



JUDICIAL INVESTIGATION COMMISSION

Room E-400, State Capitol

Charleston 25305

February 21, 1989

Re: JIC Advisory Opinion 1989-01

Dear

Your letter dated February 7, 1989, to Chief Justice _____ seeking an advisory opinion has been referred to the Judicial Investigation Commission for response. In your correspondence you state that your uncle, _____, who was your mother's brother, died on January 24, 1989. You state that he left a sizable estate and by his will created a trust for his widow and only child. The trust was created mainly for income tax purposes, and in his will he named his widow and you as trustees. You indicate that the duties of the trustees set forth in the will are detailed and because of the size of the estate will involve some attention on your part. You seek an advisory opinion on whether the Judicial Code of Ethics, Canon 5D, will permit you to serve as trustee.

Canon 5D of the Judicial Code of Ethics states in pertinent part:

- D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. 'Member of his family' includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate,

trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

It can be seen that Canon 5D of the Judicial Code of Ethics permits a judge to serve in a fiduciary capacity for a member of his family which the Canon delineates as spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

The Supreme Court of Appeals of West Virginia defined the word "family" in Watson v. Burley, 105 W. Va. 416 (1928), as follows:

The word family has two very distinct meanings: First, the collective body of persons, who live in one house and under one head or manager; and it may include in this sense parents, children, servants, or in some cases even boarders or lodgers; second, those who descend from one common progenitor; and in this sense it cannot include the parents and has no reference to the fact of residents in one house and under one head. When used in its first sense, it rarely includes boarders and lodgers; sometimes includes servants; generally includes children; but is sometimes confined to the wife and infant children or those dependent on the head of the family by reason of their relations independent of contract. The word has this comprehensive, or more or less limited, since, as will most effectually carry out the purpose of the document, in which it is used.

105 W. Va. 419. Courts and other jurisdictions have generally followed this definition which defines family as a collective body of persons who live in one house and under one head or those individuals who are related by blood or marriage.

Some cases define those individuals living in a common household with a common manager as a family. A family is a body of persons who live in one house under one head including parents, children, servants, lodgers, or boarders, or a group of persons

sharing common dwelling and table. Pesqueira v. Talbot, 441 P.2d, 73. In construing a zoning ordinance, the New Hampshire Court held that the term "family" when defined simply as a housekeeping unit is not limited to persons related by blood or marriage but includes also unrelated groups. Town of Durham v. White Enterprizes, Inc., 348 A.2d, 706. Under this criteria the courts have generally held that a family is a collective body of persons who live in one house and under one head or manager; a household including parents, children, and servants and as the case may be lodgers or boarders. Edward Hines Lumber Company v. Smith, 172 N.E.2d, 429.

Other jurisdictions have also followed the definition of family which includes descendants of common relatives or persons related by marriage. In common parlance and usage the word "family" more frequently connotes the existence of a marital or blood relationship or a legal status approximating such a relationship. Hicks v. Hatem, 289 A.2d, 325. In its most common use the word "family" implies father, mother, and children or immediate blood relatives. In Re Noel's Estate, 499 P.2d, 1072.

In conjunction with defining the term "family" some courts have defined the term "family relationship." In McMahon v. Auger, 357 P.2d, 374, the Idaho Supreme Court stated that the term "family relationship" as used in connection with presumption that services of one family relative to another are presumed to have been rendered gratuitously means a collective body of persons who form one household unit under one head and one domestic government and who have reciprocal, natural, and moral duties to support and care for one another. See also Sturgeon v. Wideman Estate, 608 S.W.2d, 140.

A review of decisions in this area demonstrates that the word "family," generally defined as individuals or a group of individuals who fall within one of the two criteria set forth by our Court in Watson v. Burley, *supra*, in the holdings of other jurisdictions, is a flexible term which often makes judicial construction difficult. It is one of indefinite conception which give rise to varying definitions. When a court is called on to give a specific meaning to resolve a particular question of law, judicial construction must relate to, and be consistent with, the context in which the word "family" is found. Planning and Zoning Commission of the Town of Westport v. Synanon Foundation, Inc., 216 A.2d, 442. In applying this rule of judicial construction to your inquiry, the language contained in Canon 5D should be discussed.

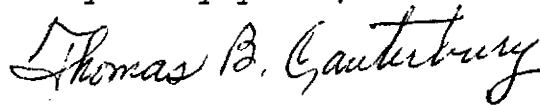
The Canon states that a judge should not serve as an executor, administrator, trustee, guardian, or other fiduciary,

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unless for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. There are two conditions which must be met before a judge can serve as an executor, administrator, trustee, guardian, or other fiduciary. First, he must serve in one of those positions for a member of his family. Second, even if a judge wishes to serve in such a position for a member of his family he can do so only if such service will not interfere with the proper performance of his judicial duties.

Based upon a review of Canon 5D and the decisions of this state and other jurisdictions which define "family" and "family relationship" you would not be precluded from serving as a trustee for your late uncle's estate subject to the restrictions set forth in the Canon.

Very truly yours,

A handwritten signature in cursive script that reads "Thomas B. Canterbury". The signature is written in dark ink and is positioned above the printed name and title.

Thomas B. Canterbury
Chairman

TBC/bl