

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 92-01
(January 24, 1992)

**Judicial Responsibilities When Family Member
Oversees Agency That Provides Supervised
Visitation in Custody Cases**

Issues

1. May a superior court judge order supervised visitation in a child custody case through a social services agency administered by a member of the judge's immediate family? The agency receives no direct compensation from the court or the county, and parents either pay visitation supervisors directly or receive the service at no charge from volunteers.

Answer: No.

2. Although the choice of the agency is voluntary, does it make a difference if the agency is the only one that provides this service in the local community?

Answer: Yes, but see discussion.

3. Would the judge be able to serve as the presiding judge of the conciliation court with responsibility for dealing with the agency?

Answer: No.

4. May the judge hear a child custody case in which the family member is called to testify?

Answer: Generally no, but see discussion.

5. Would the judge have any ethical responsibilities when visitation supervisors from the agency are called to testify in the judge's court concerning the behavior of parents in child custody cases?

Answer: No.

Facts

A member of a superior court judge's immediate family would like to become the administrator of a social services agency that supervises visitation in child custody cases under A.R.S. § 15-338.B. The agency would contract with the county for services, but parents, when able, would pay individual visitation supervisors directly for each visit. The fee would not be paid to the agency, and volunteers would donate their time in cases involving indigent parents. Parents would be advised that the service is available, and in some cases the court

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would order that visits be supervised by the agency staff. The choice of agency would be voluntary, but the agency would probably be the only one engaged in providing these services in the local community.

The judge is the presiding judge of the conciliation court and would probably play a major role among the judges in the county in dealing with the visitation agency. Visitation supervisors trained by the agency could be called to testify concerning the behavior of parents during a visit, and their testimony could have weight in a custody decision. As head of the program, the administrator could be called to testify in specific cases.

Discussion

Issues 1, 2 and 3

The facts described here raise a number of potential problems that must be considered in light of several interrelated canons. Judges are specifically warned in the Code of Judicial Conduct to avoid situations that involve relationships with their family members. Canon 2B states that:

A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him.

This canon is reinforced by Canon 3B(4), which states in pertinent part that a judge "should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism."

We believe that it would not be proper for the judge to order supervised visitation through an agency administered by a member of the judge's family. The success of the agency and, therefore, the member's livelihood may be impacted by the use made of the agency by the court. An objective observer might conclude that referrals by the judge were improperly ordered or were ordered to generate agency business. Accordingly, the judge should not sit on cases where he has the responsibility or discretion to order supervised visitation unless the parties are aware of the relationship and consent to the judge's hearing the case.

Under the facts presented here, the questions raised in issues 2 and 3 require the same answer. Our opinion would be different, however, if there were several agencies from which to choose and the judge were not responsible for making the choice. Likewise, the same ethical constraints would not be present if the judge, acting in the role of the presiding judge of the conciliation court, did not have responsibility for dealing with the agency or approving payments. *See* Advisory Opinion 84-01. But it is not likely that a presiding judge of a conciliation court would be able to carry out his responsibilities without dealing with the agency on a regular basis. We suggest, therefore, that the better course of action is simply to avoid any situation in which the judge's impartiality or motives can be called into question.

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Issue 4

Canon 3C(1) establishes the minimum conditions under which a judge must disqualify himself in proceedings in which his impartiality might reasonably be questioned. Subsection (d)(iv) requires disqualification in any situation where a "person within the third degree of relationship" to the judge "is to the judge's knowledge likely to be a material witness in the proceeding." Under this section of the code, the judge clearly would not be able to hear child custody cases in which the family member is called to testify about material facts, such as the reasons for the success or failure of a particular visitation arrangement.

Canon 3D also provides that a judge disqualified by the terms of Canon 3C(1)(d) may, instead of withdrawing, disclose on the record the basis of his disqualification, and, if counsel all agree that the judge's relationship is immaterial, the judge may continue to participate in the proceeding. While Canon 3D would allow the judge to continue hearing a case under the facts described here, we believe that this practice should be the exception and not the rule. The judge should not rely on Canon 3D as a routine way to circumvent this problem if and when there are large numbers of cases in which a member of his family could be expected to testify.

Issue 5

The judge would have no particular ethical responsibility when visitation supervisors, rather than the administrator, are called to testify, especially when their involvement in the case would be the result of the parents voluntarily using the service or their being ordered to do so by another judge. Canon 3D(1)(d) (iii) might be implicated if the supervisors' agency is paid for their testimony as experts because the payments could affect the earnings of the agency and possibly the compensation of the family member. The judge should be alert to situations in which his conduct might be called into question and, as necessary, should disclose the relationship to the program administrator and offer to recuse from the case as provided in Canon 3D.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2B, 3B(4), 3C(1) and 3D (1985).

Other References

Arizona Judicial Ethics Advisory Committee, Opinion [84-01](#) (March 3, 1984).