

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 08-192

Complainant: No. 1340100144A

Judge: No. 1340100144B

ORDER

The commission reviewed the complaint filed in this matter and found no ethical misconduct on the part of the judge. The judge properly disclosed that his spouse was employed in a non-legal capacity by the same law firm that represented a party in the case, but this disclosure did not disqualify him from continuing on the case. The other issues raised are appellate in nature and outside the jurisdiction of the commission.

The complaint is dismissed pursuant to Rules 16(a) and 23.

Dated: September 15, 2008.

FOR THE COMMISSION

\s\ Keith Stott
Executive Director

Copies of this order were mailed to the complainant and the judge on September 15, 2008.

This order may not be used as a basis for disqualification of a judge.

NOTICE

The complaint in this case is too long to post on the website. Rule 9(b) of the commission's rules provides that dismissed complaints and related orders must be made public but leaves the method of disclosure to the commission's discretion.

As a convenience to the public, complaints are posted on the commission's website after confidential information has been redacted. The commission may not post complaints that are lengthy because of the excessive amount of time needed to prepare the material for publication. When this occurs, a complete copy of the redacted complaint may be ordered from the commission at the current photocopy rate approved by the Clerk of the Supreme Court. Please contact the commission for specific details.

Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007
602-452-3200

CONFIDENTIAL
State of Arizona
Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

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CJC -08 - 192

COMPLAINT AGAINST A JUDGE

Your name: _____ Judge's name: _____ Date: 8/01/08

Instructions: Describe in your own words what the judge did that you believe constitutes misconduct. Please provide all of the important names, dates, times and places related to your complaint. You can use this form or plain paper of the same size to explain your complaint, and you may attach additional pages. Do not write on the back of any page. You may attach copies of any documents you believe will help us understand your complaint.

Violations of the Arizona Code of Judicial Conduct (as amended June 8, 2004, "Code"):

I. Judge's participation in an arrangement with a defense attorney and his law firm (Mr. _____ and _____, P.C., independently or with their client), evidently at a minimum including employment of Judge _____'s wife by that law firm during the pendency of the litigation (currently on appeal; no mandate has issued), creating a conflict of the sort described in Arizona Supreme Court Advisory Opinion 84-01 (March 3, 1984; acknowledging the benefit to judges from their community property interest in their spouses income) and thereby implicating *Arizona Revised Statutes ("A.R.S.") §13-2602(A)(2)* which speaks to a class 4 felony, with a consequent "appearance of impropriety" in violation of Canon 2, and implicating Canon 2(A) relating to respect and compliance with the law ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."), as well as Canon 3(E) pertaining to self-disqualification since Canon 3(F) was not fully implemented (there was no written agreement or similar agreement "on the record that the judge should not be disqualified"), leading to or as manifested by the Code violations described below.

II. Disobedience by Judge _____ of the rules of the tribunals, and settled Arizona law and public policy, in violation of Canon 1, requiring judges to uphold the integrity of the judiciary which of course includes following the "law" without favor to one party or side in a litigation, as defined in the Code itself (see Terminology, "Law" denotes court rules as well as statutes, constitutional provisions and decisional law."), and among other things as hereafter described, includes strictly following the instructions of an appellate court.

III. Judge _____ did not "perform the duties of judicial office impartially and diligently" in violation of Canon 3(B)(1), (2), (4) and (5) concerning, respectively, his responsibility not to hear matters assigned to him "in which disqualification is required," his responsibility to "be faithful to the law," his responsibility to be patient and courteous to litigants, and his absolute obligation to "perform judicial duties without bias or prejudice" as may be manifested by among other things his words or conduct, evinced by the record including his judgments/orders.

IV. Judge _____ did not "dispose of all judicial matters promptly, efficiently and fairly" in violation of Canon 3(C)(8), which requires that in doing so he "must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay," as detailed below.

PREFATORY REMARKS

As instructed, additional sheets have been attached. The generalized violations above will hereafter be referred to as "**Counts**" (bolded) and for the convenience of the Commission members will be cited where possible within the following narrative detailing the Factual Support for this Complaint to the Commission (please see attached pages). Also for the convenience of the Commission members, and to maintain continuity considering the length of the litigation together with the complexity that resulted from Judge _____'s piecemeal approach to the issues as urged by Mr. _____ (implicitly and occasionally explicitly), the narrative below will focus on those events within the consolidated actions after the case was first assigned to Judge _____ in the first half of 2001.

For clarity, I will endeavor to refer to myself below as the or your "Complainant," and will very much appreciate the indulgence of those members of the Commission who are not lawyers with respect to citations to Arizona law included for purposes of substantiating/justifying assertions made in connection with components of this complaint to the Commission which necessarily rely upon what law Judge _____ knew, or reasonably should have known (**Count II**). By way of acknowledgment, it is understood the Commission has no jurisdiction/authority to alter rulings by any Court or to perform functions of the Arizona State Bar Association.

