JUDICIAL INQUIRY COMMISSION

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DISQUALIFICATION: CONTEMPT CASES ARISING FROM CHILD-SUPPORT LITIGATION IN WHICH JUDGE, WHEN A PROSECUTOR, REPRESENTED DHR

ISSUE

Is a new judge disqualified from presiding in contempt petitions arising from child-support litigation that the judge, when an assistant district attorney, prosecuted on behalf of the Department of Human Resources? **Answer:** Yes.

FACTS

Before becoming the sole district judge in a rural county, the judge was an assistant district attorney (ADA) and represented the Department of Human Resources (DHR) in child-support litigation, including petitions for paternity, support, and contempt. If the judge is disqualified from any litigation arising from the DHR cases he handled when he was an ADA, several hundred cases would have to be reassigned to a judge from another county. The inquiring judge's disqualification would be particularly burdensome because the child-support case files are not electronic and, therefore, not quickly accessible to the assigned judge.

The inquiring judge has no specific recollection of any child-support litigation in which he signed any pleadings. He declares he could put aside his prior ADA involvement in a case and maintain impartiality.

The judge requests advice on the following scenarios arising from his involvement in child-support litigation when he was an ADA:

I. A contempt-for-failure-to-pay petition, signed by an ADA, is assigned to the judge who was the ADA for DHR's petition for paternity and child support involving the same child(ren).

II. A third contempt petition is assigned to the judge who, when an ADA two years earlier, was DHR's attorney for the second contempt petition, but not the attorney for the first contempt petition or the original action.

III. A contempt petition is assigned to the judge who, when an ADA, merely signed a prior contempt petition.

IV. A contempt petition is assigned to the judge who, when an ADA, obtained the original judgment of award of child support, but the pending contempt petition is pursuant to a modification of that original judgment obtained by another ADA one year earlier.

DISCUSSION

Canon 3C(1) provides, in 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 . . . .

The general provision of Canon 3C(1) requires disqualification of a judge whenever his or her impartiality might reasonably be questioned. The 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?" *In re Sheffield*, 465 So. 2d 350, 356 (Ala. 1984). The question 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). Here, the question is whether a reasonable person, knowing the judge had been the attorney representing DHR in prior child-support litigation, finds there is a reasonable basis for questioning the judge's impartiality in presiding in subsequent petitions filed in regard to that same litigation.

The Commission addressed the first scenario in Advisory Opinion 92-460. Noting that a judge is disqualified if the current proceeding in any way involves the matters or facts he or she previously prosecuted as an ADA, the Commission advised:

> [A judge] is not disqualified from presiding over a case involving failure to pay child support where [the judge] previously prosecuted the defendant for the paternity of that same child if the paternity suit and the original child support suit were separate actions. However, if the child support had been awarded in the paternity suit, [the judge] should disqualify . . . from a case involving the failure to pay that child support.

See also Advisory Opinion 95-548 (original divorce or custody proceeding and a subsequent petition are the same proceeding for purpose of disqualification).

In addressing the inquiring judge's four scenarios, the Commission has reexamined its advice in Advisory Opinion 92-460 and stands by that advice. Any assertion that a subsequent contempt-for-failure-to-pay petition is not the same "matter in controversy" as the underlying child-support-award case fails under the Alabama Supreme Court's broad definition of "matter in controversy": actions involve the same "matter in controversy" where the same fact, event, course of events, circumstance, situation, or question is relevant to both cases. *Rushing v. City of Georgiana*, 361 So. 2d 11, 12 (Ala. 1978). *See also* C. Gray, *Ethical Issues for New Judges* 13

(Am. Judicature Society 1996) (the canon's use of "matter," rather than "case," indicates a judge is disqualified not only from the specific case in which he represented a party, but in any case that is in any way related to the former representation). Thus, such disqualification is not limited to situations where the precise case is before the judge. Advisory Opinion 05-854. Rather, it includes cases involving the same matter or arising from the same fact situation and may also include similar or related matters. *Id.* (Thus, it is irrelevant that a subsequent petition or matter is given a new "point designator" in Alacourt or even that it is considered a new case.) In addition, such disqualification includes cases in which the decree of a prior lawsuit in which the judge was an attorney representing a party is being urged upon the court as binding not only as to the legal issues, but also as to the parties or a party in the present action. Advisory Opinion 86-261.

