JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

January 6, 2017

Re: JIC Advisory Opinion 2017-01.

Dear Judge

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: You took the bench as Judge for the Judicial Circuit in County on January 1, 2017. Your wife currently serves as Guardian ad Litem for several abuse and neglect cases and several adoption cases arising therefrom which are pending in County. You want to know if you can preside over any of these cases since your wife serves as Guardian.

The Commission has reviewed Rules 1.2, 2.11(A)(1) and (2) and 2.11(C) of the Code of Judicial Conduct to address the question which you have raised:

Rule 1.2 Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

> 1. The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
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> 2. The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is: (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party; (b) acting as a lawyer in the proceeding; (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or (d) likely to be a material witness in the proceeding.
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> . . . .
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> (C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment [2] to Rule 1.2 states that a judge should 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. Comment [5] notes that '[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, **impartiality**, temperament, or fitness to serve as judge" (emphasis added).

When a question of disqualification arises an analysis must be made of when a current or former relationship causes a reasonable questioning of a judge's impartiality. In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), the Court considered whether the circuit court was correct in holding that a search warrant issued by a magistrate was void because the magistrate was married to the Chief of Police and one of his officers had obtained the warrant. The Court held that in any criminal matter where the magistrate's spouse was involved the magistrate would be disqualified from hearing that matter. The Court declined to extend a *per se rule* to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small agency did not automatically disqualify the magistrate who could be otherwise neutral and detached from issuing a warrant sought by another member of the police force.

Judges must exercise extreme caution in accepting a waiver from a juvenile. In *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 529 S.E.2d 354 (2000), a prosecutor moved to disqualify a juvenile's court-appointed counsel from representing him due to an appearance of impropriety resulting from her former representation of another juvenile who was expected to be called as a witness for in the matter. The Circuit Court granted the motion. The juvenile then filed a petition for a writ of prohibition challenging the disqualification of the court-appointed counsel with the West Virginia Supreme Court of Appeals of West Virginia. The Court denied the writ and held that the decision whether to disqualify counsel was within the sound discretion of the trial court even though any conflict had been waived. Importantly, the Court noted:

> [W]e find that a discretionary standard is particularly relevant where a juvenile has executed a waiver of conflict. **Juveniles, who are necessarily of tender years and limited experience, may be unable to fully understand all the implications of, and the consequences that may flow from, such a waiver. Thus it is exceptionally difficult for a juvenile to knowingly and intelligently waive his or her constitutional right to a conflict-free lawyer.** In such circumstances, it is crucial that the trial court exercise its discretion to assure that the juvenile receives a fair trial.

Id. at 121, 529 S.E.2d at 362 (emphasis added). *See also In re Christina W.*, 219 W. Va. 678, 639 S.E.2d 770 (2006); *State v. Butcher*, 165 W. Va. 522, 270 S.E.2d 156 (1980) (The general rule in relation to competency of child to testify is that child under 14 years old is incompetent but the presumption is rebuttable while a child 14 years of age or older is presumed to be competent. However, a child is not a competent witness if he or she is of such a young age and lacking in mental facilities as to be legally irresponsible for his conduct and has no idea or conception of legal or moral obligation of the oath).

Based on the foregoing, the Commission believes that you cannot preside over any cases in which your wife appears as a Guardian ad Litem. We hope this opinion fully addresses the issue which you have raised. If there is any further question regarding this matter do not hesitate to contact the Commission.

Sincerely,

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/bjl/tat