

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 00-764

DISQUALIFICATION WHEN A RELATIVE OF A COURT REPORTER IS A PARTY; IN A SUIT INVOLVING A TRUST WHEN THE JUDGE IS A MEMBER OF A PAST BENEFICIARY'S ADVISORY COMMITTEE AND A FORMER MEMBER OF THE BOARD OF ANOTHER PAST BENEFICIARY; DUE TO RULINGS IN A PREVIOUS SUIT INVOLVING THE SAME TRUST; AND/OR DUE TO CAMPAIGN CONTRIBUTIONS BY COUNSEL

ISSUES

Is a judge disqualified to hear a tort action against the trustees of a testamentary trust asserting conversion of funds that should have been used for charitable purposes because:

1. One of the defendants/trustees is a daughter-in-law of the judge's former court reporter? **Answer:** Unless the judge has a personal bias or prejudice or personal knowledge of disputed evidentiary facts as a result, the facts presented do not cause disqualification of the judge.
2. The judge is a member of an advisory committee to a community college that has received funds from the trust? **Answer:** The judge is disqualified due to an appearance of impropriety if the college is a member of the charitable class or if the college is likely to be affected by the outcome of the case; resignation from the committee would not remove this disqualification.
3. The judge is a former member of the board of directors of a YMCA that has

received funds from the trust? **Answer:** No.

4. The judge presided over a prior action involving the trust in which he approved an accounting and made a subsidiary ruling related to an issue in the present suit? **Answer:** No.
5. The judge received certain campaign contributions from attorneys representing some defendant parties in the action? **Answer:** Not unless disqualification is required under Ala. Code §12-24-2 (1975).
6. Of the totality of the above circumstances? **Answer:** No.

FACTS

A tort action has been transferred from another county and assigned to the docket of a circuit judge. The action asserts that the defendants, as trustees of a particular testamentary trust, converted millions of dollars of the trust's funds that, under the terms of the trust, should have been used for charitable purposes. One of the defendants/trustees is a daughter-in-law of the judge's former court reporter, who retired about two months before the transfer of the case.

The judge is a member of the President's Advisory Committee for a community college said to have received "substantial funds" from the trust. Members of the committee are citizens of the county who serve at the invitation of the college's president; the committee meets a few times a year, at which time the president provides a status report on

the college (e.g., enrollment, and faculty and staff changes) and entertains suggestions, observations, and perhaps recommendations from the committee. The judge states that the committee is basically a community relations body that helps the president stay in touch with and foster good relations with the community. The committee has no official status or authority to the judge's knowledge, and the judge receives no compensation for serving on the committee. A recusal motion filed by the plaintiffs in the action alleges without explanation that the college's "interest in the matter could be adverse to the Charitable Class and the Court's association with the college could raise reasonable questions as to the impartiality of the Court."

The judge used to be a member of the Board of Directors of a YMCA said to have also received "substantial funds" from the trust. His membership on the board ended sometime in 1998. The recusal motion alleges without explanation that the YMCA's "interest in this matter could be adverse to the Charitable Class and the Court's association with the ... YMCA could raise reasonable questions as to the impartiality of the Court."

The will under which the trust was created provided certain trust funds for charitable contributions to be used in a specified county in Alabama and another specified county in Florida. The judge presided over an earlier action involving the trust in which he approved an accounting for a certain period of time. The decree in that action contains the statement that "the Attorney General of the State of Alabama has been made a party hereto, thereby adequately representing the interest of all potential charitable income beneficiaries." The recusal motion alleges

that this issue "is central to any question of *res judicata*" in the current action.

An amended recusal motion alleges the judge is disqualified because counsel for some defendant parties made contributions to the judge's current campaign for reelection in excess of the amount specified in Ala. Code §12-24-2 (1975). One of the contributions from the firm in question was returned by the judge before the amount stated in the statute was exceeded, and the total contributions retained do not exceed that amount. A transcript excerpt and other documentation indicate that the parties have already agreed that the defendants represented by the firm in question should be dismissed from the suit; they have not been dismissed only because the judge has not yet ruled on the original recusal motion.

DISCUSSION

In Advisory Opinion 96-620, the Commission addressed the situation of a familial relationship between a party and the judge's court reporter as follows:

With regard to your final inquiry, this Commission has previously held that a judge is not disqualified by the mere fact that a party is related by blood or marriage to the judge's court reporter. Advisory Opinions 79-62, 93-513, and 94-535. The Commission has also previously held that the judge in such a situation should reveal the relationship to the parties and their attorneys in order to avoid any appearance of impropriety. Advisory Opinions 93-513 and 94-535. Of course, if the judge has an actual

personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts as a result of his court reporter's relationship to a party, then he would be disqualified under Canon 3C(1)(a). Otherwise, the judge would only be disqualified if there are additional circumstances beyond the mere relationship of the court reporter to the party which would cause the judge's impartiality to be reasonably questioned. The Commission notes that if such additional circumstances exist, and if assigning a different court reporter to the particular case would remove the appearance of partiality, the assignment of a different court reporter would be an alternative to recusal.