Here, in the inquiring judge's scenarios, the "matter in controversy" in a contempt petition, as in the original award of child support, is the financial support of the child(ren) and the obligor parent's ability to provide that support. *See Suggs v. Suggs*, 54 So. 3d 921, 923-24 (Ala. Civ. App. 2010) (in setting a child-support award, the obligor parent's ability to pay child support is always an underlying factor to consider); Comment, Rule 32, Ala. R. Jud. Admin. ("The guidelines will provide an adequate standard support for children, subject to the ability of their parents to pay . . . ."). Moreover, an element of criminal contempt of a court order is that the obligor parent was subject to a lawful order of reasonable specificity. *Mullins v. Sellers*, 80 So. 3d 935, 942-43 (Ala. Civ. App. 2011).

Advisory Opinion 02-793 is instructive here. There, the Commission advised that a judge is *forever* disqualified from any DHR case involving a child or family with respect to whom the judge, when an attorney representing DHR, had filed a petition regarding matters of dependency, abuse, and neglect—unless the current proceeding *clearly* does not involve the same matter in controversy. Given the broad definition of "matter in controversy," the Commission observed, "Cases such as this are rarely completely unrelated in every respect." *Id.* The same rationale applies in child-support litigation, i.e., rarely, if at all, would any action in child-support litigation involving the same parties be completely unrelated to the prior child-support litigation. *See also* Advisory Opinion 87-306 (a judge is disqualified from a dispositional review of a dependency order because, when an attorney, the judge was the dependent children's guardian ad litem; the matter in controversy in both cases is the same, i.e., the dependency status of the children).

Other state courts and judicial-ethics advisory bodies have also concluded a judge is disqualified from child-support litigation that arises from prior litigation in which the then-attorney-now-judge represented a party. *See State ex rel. Division of Family Services v. Oatsvall*, 612 S.W.2d 447 (Mo. App. 1981); *Hill v. Hill*, 203 Okla. 260, 220 P.2d 450 (1950); *In re D.C., Jr.*, No. 07-09-00320-CV, 2010 WL 3718564 (Tex. App. Sept. 23, 2010); Kansas Supreme Court Judicial Ethics Advisory Panel Opinion JE-69; Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 87-038. *Cf.* Alabama State Bar Opinion 1990-105 (an enforcement-of-child-support action is not just substantially the same matter, but is the same

matter as the underlying divorce action, such that the ex-wife's child-support-action attorney has a conflict of interest if his or her associate represented the ex-husband in the divorce action, thereby creating an appearance of impropriety); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 2005-5 (a divorce and any subsequent post-decree matters—such as a modification of child custody, visitation, child support, or defending or initiating a contempt order to enforce a prior court order—are the same matter; thus, a former-judge-now-attorney may not represent a person in post-decree matters when he or she was the judge in that person's divorce; to accept such employment would give the appearance of impropriety, even if none exists).

Another disqualifying circumstance arises under the inquiring judge's scenarios: Canon 3C(1)(a)'s provision that the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." The judge most likely gained such knowledge while serving as an attorney in a prior, related child-support award, modification, or contempt petition.

A third likely disqualifier is that, even if a judge believes he or she has no bias, the circumstances, including similar or closely related issues and parties, may present the appearance of bias sufficient to cause a reasonable doubt regarding the judge's impartiality. Canon 3C(1); Advisory Opinions 99-727; 93-478. *See also* West Virginia Judicial Investigation Commission August 9, 1994 Opinion (a family-law judge is disqualified from cases he initiated when he was a state child-advocate attorney and all subsequent proceedings involving the same parties and brought by the child-advocate office because the judge's impartiality would be reasonably questioned). In addition, a reasonable question as to the judge's impartiality may arise from the likelihood the judge, when an attorney, advocated certain opinions regarding the same issues and parties currently before the judge, e.g., the award of child support, the enforcement of that order, and the obligor parent's ability and willingness to pay that child support. *See* Delaware Ethics Advisory Committee Opinion JEAC 2002-2; Washington Ethics Advisory Opinion 05-1.