This complaint to the Commission therefore is not—and the Commission members should reject any suggestion that it is or may be—intended as a means of invoking the Code for mere tactical advantage in a proceeding, OR that this complaint could be regarded either as solely appellate in nature or outside of the Commission's jurisdiction. The Complainant recognizes that, as indicated by the Preamble to the Commission's Rules, in the context of this complaint the Commission is responsible only for administering the judicial discipline system with respect to Judge _____ (I am unaware of any issue or question relating to "incapacity" within the meaning of the Code or the Commission's Rules).

By way of further acknowledgment, in part because judges "shall inform the appropriate authority" regarding substantial questions in connection with the conduct of judges and lawyers as provided in Canon 3(D)(1) and Canon 3(D)(2) this complaint to the Commission is informed by and intended to be consistent with the *Lawyer's Creed of Professionalism of the State Bar of Arizona*, the *Arizona Rules of Professional Conduct*, the *Report on Judicial Conduct Commissions* as discussed in *The Justice System Journal* (Vol. 28, Number 3, p. 408, see <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=146>), and factual detail described by the dissent in *United States v. Frega*, 179 F.3d 793, 800, 802-807 and 813-818 (1999) which the Commission members will find presents certain similarities to the conduct of Judge _____ and Mr. _____.

By way of a brief background, the consolidated action that was before Judge _____ involves a bank ("the Bank") which since mid-1996 has served as successor trustee of the *inter vivos* generation-skipping spendthrift trust of _____ ("the couple") created, following the Bank's solicitations, by a Trust Agreement executed January 11, 1983 ("1983 Trust") to "distribute" income then ultimately the principal from "the majority of the couple's estate" consisting of their intangible personal property (securities) and real property.

The couple named themselves the trustees of the 1983 Trust and contemporaneously executed mutual reciprocal Wills expressly referencing their Trust. They delivered their Wills and Trust Agreement to the Bank then in June 1983 delivered a fraction of their securities (intangible personal property) to the Bank, retaining all remaining securities that were part of the couple's estate in certificate form, apparently to limit the Bank's control and minimize certain fees it charges on the total value of securities in the Bank's physical care.

_____ died March 1, 1986. _____, through her then-attorney later in 1986, gave the Bank instructions that it evidently failed to follow. A second group of stock/bond certificates (including securities different from those in the first group) was delivered to the Bank by _____ in 1987, requesting the Bank to have the securities re-titled and the replacement certificates returned to _____. It is reasonably believed the certificates received by the Bank in 1983 and 1987 from _____, and the correspondence with third parties initiated and received by the Bank related to re-titling the securities, disclose how all the securities were titled at _____'s death. Judge _____'s election not to enforce orders (described below) concerning production of these materials is reasonably related to all four **Counts** of this Complaint. _____ died November 8, 2000.

In their 1983 Wills the couple itemized the tangible personal property which was not to pour-over into their Trust, disinherited one of their two children (_____ Complainant's brother and the Bank's co-defendant) stating

that due to their differences with him no provision was made for him in their Wills or their Trust, then devised their real property and remaining intangible personal property to their Trust. The 1983 Trust does not mention but implicitly provides for his issue, if any, when both Settlers and your Complainant became deceased, treating such issue as is customary in a generation-skipping spendthrift trust. never married, has no children, and your Complainant's two daughters (and) are the only grandchildren of .

On August 28, 1986, six months after died, executed a new Will. It made no reference to the 1983 Trust. But on the same day she also executed a "Revocation of Trust" ("*Revocation*") having only a single sentence.¹ It would be significant to any lawyer/judge because it explicitly relied for its authority upon Article ELEVENTH of the 1983 Trust which proscribes revocation in the circumstances, rendering the *Revocation* a nullity as urged by its drafter, and the plaintiffs (i.e., Complainant and his daughters, the grandchildren). It sought to partially revoke the 1983 Trust, evidently in connection with only 's half of the couple's estate.

Also on August 28, 1986, executed a Declaration of Trust (1986 Trust). It declared that its *res* (i.e., the corpus representing its principal assets) is "presently held" in the 1983 Trust. executed only one other Will (in 1996, with two amendments to the putative 1986 Trust, at a time the plaintiffs allege she lacked the capacity to validly execute the trust amendments, or even the testamentary capacity to validly execute a Will, and that she was unduly influenced). 's 1996 Will also made no reference to the 1983 Trust.

The Bank acted as agent from 1983 to mid-1996. In 1986 it received copies of the *Revocation* and original Declaration of Trust, but did not advise or her then-lawyer of its conflicts with and violations of the 1983 Trust's terms. Significantly, as indicated above, the only ascertainable *res* identified with the putative 1986 Trust was 's half of the majority of couple's estate for which the 1983 Trust was created.