Advisory Opinion 96-620 involved the same trust and the same familial relationship as in the present advisory opinion request. If the judge has an actual personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts as a result of his former court reporter's relationship to a party, then he is disqualified under Canon 3C(1)(a). Otherwise, the Commission is of the opinion that the facts presented do not require the disqualification of the judge on account of his former court reporter's relationship to a party.

Canon 3C(1) provides generally that a judge is disqualified whenever the judge's "impartiality might reasonably be questioned." The test under this provision 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 the present case, the Commission is of the opinion that the judge is disqualified under the general provision in Canon 3C(1) if the community college on whose advisory committee the judge serves is a member of the plaintiff charitable class or if the college is likely to be affected by the outcome of the case. The Commission also finds that, under the facts in this case, the question as to the judge's impartiality existing under such circumstances would not be removed by resignation of the judge from the advisory committee.

It does not appear to the Commission that the judge's former membership on the board of directors of the YMCA causes disqualification of the judge under either the general provision of Canon 3C(1) or any of that canon's subsections.

The Commission has addressed whether a judge is disqualified to hear a case on account of previous judicial involvement with related litigation. In Advisory Opinion 98-702, the Commission wrote:

Recusal is not required on account of a judge having prior familiarity with the case derived from having previously tried the same case or a related case. Advisory Opinions 89-375, 93-510, and 93-511. "The rule against prior personal knowledge only

applies to knowledge garnered from extrajudicial sources. Knowledge about matters in a proceeding that has been obtained by a judge within the proceeding itself or within another legal proceeding is permissible and does not call for disqualification.” J. Shaman, S. Lubet, J. Alfini, Judicial Conduct and Ethics, §4.10 at 113 (1995).

Further, the bias necessary to disqualify a judge generally must arise from an extrajudicial source, and involve an opinion on the merits based on something other than what the judge has learned from participating in the particular case or a prior case. *See* Advisory Opinions 83-188, 89-375, 92-449, 93-510, and 97-639. The mere fact that a judge has heard and made factual findings in a prior related case is not ground for disqualification. Advisory Opinions 83-188, 86-267, 89-350, 89-375, 92-449, 97-639, and 98-685.

The fact that a judge has heard evidence and rendered a decision adverse to a party in a former proceeding does not disqualify the judge to try a later case involving the same issue. Advisory Opinion 93-510, citing *Lindsey v. Lindsey*, 229 Ala. 578, 580, 158 So. 522 (1934). Thus, it is the opinion of the Commission that the judge is not disqualified due to the subject rulings he made in the prior action involving an accounting.

The Commission last addressed Ala. Code §12-24-2 (1975) in Advisory Opinion 99-725:

The Commission is not authorized to determine the validity or enforceability of Section 12-24-2, nor is it authorized to advise a judge that he is exempt from compliance with any statutory mandate, in the absence of an adjudication or other authoritative declaration of invalidity or unenforceability. In the opinion of the Commission, the enforceability of this statute is a legal question which the judge himself may address.

Your second question deals with whether a judge, separate and apart from the requirements of § 12-24-2, must recuse himself from a case in which an attorney or party has contributed \$2,000 or more to the judge’s campaign for judicial office. The Commission has previously opined that the mere receipt of campaign contributions from an attorney or party involved in a case does not cause disqualification. Advisory Opinions 98-698 and 96-607. Except to the extent that § 12-24-2 may have applicability, the Commission reaffirms those opinions.

In the opinion of the Commission, the judge is not disqualified on account of the campaign contributions alleged unless his disqualification is legally required under §12-24-2. The Commission cannot determine the validity or enforceability of this statute. The Commission notes that the facts in the present case also raise an additional legal question which the Commission may not address as to

whether the contribution level in §12-24-2 was ever exceeded.

The inquiring judge also asks whether the totality of the circumstances require his disqualification on the ground that his impartiality may reasonably be questioned. In responding to this question, the Commission assumes nonexistence of the circumstances previously identified under which the judge would be disqualified to preside over this case. In the absence of any such disqualifying circumstances, it is the opinion of the Commission that the totality of the circumstances presented do not cause disqualification of the judge.

REFERENCES

Alabama Advisory Opinions 93-510, 96-620, 98-702, and 99-725.

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

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

In re 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, 800 South McDonough Street, Suite 201, Montgomery, Alabama 36104; tel.: (334) 242-4089; fax: (334) 240-3327; e-mail: jic@alalinc.net.