

Nebraska Ethics Advisory Opinion 03-3

Question Presented –

Should a county judge recuse in a juvenile case where there is a difference of opinion between the Department of Health and Human Services/Office of Juvenile Services and a school district regarding in-school supervision where the judge's spouse is a member and vice president of the school board?

Conclusion

It is the opinion of the committee that the judge should issue an order of recusal because to remain in the case would have the appearance of impropriety; and because the judge's spouse has more than de minimis interest that could be affected substantially by the proceeding.

Statement of Facts

A juvenile was adjudicated for subjecting a 7-year-old child to sexual penetration and committed to the care and custody of the Department of Health and Human Services/Office of Juvenile Services (Department). The initial level of treatment was to be at the out-of-home placement level, and a residential sexual offender program was recommended. At a review hearing, the county attorney objected to the Department's plan because the juvenile was placed in foster care rather than receiving sexual offender treatment. After an evidentiary hearing, the Court approved the Department's plan but provided that while in school, the Department was to provide the juvenile with a community treatment aide or other appropriate one-on-one supervision until his behavior improved.

The Department appealed the court's order to a juvenile review panel and to the Court of Appeals. The juvenile review panel affirmed the court's order. The Department dismissed its appeal to the Court of Appeals.

The case is now set for another review hearing. The Department has filed a motion to recuse the judge because the Department and the school system disagree regarding the continued necessity of a community treatment aide or other one-on-one supervision. The spouse of the judge is a board member and vice president of the school board where the juvenile is enrolled. The school district is not a party to the case and does not have standing to object to the case plan. The judge anticipates that a teacher or other employee of the district would be called as a witness regarding the juvenile's behavior. While enrolled in the school system, the juvenile has exhibited behavior that would require intensive supervision. The judge's spouse has no personal knowledge of the juvenile's behavior and would not be called as a witness.

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2 and 3

References in Addition to Nebraska Code of Judicial Conduct

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.24 and § 4.25 (3d ed. 2000)

Nebraska Ethics Advisory Opinion 98-6

Discussion

The relevant portions of the Code of Judicial Conduct are Canons 2 and 3.

CANON 2

A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities

....

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

....

CANON 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

....

E. DISQUALIFICATION

(1) A judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, including but not limited to instances where:

....

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child, wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or [is] a party to the proceeding or has any other more than de minimis interest that could be affected substantially by the proceeding.

(d) the judge or the judge's spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person.

....

(iii) is known by the judge to have a more than de minimis interest that could be affected substantially by the proceeding.

....

As indicated above, there are two sections of the Code that must be considered when answering this question. First, Canon 3 requires in all cases that a judge must perform his or her activities impartially. Even if the judge can perform those duties impartially, under the Code, then under Canon 2, the judge's decision must not have the appearance of impropriety.

Canon 3 states that a judge should not participate in any proceeding "in which the judge's impartiality reasonably might be questioned [where] the judge's spouse ... is known by the judge to have a more than de minimis interest that could be affected substantially by the proceeding."

“De minimis” is defined in the Code’s “Terminology” section as follows: “denotes an insignificant interest that could not raise reasonable question as to a judge’s impartiality.” See Canon 3E(1)(c) and (d).

The judge’s spouse in this case is vice president and a member of the school board. The school board is entrusted with shepherding the operation and general welfare of the school district and its students. As indicated in the statement of facts, the juvenile in question has exhibited behavior in the public school system, which behavior, if allowed to go unsupervised, could result in serious consequences and in litigation by other students against the district. The judge’s spouse certainly has more than a de minimis interest in preventing harmful behavior by this juvenile which could result in litigation against the district. The committee therefore believes the judge should recuse himself because of the provisions of Canon 3.

The judge should also recuse himself on the basis that if he were to remain in the case and rule against the Department, it would have the appearance of impropriety. “If disqualification is not required under any of the relatively specific provisions of Canon 3 of the Code of Judicial Conduct, it still might be required in any other instance in which a judge’s impartiality might reasonably be questioned. . . . Thus where there is an appearance of partiality to a reasonable observer, disqualification is necessary. The test for an appearance of partiality is meant to be an objective one: whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial.” Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25 (3d ed. 2000).

In this case, the objective disinterested observer is not going to know much about the actual facts of the case. That disinterested observer is only going to know the judge’s spouse is on the school board and the judge ruled in favor of the school on the conflict of interest. Although the factual situation presented certainly would justify the judge’s decision to maintain one-on-one coverage of this juvenile, to the objective disinterested observer, the judge’s decision would have the taint of partiality to the school district. Based on the facts of this case, the Committee is of the opinion that the judge should recuse himself.

Disclaimer

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Ethics Advisory Committee.

APPROVED AND ADOPTED
BY THE COMMITTEE ON OCTOBER 9, 2003

Judge Randall L. Rehmeier

Judge John F. Irwin

Judge Graten Beavers

Judge Douglas F. Johnson

Judge Stephen R. Illingworth

Judge John F. Steinheider

Judge William B. Cassel – concurrence attached

Judge Cassel, concurring.

I have no quarrel with the principles discussed or applied in the majority opinion. However, under the present circumstances, I would decline to answer the inquiry without obtaining assurance that the disclosure and opportunity to respond required by Canon 3B(7) is provided to the parties to the pending motion.

Appendix A to the Code of Judicial Conduct authorizes the creation of this committee. The committee has authority to “express its opinion on proper judicial conduct with respect to the provisions of this code, . . . at the request of a court . . . , provided that an opinion may not be issued on a matter that is pending before a court . . . except on request of the court” Neb. Code of Jud. Cond., Appendix A, paragraph B(1). However, Appendix A also states that the “opinion is confidential and not public information unless the Nebraska Supreme Court otherwise directs.” *Id.* at paragraph D.

Unless the confidentiality is waived and the parties to the pending motion to recuse now before the juvenile court are provided with the communication by the judge to the committee and the committee’s opinion, and the parties are allowed the opportunity to respond to the content of the committee’s opinion, in my view, providing such opinion would not comply with the requirements of Canon 3B(7).

Judge Irwin joins in this concurrence.