(acting as trustee of the disparate trusts) and the Bank (acting as agent) thereafter commingled the assets of all the trusts under the name of the 1986 Trust. Another provision of the 1983 Trust, Article FIFTH(c), Section 2, however, provides the only means by which Trust assets/income from the surviving Settlor's () half of the couple's estate (in a resulting Survivor's Trust aka "Power of Appointment Trust" under the 1983 Trust, which arose at death) could validly be "distributed to or in trust for" persons who were not beneficiaries of the 1983 Trust, "including the estate of the surviving Settlor." It had to be only "in such manner and proportions as the surviving Settlor may appoint by his or her Will, making specific reference to this power of appointment."

In view of the foregoing, the Commission will no doubt find informative a letter from Mr. (the lawyer appointed to be 's Guardian *ad Litem*, "g.a.l.," in the consolidated prior guardianship action). It was sent to the plaintiffs' former counsel, is in the superior court record, and was brought to Judge 's attention after the consolidated case was assigned to him in 2001. The plaintiffs were not acquainted with Mr. before his appointment and had no relationship with him after 1998. His letter is attached to this Complaint.

FACTUAL SUPPORT AND BACKGROUND FOR THIS COMPLAINT

1. The consolidated action indicated above was originally assigned to Judge by Minute Order of Presiding Probate filed April 30, 2001, consequent to a Notice of Change of Judge "filed by Respondent ." The said consolidated action was reassigned to Commissioner by Minute Order of Judge filed August 1, 2006 and confirmed by Minute Order of Judge himself filed January 3, 2007 stating that "the reassignment of this case to Commissioner / Judge Pro Tem is effective. Any future pleadings should be directed to Commissioner / Judge Pro Tem ."

¹ " , pursuant to Article ELEVENTH of that Trust Agreement dated January 11, 1983 hereby revokes said Trust Agreement with respect to her separate property consisting of one-half of the assets presently in said trust."

AUG 04 2008

August 1, 2008

RE: Enclosed Formal Written Complaint To Commission Against Judge

Mr. E. Keith Stott, Jr., Executive Director
State of Arizona, Commission on Judicial Conduct
1501 West Washington Street
Suite 229
Phoenix, AZ 85007

~~VIA FACSIMILE~~
* VIA U.S. MAIL
~~VIA E-MAIL~~

SUBJECT: As Indicated Above Plus Information Regarding Attorneys That Appeared In The Case

Dear Mr. Stott:

Please find enclosed the abovementioned, formal written complaint to the Commission against Judge (one is provided for the convenience of each member assigned to the Investigative Panel, the other is for use by the Executive Director and Disciplinary Counsel). I will be happy to also provide the Complaint in searchable PDF format by email, if requested.

The names and relationships of the attorneys identified on the Complaint form are listed below together with the addresses and phone numbers I still have and were readily available. I do not have the names, addresses or phone numbers of the court personnel who may have knowledge of the judge's conduct. If you believe they might remember details that may be of help to you, let me know and I'll be happy to find the names of the court reporters whose services were used at hearings before Judge .

1. (Bar #) of , Arizona was my lawyer from December 1996 until the first hearing before Judge in mid-2001. I kept in touch with him for a while and he may very well remember details of the case through 2002 or beyond.
2. (Bar #), 's son, stood in for his father several times during his tenure. I have no idea where he might be today. He would have no knowledge of Judge 's conduct.
3. (Bar #) is the attorney appointed by Judge during the latter part of the consolidated guardianship action referred to. He served as "Special Guardian *ad Litem*" for my mother through some of 1998, during which time he interviewed me, my mother, employees of the skilled nursing facility where I arranged for my mother to be cared for from 1995 until her

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To: State of Arizona
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Phoenix, AZ 85007

death in November 2000, and apparently one or more officers of one of the two defendants in the case, Bank. He was prevented from interviewing my brother, the other defendant in the case, by my brother's then-attorney (). To my knowledge, Mr. was last at Law Office, P.C., Suite , phone (I suspect the area code for Mr. 's last phone number may have been changed).

4. (Bar #) was the lawyer who represented my daughters until late-2000. I think it is likely Mr. has retired. He left the case some six months before it was assigned to Judge , and would have no knowledge of Judge 's conduct.
5. (Bar No. unknown) was the lawyer appointed by Judge to serve as my mother's attorney during the consolidated guardianship action. He left the case about a couple of years, I think, before it was assigned to Judge . I believe it is unlikely that Mr. would remember many details of the case, or that he would have any knowledge of Judge 's conduct. His office was probably in the area.
6. (Bar #) of P.C. (Bar #), is the lawyer who has represented Bank since, I believe, December 1996, around which time the guardianship action was commenced. His address at , P.C., is Suite , AZ . His telephone number is . Considering the allegations in the Complaint, Mr. would be a hostile witness for you.
7. (Bar #) was the lawyer representing , one of the two defendants in the case, until his retirement. I assume that he is still in the greater area. He would also be a hostile witness for you.
8. (Bar #) replaced as 's lawyer, I believe early in 2006. She is with , LLP, Suite , AZ , phone . She also would be a hostile witness for you.

Judge has ruled on appeal in the case, may have occasion to do so again, and should recuse.

Sincerely,

Enclosures

cc: file