

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 03-815

DISQUALIFICATION WHEN A REFEREE APPOINTED BY THE JUDGE IS AN ATTORNEY IN THE CASE

ISSUE

Is a judge disqualified to hear cases in which a party is represented by an attorney who is a referee appointed by the judge to assist on a regular basis with the judge's child support cases if the opposing parties and their attorneys agree that the judge should hear the case and waive any objections pertaining to the judge's impartiality? **Answer:** Yes.

FACTS

The parties in a pending case were divorced in 1991. During the past ten years, the judge has heard the evidence in numerous Petitions to Modify and Petitions for Rule Nisi as well as other issues involving the parties and has issued numerous associated orders. Through such hearings, the judge has become very familiar with the parties and the case. A petition to correct an earlier judgment was pending when the judge became aware of Advisory Opinion 00-757.

The judge had appointed the attorney for the husband as a referee to hear child support cases. The attorney assists the judge on a regular basis with the judge's child support cases. The current petition to correct judgment does not involve child support. The opposing parties and their attorneys agree that the judge should hear the case and waive any objections pertaining to the judge's impartiality. The husband, who is represented by the attorney who is the referee, does not want the judge to hear the case.

DISCUSSION

A judge is required to disqualify himself in a proceeding in which his "impartiality might reasonably be questioned." Canon 3C(1).

"Recusal is required under Canon 3C(1) when 'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.' *Acromag-Viking v. Blalock*, 420, So.2d 60, 61 (Ala. 1982). See, also, *Wallace [v. Wallace]*, 352 So.2d 1376, 1379, (Ala.Civ.App. 1977)]. Specifically, the Canon 3C(1) test 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?' Thode, *The Code of Judicial Conduct - The First Five Years in the Courts*, 1977 Utah L.Rev. 395, 402."

Matter of Sheffield, 465 So.2d 350, 355-356 (Ala. 1984).

The recusal test stated in Canon 3C(1) sometimes bars trial by a judge who has no actual bias in the case. *Matter of Sheffield*, 465 So.2d at 356. In many circumstances, it will disqualify a judge even if all the parties to the proceeding would consent to the judge hearing the case. This is reflected in Canon 3D, which only permits remittal of disqualification if the disqualification arises under subsection (c) or subsection (d) of Canon 3C(1). The canons are concerned with both the parties to an action and with maintaining confidence in the integrity and

impartiality of the judiciary among the general public. As noted in *Acromag-Viking, supra*, disqualification under Canon 3C(1) includes circumstances in which it is reasonable for members of the public to question the impartiality of the judge.

In Advisory Opinions 99-736, 00-754 and 00-757, the Commission considered questions concerning the propriety under Canon 3C(1) of a judge hearing cases in which a party was represented by an attorney who was a referee appointed by the judge, then assisting the judge on a regular, ongoing basis with other cases over which the judge presided. In Advisory Opinion 99-736, the Commission noted that such a referee stands in a position of close trust with the judge who appointed him, and it concluded that a person of ordinary prudence might reasonably question the judge's impartiality in a case in which such a referee represents a party. In Advisory Opinion 00-754, the Commission noted that, because the referee in question heard cases in a courtroom while wearing a judicial robe, he would appear to the general public to be a judge. It also observed that a referee appointed under Rule 35(C) of the Alabama Rules of Judicial Administration is, by the terms of that rule, a confidential employee of the judge or judges who hear child support cases. In all three cases, the Commission concluded that the judge was disqualified to hear cases in which a party was represented by the referee in question.

Canon 3D provides for the remittal of disqualifications arising under Canon 3C(1)(c) or 3C(1)(d). It requires the written agreement of all parties and their lawyers. Canon 3D does not permit remittal of the disqualification at issue because the disqualification does not arise under subsection (c) or (d) of Canon 3C.

Even if the disqualification had arisen under one of these two subsections, it would not be remitted under the facts presented because one of the parties does not agree that the judge should hear the case.

It is the opinion of the Commission that the judge is disqualified to hear cases in which a party is represented by an attorney who is a referee appointed by the judge then assisting the judge on a regular basis with the judge's child support cases even if the opposing parties and their attorneys agree to the judge hearing the case and would waive any objection to the judge's impartiality.

REFERENCES

Acromag-Viking v. Blalock, 420 So.2d 60 (Ala. 1982).

Alabama Advisory Opinions 99-736, 00-754 and 00-757.

Alabama Canons of Judicial Ethics, Canons 3C(1) and 3D.

Matter of Sheffield, 465 So.2d 350 (Ala. 1984).

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, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: jic@alalinc.net.