

# Nebraska Judicial Ethics Committee Opinion 08-3

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## ***Question Presented --***

*Should a juvenile court judge recuse in a pending juvenile case where a spouse of another juvenile judge will testify in the case?*

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## **Conclusion**

The Nebraska Code of Judicial Conduct does not require automatic recusal of a judge in a situation where another judge's spouse is a witness in a proceeding before the judge.

## **Statement of Facts**

A juvenile judge of a separate juvenile court has had a case on his docket since December 31, 2003. The case is presently before the court on a pending motion to terminate parental rights. The State is in the process of presenting its case in chief. The judge has informed all counsel of record that a therapist who was called as a witness in the proceeding and, apparently, who is in the process of testifying, is married to another judge of the same separate juvenile court. The parent who is the subject of the termination of parental rights proceeding has requested the judge to recuse himself from the proceedings.

## **Applicable Code Sections**

Neb. Code of Jud. Cond., § 5-202 (Canon 2), § 5-203 (Canon 3), and Appendix A

## **References in Addition to Nebraska Code of Judicial Conduct**

Nebraska Judicial Ethics Opinion 98-6

Nebraska Judicial Ethics Opinion 03-3

Nebraska Judicial Ethics Opinion 96-3

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4 (3d ed. 2000)

Commonwealth of Virginia Judicial Ethics Advisory Opinion 01-8

## **Discussion**

The judge submitting this question to the committee has represented to the committee that he has complied with Canon 3(B)(7)(b) of the Nebraska Code of Judicial Conduct and will comply with its provisions when this opinion is issued. When a question is presented to the committee which involves a matter pending before a court, Canon 3(B)(7)(b) requires notice to parties in the pending proceeding that the judge has consulted the Nebraska Judicial Ethics Committee together with the substance of the request and the advice received. The judge who has presented this question to the committee has verified that (1) notice has been given to the parties in the pending proceeding that the committee has been consulted, (2) a copy of the judge's request for an opinion has been provided to the parties, (3) a copy of the committee's opinion letter will be provided to the parties, and (4) the parties will be provided an opportunity to respond to the judge with their comments concerning the request for an opinion and the committee's opinion letter.

The relevant portions of the Nebraska Code of Judicial Conduct are Canons 2 and 3. Canon 2 provides that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. A judge is required to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Further, Canon 2 requires that a

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

Canon 3 provides that a judge shall perform the duties of judicial office impartially and diligently. Canon 3(E) provides that a judge shall not participate in any proceedings in which the judge's impartiality reasonably might be questioned, regardless of whether any of the specific rules in Canon 3(E)(1) apply. Although none of these specific instances listed in Canon 3 (E)(1) appear to apply, Canon 3(E)(1)(e) does provide that a judge should disqualify in "[a]ny other instance where law requires disqualification."

Although the committee is of the opinion that Canons 2 and 3 do not require recusal in this instance, a trial judge, using an objective standard, is required to make an initial assessment as to the existence of a reasonable question about impartiality. If the judge objectively determines that the relationship in question does not cause doubt on the impartiality of the judge, then recusal is not required. Nebraska Judicial Ethics Opinions 96-3 and 98-6 reference an objective test to be applied in determining situations where a judge's impartiality is subject to reasonable question. Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 4.25 (3d ed. 2000) defines the objective tests as follows: "The test for an appearance of impartiality 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." Shaman goes on to say that the test is objective in the sense that the standard is filtered through the eyes of a reasonable observer rather than through the subjective view of the judge in question. This standard, according to Shaman, calls for recusal when objective appearance casts reasonable doubt upon impartiality even though the judge in question subjectively feels that he or she can act fairly.

In this instance, the judge has disclosed all facts that might be grounds for recusal to the parties in the action. Although there has been a request for a recusal, a judge is not, per se, required to recuse just because he or she has been requested to do so. A judge must be sensitive to social and professional relationships developed prior to appointment to the bench and while on the bench. Social relationships may require recusal in some circumstances but not in all circumstances. The mere fact that a witness is married to another judge, even another judge of the same district or jurisdiction where the presiding judge serves, does not automatically require recusal. Requiring recusal simply because of the relationship addressed in this opinion could arguably require recusal in many, if not all, cases that came before a judge. The judge, even in a metropolitan area, usually knows most, if not all, of the lawyers who appear before him. In some instances, the judge is also familiar with and knows many witnesses personally. Further, if the basis for recusal were simply the fact that the witness was married to another judge, then arguably there could be no judge that could hear the case. Such a rule would be untenable, require delays in the business of the court, increase the expense of litigation, and delay the resolution of issues before the court. A judge simply should not be required to recuse himself or herself or disrupt the orderly flow of his or her docket at the whim or unsupported suggestion of a party.

A judge should, of course, recuse himself or herself if he or she harbors a personal bias or prejudice that would prevent any party from having a fair trial. A judge must also consider the public's perception of his or her fairness so that the public's confidence in the integrity of the judicial system is maintained. See Commonwealth of Virginia Judicial Ethics Advisory Opinion 01-8.

**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 Judicial Ethics Advisory Committee.*

APPROVED AND ADOPTED  
BY THE COMMITTEE ON JANUARY 20, 2009

*Judge John F. Steinheider  
Judge Carlton E. Clark  
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Judge Lawrence D. Gendler  
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