

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2004-10

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[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: It is improper under both the Ohio Code of Judicial Conduct and Ohio Ethics Law for a part-time municipal court judge to appoint his or her son or daughter as acting judge to serve during the judge's vacation. Under the Ohio Code of Judicial Conduct, an appointment by a judge of a relative within the third degree of consanguinity to serve as acting judge may appear as an act of nepotism, even though the appointee is qualified to receive the appointment. Under Ohio Ethics Law, such appointment is improper because the appointee is a member of the judge's family who if appointed as acting judge would have a prohibited pecuniary interest in a public contract.

OPINION: This opinion addresses a judge's appointment of a relative to serve as acting judge of a municipal court.

Is it proper for a part-time municipal court judge to appoint his son or daughter as acting judge to serve during the judge's vacation?

By law, a judge of a municipal court that has only one judge may appoint a substitute to serve when the judge is temporarily absent, incapacitated, or otherwise unavailable. See Ohio Rev. Code Ann. § 1901.10(A)(2) (West Supp. 2004). The appointee, who must have the qualifications required by Ohio Revised Code section 1901.06, is an "acting judge" and has the jurisdiction and powers conferred upon the municipal court judge. *Id.*

By ethical standards, a judge must make appointments within the bounds of both the Ohio Code of Judicial Conduct and Ohio Ethics Law. The Board of Commissioners on Grievances and Discipline is the appropriate body to render advice as to the application of these disciplinary rules and ethics laws. See Gov.Bar R. V(2)(C) and Ohio Rev. Code Ann. §§ 102.01 (F)(2), 102.08 (West 2002).

Ohio Code of Judicial Conduct

Under Canon 3(C)(4), a judge must avoid nepotism. Judges must not make unnecessary appointments. Judges are to make appointments impartially based on merit.

Canon 3(C)(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid favoritism and nepotism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Under Canon 4(A), “[a] judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment.”

Canon 3(C)(4) and Canon 4(A) effectuate the broad mandates of Canon 3 that “[a] judge shall perform the duties of judicial office impartially and diligently” and Canon 4 that “[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

Nepotism is defined as “[b]estowal of official favors on one’s relatives, esp. in hiring.” *Black’s Law Dictionary* 1066 (8th ed. 2004).

To eliminate Canon 3(C)(4) concerns regarding nepotism, the appointment of a relative within the third degree of relationship of a judge or a judge’s spouse is prohibited. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 93-4 (1993).

The degrees of relationship computed by the rules of civil law are as follows: parents and children are within the first degree; grandparents, grandchildren, brothers, and sisters are within the second degree; uncles, aunts, nephews, nieces and great-grandparents are within the third degree; first cousins, great-uncles, great-aunts, and great-great-grandparents are within the fourth degree; great-great uncles, great-great-aunts, children of a cousin (first cousins once removed), and the children of a great-uncle or a great-aunt are within the fifth degree; second cousins are within the sixth degree. See 23 *Am. Jur. 2d Descent & Distribution* § 55 (1983).

Thus, the Board advises that it is improper under the Ohio Code of Judicial Conduct for a part-time municipal court judge to appoint his or her son or daughter as acting judge to serve during the judge’s vacation. An appointment by a judge of a relative within the third degree of consanguinity to serve as acting judge may appear as an act of nepotism, even if the appointee is qualified to receive the appointment.

Ohio Ethics Law

Judges are “public officials,” subject to Section 2921.42(A). See Ohio Rev. Code Ann § 2921.01(A) (West Supp. 2004). The prohibition within R.C. 2921.42(A) is pertinent to this inquiry.

R.C. 2921.42 (A) No public official shall knowingly do any of the following:

- (1) Authorize, or employ the authority or influence of his [her] office to secure authorization of any public contract in which he [she], a member of his [her] family, or any of his [her] business associates has an interest.

Ohio Revised Code Ann. § 2921.42(A) (West 1997).

Under Ohio Ethics Law, it is improper for a judge to use the authority or influence of the judicial office to secure the authorization of a public contract for a family member.

A “public contract” includes “employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.” Ohio Rev. Code Ann. § 2921.42(G)(1) (West 1997). A “public contract” includes an appointment by a judge to acquire an individual’s services to carry out the court’s duties. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 93-4 (1993). See, also, Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 93-2 (1993) (“[T]he appointment of an attorney to serve as fiduciary of an estate, as guardian and or attorney for the mentally incompetent, or as court appointed counsel for an indigent in juvenile court is a ‘public contract’ as the term is used in section 2921.42 since the court is acquiring services pursuant to its duties.”)

A “family member,” for purposes of Section 2921.42(A), “includes, but is not limited to: 1) grandparents; 2) parents; 3) spouse; 4) children, whether dependent or not; 5) grandchildren; 6) brothers and sisters; or 7) any person related by blood or marriage and residing in the same household.” See Ohio Sup.Ct., Commrs. Grievances & Discipline, Op. 93-4(1993), 93-2(1993), Ohio Ethics Commission, Op. 80-001 (1980).

An “interest” is a definite, direct interest that may be either pecuniary or fiduciary. Compensation for serving as an “acting judge” is a pecuniary interest. See Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 93-4 (1993) (Compensation to a court appointed attorney/member of the judge’s family for representing an indigent party is an “interest.”)

Thus, the Board advises that it is improper under Ohio Ethics Law for a part-time municipal court judge to appoint his or her son or daughter as acting judge to serve during the judge’s vacation. The appointment is improper because the appointee is a member of the judge’s family who if appointed as acting judge would have a prohibited pecuniary interest in a public contract.

Related Opinions

In Opinion 93-4, the Board advised that it is improper under both the Ohio Code of Judicial Conduct and Ohio Ethics Law for a judge to appoint an attorney to represent indigent parties indicted by the grand jury, when the attorney is related to the judge or the judges' spouse within the third degree of consanguinity. The Board noted that occasional exceptions might apply under extraordinary circumstances in sparsely populated jurisdictions with few attorneys. Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 93-4.

For an opinion addressing concerns regarding favoritism in appointments by judges, see Ohio Sup.Ct., Bd. Commrs. Grievances & Discipline, Op. 93-2 (1993).

For an opinion by the Ohio Ethics Commission advising upon the employment of relatives see Ohio Ethics Comm., Op.90-010 (1990) advising that "Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city director of service and safety from authorizing or otherwise using the authority or influence of his office to secure the employment of his son by the fire department of the city in which he serves even if: (a) the son has scored the highest on an examination which was administered by a municipal civil service commission to screen potential applicants; (b) the son has been recommended for employment by the city fire chief; and (c) the director has not participated in interviewing the three eligible candidates."

Conclusion

It is improper under both the Ohio Code of Judicial Conduct and Ohio Ethics Law for a part-time municipal court judge to appoint his or her son or daughter as acting judge to serve during the judge's vacation. Under the Ohio Code of Judicial Conduct, an appointment by a judge of a relative within the third degree of consanguinity to serve as acting judge may appear as an act of nepotism, even though the appointee is qualified to receive the appointment. Under Ohio Ethics Law, such appointment is improper because the appointee is a member of the judge's family who if appointed as acting judge would have a prohibited pecuniary interest in a public contract.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code, the requester may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.