

Nebraska Ethics Advisory Opinion 97-7

Question Presented--

May a judge (1) serve as a trustee of a trust created for the benefit of an incapacitated cousin and (2) receive her Social Security disability payments as a designated payee?

Conclusion

A judge may serve as a trustee of a trust established for a "family member" so long as it will not interfere with the proper performance of the judge's judicial duties. A judge's receiving, retaining, and disbursing a third party's Social Security benefits without formal appointment as a conservator or guardian would create the appearance of impropriety and should be avoided by a judge. A judge may serve as a guardian or conservator for a "family member" so long as it will not interfere with the proper performance of the judge's judicial duties.

Statement of Facts

A newly-appointed county judge is currently serving as a testamentary trustee for a 46-year-old incapacitated cousin. The judge is also the designated payee to receive Social Security disability payments for the cousin. In addition to his financial responsibilities involving the handling of the trust and Social Security payments, the judge cares for the actual living needs of his cousin and provides her with a home and all of her living expenses due to her inability to provide for herself. The judge indicates that there is no court involvement at the present time and that he does not anticipate that there will be any in the future. The judge is interested in determining the appropriateness of his continuing as trustee for his cousin, as well as continuing to receive her Social Security payments as the designated payee. Since the judge has indicated that there is no current court involvement with the trust, it is assumed that the trust is not registered. Although the judge does not indicate the residence of his cousin, it appears from the facts as given by the judge that the judge's cousin lives in the State of Nebraska and within the same county in which the judge serves on the county court bench.

Applicable Code Sections

Neb. Code of Jud. Cond., Canons 2A, 4D, and 4E(1), (2), and (3) (rev. 1996)

References in Addition to Nebraska Code of Judicial Conduct

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* § 7.24

Neb. Rev. Stat. § 30-2801 et seq. (Reissue 1995); Neb. Rev. Stat. § 30-2648 (Reissue 1995)

Neb. Ct. R. of Cty. Cts. 42 (rev. 1996)

Discussion

Nebraska's current Code of Judicial Conduct is based on the 1990 American Bar Association Model Code of Judicial Conduct as edited by the Nebraska Judicial Ethics Advisory Committee and the Nebraska Supreme Court. The serving in a fiduciary capacity is discussed in Jeffrey M. Shaman

et al., Judicial Conduct and Ethics § 7.24. Shaman states:

The 1990 Model Code goes on to place certain restrictions even on service as a family fiduciary. The position must not interfere with the performance of judicial duties. Additionally, the judge may not serve if it is likely that the estate, trust, or ward will come before the judge's own court or one over which he or she exercises appellate jurisdiction. Finally, a judge acting as a fiduciary is subject to the same financial limitations as apply to the judge in a personal capacity. In other words, "[a] judge is not allowed to engage in business or become involved in investment or financial activities on behalf of someone else if he could not properly do the same for himself."

Nebraska's Code of Judicial Conduct appears to have adopted the language of § 4E of the 1990 American Bar Association Model Code verbatim. See Neb. Code of Jud. Cond., Canon 4E(1), (2) and (3). Accordingly, it appears permissible for a judge, including a county judge, to act in a fiduciary capacity for a family member as long as it will not interfere with his or her performance of judicial duties. In the terminology section of the Code, a "[m]ember of the judge's family" is defined as a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship. Accordingly, it would appear that in the instant case, the judge's cousin could qualify as a "family member" for the purpose of the judge assuming fiduciary responsibilities. The language at Canon 4E(2) is of particular significance. At Canon 4E(2), it is provided that a "judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction." In the instant case, it does not appear that the testamentary trust appointing the judge as the trustee of his cousin has been registered. Neb. Rev. Stat. § 30-2801 et seq. (Reissue 1995) provides for the registration of trusts. Section 30-2803 generally provides that by registering a trust, the trustee submits personally to the jurisdiction of the court and proceedings under § 30-2806 of the Code relating to the trust. Section 30-2806 provides, inter alia, for the review of the trustee's interim or final accounts. In the event that the trust in question becomes registered and the judge is required to periodically account to the court his actions and handling of funds, the judge should at that point consider resigning his capacity as trustee assuming that the registration of the trust is in the county and court in which the judge normally presides. The fact that the judge may be in a multijudge district is of no difference. The judge is prohibited from engaging in proceedings that would ordinarily come before him or her in the court on which the judge serves or has appellate jurisdiction. See Canon 4E(2). In the commentary following Canon 4E, it is also noted that restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Canon 4D(4). Canon 4D(4) provides that "judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall dispose of investments and other financial interests that might require frequent disqualification."

The judge's receiving of his cousin's Social Security disability payments as the designated payee presents some additional problems. According to the information supplied by the judge, the judge's cousin "is unable to provide for herself." Canon 2 of the Code of Judicial Conduct provides that a "Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities." Canon 2A provides that a "judge shall respect and comply with the law and shall act at

all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In the commentary following Canon 2A, it is stated that "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Since the judge in the instant case will be receiving monthly disability payments and then using the funds to provide care for his cousin, issues may certainly arise as to the amount of the funds received by the judge and how the moneys were expended by him. In addition, if some of the funds are not expended, they would accumulate in the form of an asset. Accordingly, it would appear that in order to eliminate any appearance of impropriety that might otherwise result, the judge should be appointed as a guardian or conservator to handle the Social Security payments received and to handle any accumulation of said funds. Neb. Rev. Stat. § 30-2648 (Reissue 1995) provides that a conservator must account to the court at times as directed by the court. Neb. Ct. R. of Cty. Cts. 42 (rev. 1996), as adopted by the Supreme Court, provides for an annual accounting by a guardian or conservator unless otherwise ordered by the court. As previously discussed, a judge may act in a fiduciary capacity such as a conservator or guardian for a family member provided such service will not interfere with the proper performance of the judge's judicial duties. Assuming that the judge's cousin resides in the same county in which the judge will be presiding, the judge should not serve as a guardian or conservator for his cousin. Since the judge would be required to provide an annual accounting for his administration of the guardianship or conservatorship, he would be appearing and engaging in proceedings that would ordinarily come before him in the court on which he serves.

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 JANUARY 23,

1998

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