

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 18-943

DISQUALIFICATION: PROBATE JUDGE HEARING GUARDIANSHIP PETITION OF PARENT OF COURT'S CHIEF CLERK

ISSUE

May the probate judge preside in the petition for guardianship of a parent of the probate court's chief clerk?

FACTS

A guardianship petition has been filed for a parent of the probate court's chief clerk. The judge has granted emergency guardianship to the chief clerk's other parent, the only other relative.

DISCUSSION

The following Alabama Canons of Judicial Ethics apply:

- Canon 1 A judge should uphold the integrity and independence of the judiciary.
- Canon 2 A judge should avoid impropriety and the appearance of impropriety in all his/her activities.
- Canon 2A A judge . . . should conduct him/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- Canon 2C A judge should not allow his/her family, social, political, or other relationships to influence his/her judicial conduct or judgment.
- Canon 3 A judge should perform the duties of his office impartially and diligently.
- Canon 3C (1) A judge should disqualify him/herself in a proceeding in which his/her disqualification is required by law or his/her impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) He/she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

The test under the general disqualification of Canon 3C(1) 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). This test sometimes bars a judge who has no actual bias in the case. Matter of Sheffield, 465 So. 2d at 356.

In Advisory Opinion 98-701, the Commission advised that the mere fact a party is employed within the court does not cause disqualification. However, it continued, “Special circumstances may exist which cause disqualification. Such circumstances include, but are not limited to, social, financial, ‘non-judicial,’ or extraordinary relationship between the party and the judge, and the nature of the particular case or its potential impact on future working relations among court personnel.”

Thus, the question is whether any special factor exists here that creates a reasonable question as to the judge's impartiality. Pursuant to § 12-13-40(4), Code of Alabama (2012), the probate judge employs at his/her expense a chief clerk for whose official acts the judge shall be responsible. This constitutes a special factor that causes the judge's disqualification. Advisory Opinion 98-684 (a circumstance that creates an appearance of impropriety is the fact that the judge is responsible for the employee's appointment). See also Advisory Opinions 03-815 (a judge is disqualified where a party is represented by an attorney who is a referee appointed by the judge to assist on a regular basis—even if the parties and their attorneys agree to waive any objection to the judge's impartiality); 99-736 (a referee, appointed by the judge, stands in a position of close trust with the judge, and a person of ordinary prudence might reasonably question the judge's impartiality in a case in which the referee represents a party).

Of course, a judge also is disqualified under Canon 3C(1)(a) if he/she has a personal bias or prejudice as a result of association with a litigant such that the judge doubts his/her ability to impartially decide the case, or if the judge has personal knowledge of disputed evidentiary facts.

The disqualifications discussed here are not subject to remittal, i.e., they cannot be waived by the parties and their attorneys. See Canon 3D.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1; 2; 2A; 2C; 3; 3C; 3C(1); 3C(1)(a); and 3D.

Alabama Advisory Opinions 03-815; 99-736; 98-701; and 98-684.

§ 12-13-40(4), Ala. Code (2012)

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

In re Sheffield, 465 So. 2d 350, 356 (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 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.