

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: AUGUST 1, 2002

ADVISORY OPINION 02-801

DISQUALIFICATION DUE TO INTEREST OF A RELATIVE AND FINANCIAL INTEREST AS A FIDUCIARY

ISSUES

I. Is a judge who serves as one of the executors of his deceased aunt's estate and as a trustee of a related testamentary trust for the benefit of two of his cousins disqualified to hear an action in which the estate has a financial interest and is a potential party as a class member? **Answer:** Yes, even if the judge resigns his positions as executor and trustee.

II. If the judge is disqualified, is the disqualification subject to remittal? **Answer:** Only if the procedures specified in Canon 3D are followed; the current parties may remit the disqualification at this time but, if a class is certified, each member of the class must individually remit the disqualification.

FACTS

A circuit judge was assigned to hear an action alleging that the defendants have failed to make royalty payments on half of the natural gas liquids extracted from gas produced in a particular natural gas field, and also that they have been improperly charging certain costs to royalty owners. The plaintiffs seek class certification; the purported class is all royalty and overriding royalty owners in the natural gas field.

During the class certification hearing, as he was examining an exhibit that had been introduced into evidence, the judge noticed that one of the royalty owners was a deceased

aunt. The judge serves as a coexecutor of this aunt's will. Another nephew and a bank serve as the other two executors. A testamentary trust was created in the will for the benefit of the decedent's two daughters, who are first cousins to the judge. Royalties from the natural gas field are now being paid to the trust. The judge is a trustee of the trust.

After the judge noticed that his aunt's estate was a royalty owner in the natural gas field and a potential class member, he notified counsel for the parties on the record, and all of the parties stated on the record that they had no objection to him continuing as the judge in the case. The judge informed the parties that he would be requesting an opinion from the Commission as to whether he is disqualified from hearing the case.

The class certification hearing continued to its conclusion over the course of three days. Law professors from Texas, Oklahoma and Kansas had been flown in to testify as experts at substantial expense to the parties. The judge has not ruled on the class certification issue pending an opinion from the Commission. The judge asks whether he is disqualified; if so, whether resignation as executor and trustee would make a difference; and, if disqualified, whether the disqualification is subject to remittal.

DISCUSSION

Canon 3C(1)(c) provides, in pertinent part, that a judge should disqualify himself when he knows that he, individually or as a fiduciary, has a financial interest in the subject matter in controversy. Canon 3C(1)(d)(i) and 3C(1)(d)(ii) further require disqualification

whenever a person within the fourth degree of relationship to the judge is a party to the proceeding or is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. Canon 3D allows for remittal of disqualifications under Canon 3C(1)(c) and Canon 3C(1)(d) where specified procedures are followed.

In Advisory Opinion 85-246, the inquiring judge was the executor of an estate of which his wife was a beneficiary. The Commission advised the judge that he was disqualified because he had a financial interest in the subject matter as a fiduciary (executor of the estate), and also because his spouse had a financial interest in the subject matter (as a beneficiary). Because the disqualifications arose under Canon 3C(1)(c), they were found to be subject to remittal.

In the present case, the judge has a financial interest in the subject matter of the case as a fiduciary (executor of the estate and trustee of the trust), which calls into play the terms of Canon 3C(1)(c). Resignation as executor and trustee would remove the requirement of disqualification under Canon 3C(1)(c), but the disqualification provisions under Canon 3C(1)(d) would remain. A person within the fourth degree of relationship to the judge is not currently a party to the proceeding, but will become one if class certification is granted (Canon 3C(1)(d)(i)). Persons within the fourth degree of relationship to the judge (his cousins) are known to the judge to have an interest that could be substantially affected by the outcome of the case (Canon 3C(1)(d)(ii)).

Because the disqualifying circumstances presented are all within the terms of Canons 3C(1)(c) and 3C(1)(d), they are subject to remittal if the procedures for remittal in Canon 3D are followed. Canon 3D provides as follows:

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose in the record the basis of his disqualification. If based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement signed by all parties and lawyers shall be incorporated in the record of the proceeding.

In Advisory Opinion 86-253, the Commission concluded that class representatives in a class action lawsuit may not remit judicial disqualification on behalf of the entire class. The Commission provided the following analysis of this issue:

The procedure for remittal of disqualification is designed to minimize the chance that a party will feel coerced into an agreement to remit the disqualification. The agreement to remit is personal to each party to the proceeding as well as to each lawyer. An attorney in his representative capacity may not agree

to remit the disqualification on behalf of his client.

At the present time, there are only named parties to the proceeding. The Commission is of the opinion that these parties and their counsel may remit the judge's disqualification to proceed as the judge in the case at this time. To do this, Canon 3D requires that the parties and lawyers must all agree in writing that the judge's relationship is immaterial and, so long as he retains a fiduciary relationship to the estate, that his financial interest is insubstantial, and the agreement signed by all the parties and lawyers must be incorporated in the record of the case. Thus, if the procedure in Canon 3D is followed, the judge may decide the class certification issue.

If the class is certified, additional persons will become parties to the action including, as the proposed class is now defined, the judge's aunt's estate. Under Canon 3D, remittal of disqualification after certification of a class requires individual written agreement by each member of the class. Thus, if a class is certified, the judge will be disqualified to preside over subsequent proceedings in the case unless each of the members of the class signs a written agreement that is incorporated in the record that the judge's relationship is immaterial and, if the judge remains executor or trustee of his aunt's estate, that his financial interest is insubstantial.

REFERENCES

Advisory Opinions 85-246 and 86-253.

Alabama Canons of Judicial Ethics, Canons 3C(1)(c), 3C(1)(d)(i), 3C(1)(d)(ii) and 3D.

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.