Conclusion

The inquiring judge is disqualified from any petition arising from child-support litigation in which he represented DHR when he was an attorney, i.e., in the original child-support award or any prior contempt proceeding, including having merely signed a prior contempt petition against the obligor parent.[1] As stated in Advisory Opinion 02-793, in advising that a judge is disqualified from cases pertaining to the children and parents with respect to whom the then-attorney-now-judge had filed petitions on DHR's behalf, "[T]o avoid a reasonable question as to his [or her] impartiality, [the judge] should not hear a DHR case if any act, event, circumstance, situation or question in the case is relevant to a case he [or she] prosecuted for DHR before becoming a judge." This prohibition applies regardless of how long ago the representation of the

[1] Regarding this last point, see J. Alfini et al., *Judicial Conduct and Ethics*, § 4.10 (4th ed. 2007) (a judge is disqualified in a case where he or she, when a prosecutor, recorded his or her name on documents of record in the case before the judge even if there is no showing the judge was involved or had knowledge of the case while a prosecutor).

then-attorney-now-judge ended. C. Gray, *supra*, at 13. It also applies in an uncontested matter. Advisory Opinion 95-546. The judge has an affirmative duty to disqualify, and such disqualification is not remittable pursuant to Canon 3D.

Whether the judge has any recollection of the particular case he or she prosecuted is irrelevant to the disqualifying factors applicable here. Likewise inconsequential is the judge's ability or intent to put aside the circumstances and evidence of the prior cases he or she prosecuted. *See In re Sheffield,* 465 So. 2d 350, 357 (Ala. 1984) (the reasonable-person-appearance-of-impropriety test may sometimes disqualify judges who have no actual bias and who would do their very best to be impartial).

Finally, the Commission recognizes disqualification is often problematic for a rural judge. *See* Model Code of Judicial Conduct, Rule 3(E) (Annotation) (1990). Frequent disqualifications can significantly disrupt the calendar of the court and that of the substitute judge. Moreover, proceedings involving children may extend over a lengthy period—all the while the judge is disqualified. Nevertheless, maintaining the appearance of impartiality is critical to "an unimpeachable judicial system in which the public has unwavering confidence." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). As stated in Canon 1, "An independent and honorable judiciary is indispensable to justice in our society." This requires avoiding all appearance of impropriety. Canon 2.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1, 2, 3C(1), 3C(1)(a), 3D

Advisory Opinions 05-854; 02-793; 99-727; 95-548; 95-546; 93-478; 92-460; 87-306; 86-261

Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994)

In re Sheffield, 465 So. 2d 350, 356-357 (Ala. 1984)

Rushing v. City of Georgiana, 361 So. 2d 11, 12 (Ala. 1978)

Mullins v. Sellers, 80 So. 3d 935, 942-43 (Ala. Civ. App. 2011)

Suggs v. Suggs, 54 So. 3d 921, 923-24 (Ala. Civ. App. 2010)

Comment, Rule 32, Ala. R. Jud. Admin.

Alabama State Bar Opinion 1990-105

Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980)

State ex rel. Division of Family Services v. Oatsvall, 612 S.W.2d 447 (Mo. App. 1981)

Hill v. Hill, 203 Okla. 260, 220 P.2d 450 (1950)

In re D.C., Jr., No. 07-09-00320-CV, 2010 WL 3718564 (Tex. App. Sept. 23, 2010)

Delaware Ethics Advisory Committee Opinion JEAC 2002-2

Kansas Supreme Court Judicial Ethics Advisory Panel Opinion JE-69;

Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinions 2005-5; 87-038

Washington Ethics Advisory Opinion 05-1

West Virginia Judicial Investigation Commission August 9, 1994 Opinion

Model Code of Judicial Conduct, Rule 3(E) (Annotation) (1990)

C. Gray, *Ethical Issues for New Judges* 13 (Am. Judicature Society 1996)

J. Alfini et al., *Judicial Conduct and Ethics*, § 4.10 (4th ed. 2007)

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 18 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.