualified to hear any case in which he has an actual personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. This clearly would include cases where the judge has an actual bias or personal knowledge of disputed evidentiary facts arising from prior service as a party's guardian or federal fiduciary/payee.

The Commission has advised that a judge who previously served as a guardian ad litem in the matter in controversy is disqualified under Canon 3C(1)(b). Advisory Opinions 86-270, 86-285 and 87-306. In cases where the judge has previously acted as a lawyer in the matter in controversy, disqualification is required by the express terms of Canon 3C(1)(b). The Supreme Court of Alabama has given the phrase "matter in controversy" a rather broad definition. In *Rushing v. City of Georgiana*, 361 So.2d 11, 12 (1978), the Court held that cases involve the same "matter in controversy" where the same fact, event, course of events, circumstance, situation or question is relevant to both cases.

The Commission is of the opinion that the nature of the fiduciary relationship involved

also requires disqualification of the judge in cases where the matter in controversy was the subject of previous litigation while the judge served as the party's guardian or federal fiduciary/payee, even if the judge did not serve as a lawyer in the previous case. Canon 3C(1) requires disqualification of a judge whenever his impartiality might reasonably be questioned. The test under this canon is: "Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" *In re Sheffield*, 465 So.2d 350, 356 (Ala. 1984). The question under Canon 3C(1) is not whether the judge is impartial in fact, but rather whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994).

In Advisory Opinion 99-740, the Commission concluded under the general provision in Canon 3C(1) that a judge is disqualified from hearing cases in which former clients in unrelated matters appear for a period of two years from the time the representation ceased. The Commission noted that a two-year period is observed in the federal courts under an interpretation of the Code of Conduct for United States Judges, and found that such a period is appropriate under the Alabama Canons of Judicial Ethics. The Commission is of the opinion that the judge in this case is similarly disqualified to hear cases involving parties for whom he previously served as guardian or federal fiduciary/payee, whether or not he actually acted as the party's lawyer, for two years after the fiduciary relationship ceased.

Canon 3B(4) provides that a judge “should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism.” Canon 2A requires a judge to “conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

The new judge has divested himself of all financial interest in his former law firm, and it is the Commission’s understanding that there are no remaining financial obligations between the judge and the firm other than the judge’s already fixed interest in the firm’s 401K plan. The person being considered for appointment as the general conservator had previously been selected to serve in this capacity by the former probate judge, and there is no reason to believe that he is not fully qualified to continue to discharge the responsibilities of the position. Under the facts presented, the Commission finds no conflict between reappointment of this attorney and the provisions of Canons 2A and 3B(4).

The Commission has also considered whether the proposed appointment would cause inappropriate disqualification of the judge to hear cases. In Advisory Opinion 98-707, the Commission advised a judge that the canons prohibited her from hiring as her bailiff the mother-in-law of a local attorney where, under the facts presented, such employment would cause more than occasional disqualification of the judge.

The proposed appointment will cause disqualification of the judge to hear some cases. Under Canon 3C(1)(b), the judge may not hear cases in which the attorney in question served as a lawyer while the judge

practiced law with the same firm. Any such cases related to the general conservator position would only be those which arose during the approximately two-month period that the attorney served as general conservator before the judge resigned from the firm.

The judge has also stated an intention to recuse himself from all cases involving his former firm for a period of one year. While this will result in the judge not hearing cases involving the proposed appointee for this period, this is not expected to cause any disruption in the functioning of the probate court. Uncontested matters may be heard by the chief clerk, and other cases can be handled through the system of special judges already in place to handle the large volume of cases in the county. While not required by the canons, it certainly is in keeping with the spirit and goals of Canons 1 and 2A for a new judge to refrain from hearing cases involving his former firm for a period of time after taking office where this is feasible and consistent with the proper functioning of the court.

REFERENCES

Alabama Advisory Opinions 86-270, 86-285, 87-306, 98-707, and 99-740.

Alabama Canons of Judicial Ethics, Canons 1, 2A, 3B(4), 3C(1), 3C(1)(a), and 3C(1)(b).

Ex parte Duncan, 638 So.2d 1332 (Ala. 1994).

In re Sheffield, 465 So.2d 350 (Ala. 1984).

Rushing v. City of Georgiana, 361 So.2d 11 (1978).

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, 800 South McDonough Street, Suite 201, Montgomery, Alabama 36104; tel.: (334) 242-4089; fax: (334) 240-3327; E-mail: jic@alalinc.net.