



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2015 - 01

QUESTION:

Are there any ethical issues under the Code of Judicial Conduct that should be considered by a judge during the process of adopting or fostering a child? If a judge adopts or fosters a child from within his or her judicial district, does the judge have any obligation to recuse from cases involving the Department of Social Services (DSS) in his or her county of residence?

COMMISSION CONCLUSION:

During the application process to foster or adopt a child, a judge will be required to disclose information about his or her employment, and it is appropriate to disclose and discuss his or her judicial office in that context. However, a judge should be cautious to avoid statements or remarks which could be viewed as an attempt to use his or her judicial office to gain favorable treatment in the adoption process.

During the application process to foster or adopt a child, if a Department of Social Services is involved in that process, a judge should disqualify himself or herself from any case or proceeding involving that specific Department of Social Services for as long as the application is pending.

After the conclusion of the application process, if an application to foster or adopt a child is denied, then the attempt to adopt or foster no longer forms a basis for disqualification and the judge may resume hearing any cases or proceedings involving that specific Department of Social Services.

If, after the conclusion of the application process, an application to adopt a child is successful and the adoption is complete, no further disclosure or disqualification of the matter is required when hearing any cases or proceedings involving that specific Department of Social Services.

If, after the conclusion of the application process, an application to foster a child is successful and the fostering has commenced, a judge has an obligation to disqualify himself or herself from any cases or proceedings involving any specific Department of Social Services with jurisdiction or influence over the continued foster-care arrangement for the duration of the fostering of that child, unless all counsel and parties waive the potential disqualification pursuant to the remittal of disqualification procedures set out in Canon 3D of the Code of Judicial Conduct.

DISCUSSION:

The frequency with which the Commission has received questions about judges involved in fostering or adopting children through a local Department of Social Services has increased in recent years. This formal opinion represents a more involved examination of the issues underlying adoption and foster care by a judge and supersedes any previous informal advice provided by the Commission.

The Commission first considered the influence a judge might have over a local Department of Social Services. Canons 1, 2A and 2B of the Code of Judicial Conduct provide that a judge's conduct should ensure the preservation of the integrity, independence and impartiality of the judiciary and prohibit conduct which misuses the prestige of the judicial office. Further, Canon 2B specifically advises that "[a] judge should not allow the judge's family, social, or other relationships to influence the judge's judicial conduct or judgment." Particularly at the District Court level, where a judge may have frequent interactions with representatives of a local Department of Social Services, it is important that a judge not make statements or take actions that could be viewed as an attempt to use his or her judicial office to gain favorable treatment in the adoption or foster care process. The adoption or fostering process will require a judge to disclose and perhaps discuss his or her employment as part of the evaluation of the judge as a candidate for adoption or foster-parenting. Such disclosure and discussion is proper. However, other conduct that would reasonably suggest that a judge's judicial actions in unrelated cases involving the Department of Social Services might be influenced by the actions of the Department in the judge's adoption or fostering case is not proper.

The Commission next considered the influence a local Department of Social Services might have over a judge. Here, the Commission was further guided by Canon 2B which also holds that "...nor shall the judge convey or permit others to convey the impression that they are in a special position to influence the judge." Upon examination of the adoption and fostering process, the Commission identified certain situations where the leverage exercised by the Department of Social Services over extremely personal aspects of a judge's life could create a reasonable and substantial conflict of interest for the judge.

Canon 3D advises that a judge should disqualify himself or herself in any proceeding in which the judge's impartiality may reasonably be questioned. Canon 3C describes situations where the judge's spouse, child or family member might have a substantial interest in a party to, or in an outcome of, a specific proceeding. While the issue of an adoption or foster care is not specifically addressed within the Code, the Commission concluded that the potential impact to a judge by the actions or recommendations of a Department of Social Services in regards to the approval of an adoption or foster care application is substantial. Once an application had concluded and a matter permanently resolved, however, that potential impact is diminished. Only where that potential impact remains, such as in an on-going foster-care arrangement that continues under the review and approval of the Department of Social Services, should a judge continue to disqualify himself or herself from a Department of Social Services case.

Canon 3D provides that "nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative." A judge should always disqualify when the judge questions his or her own ability to remain impartial. However, where a judge believes that his or her judgment will not be influenced by a potential conflict with the Department of Social Services, and where circumstances such as necessity or emergency challenge the reasonableness of disqualification, disqualification may potentially be waived. Such situations may include, for example, when an otherwise disqualified judge is the only judge available for hearing Department of Social Services matters; when emergency situations require immediate judicial action such as on an emergency ex parte order or temporary restraining order; or when certain administrative or ministerial actions that do not require any independent discretion by a judge warrant immediate action, then an otherwise disqualified judge may disclose the basis for his or her disqualification from Department of Social Services cases and, if all counsel and parties provide a written waiver for the potential disqualification, remit the disqualification pursuant to the procedures set out in Canon 3D of the Code of Judicial Conduct.

As this formal opinion supersedes any informal opinion produced by the Commission on this subject, any judge who has acted in conformity with a previous informal opinion inconsistent with this formal opinion will be deemed to have acted in good faith and any conduct by a judge undertaken in reliance upon any previous informal advice by the Commission on this subject shall not be held to be misconduct.

References:

North Carolina Code of Judicial Conduct

Canon 1

Canon 2A

Canon 2B

Canon 3C

Canon 3D

Rules of the North Carolina Judicial Standards Commission, Rule 8 (2014)