

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: MAY 18, 2001

ADVISORY OPINION 01-777

APPOINTMENT OF TEMPORARY PROBATE JUDGES

ISSUES

May a probate judge appoint temporary probate judges to hear cases the judge is disqualified to hear? **Answer:** No.

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. The judge also 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 also served for a period as the general conservator for the county.

In a prior advisory opinion, the judge was advised that the foregoing circumstances caused disqualification to hear certain cases that may come before him. It also found that, while not required by the canons, the judge's intention to refrain from hearing *any* cases

involving his former firm for a one-year period after taking office was in keeping with the spirit and goals of Canons 1 and 2A when doing so was feasible and consistent with the proper functioning of the court.

The appointment of special probate judges in the county is governed by a general bill of local application. Under this Act, the judge may appoint one or more temporary probate judges to serve contemporaneously with him when he finds such appointments necessary due to various circumstances, including caseload management. The Act further provides that the decisions of a temporary judge are not subject to revision by the elected judge, and that the elected judge is not responsible for any acts or decisions by a temporary judge.

The current procedure for dealing with cases in which the elected judge is disqualified or otherwise recused is to assign these cases to a temporary judge. The elected judge appoints temporary judges to assist with caseload pursuant to the local Act. The actual assignment of cases is made by and through the Chief Clerk of the Probate Court or at the Chief Clerk's direction. The Chief Clerk is a permanent civil service employee. Decisions made by temporary judges are not subject to the elected judge's review or supervision.

The Attorney General has issued an opinion that the foregoing appointment of temporary judges by the elected judge does not violate the general laws of the State. The judge inquires whether the Canons of Judicial Ethics

permit him to appoint temporary probate judges who will hear cases the judge is disqualified to hear.

DISCUSSION

In *Ex parte Jim Walter Homes, Inc.*, the Alabama Supreme Court decided that, after a trial judge presiding in a particular case has been disqualified from hearing the case under the Canons of Judicial Ethics, either by voluntary action of the judge or after objection by a party, the judge may not reassign the case to another judge under Rule 13 of the Alabama Rules of Judicial Administration. The Court noted that, under normal circumstances, a presiding judge in a circuit has authority under Rule 13 to temporarily assign other judges to serve in the circuit when the presiding judge deems the assignment necessary to assist in the orderly administration of justice. However, the Court concluded that it would be contrary to Canon 3C for a disqualified judge to reassign the case because the impartiality of the reassignment might reasonably be questioned. The Court stated that its holding was made in order to avoid the appearance of impropriety. *Ex parte Jim Walter Homes, Inc.*, 776 So.2d 76, 78-80 (Ala. 2000).

The inquiring judge is currently recusing himself both from cases in which he is disqualified and from other cases in which his former firm is involved as to which the Canons do not require his disqualification. With regard to the latter cases, the Commission observes that the opinion in *Jim Walter Homes* distinguished prior decisions upholding reassignment by the original judge after recusal when the recusing judge was not

actually disqualified to hear the case. *Id.*, at 79. Thus, the opinion in *Jim Walter Homes* does not appear to cast any doubt on the propriety of the conduct at issue with respect to cases in which the Canons do not require disqualification of the judge. However, the Commission concludes that the judge may not appoint temporary probate judges to hear cases the judge is disqualified to hear.

The correct procedure for appointment of a temporary probate judge when the elected judge is disqualified is a legal question the Commission cannot resolve. However, the Commission notes that subsection (a) of the local Act appears to provide for appointment of temporary probate judges by the presiding judge of the circuit in circumstances that include disqualification of the elected probate judge.

REFERENCES

Alabama Canons of Judicial Ethics, Canon 3C.

Ex parte Jim Walter Homes, Inc., 776 So. 2d 76 (Ala. 2000).

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.