



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

March 25, 2014

JIC Advisory Opinion 2014-07

Rule 2.13(c) of the Rules of Judicial Disciplinary Procedure gives the Judicial Investigation Commission the authority to promulgate advisory opinions on ethical issues pertaining to the Code of Judicial Conduct. The Rule states that "[t]he Commission may render in writing such advisory opinion as it may deem appropriate." *Id.* The question presented is: Can a judicial officer preside over cases that have previously been handled by another judicial officer when the two are married to one another and reside together in the same household?

The factual scenario giving rise to the instant opinion is as follows: A magistrate is married to a circuit judge. The two serve in the same judicial circuit. The duties of the magistrate and the circuit judge are many and varied. In some instances, the duties of the two judicial officers may overlap.

Magistrates have jurisdiction over civil cases in which the financial amount in dispute is less than five thousand dollars (\$5000.00). *See* W. Va. Code §§ 50-2-1 *et seq.* Magistrates hear misdemeanor cases and conduct preliminary hearings in felony cases. *Id.* In criminal cases, magistrates issue and record affidavits, complaints, arrest warrants, and search warrants. *Id.* They also initially set bail in all criminal cases except those in which a defendant is charged with first-degree murder pursuant to W. Va. Code § 61-2-1 or kidnapping pursuant to W. Va. Code § 61-2-14a(a). *Id.*

Magistrates also issue emergency protective orders in cases involving domestic violence. In some counties where there are no mental hygiene commissioners, the chief judge can designate a magistrate or magistrates to handle all or part of probable cause involuntary hospitalization cases. Magistrates cannot handle final commitment or guardianship cases. Lastly, magistrates have jurisdiction of all matters

involving unlawful entry or detainer of real property or involving wrongful occupation of residential rental property.

W. Va. Code § 51-2-2 provides that “[t]he circuit court shall have supervision and control of all proceedings before magistrates, by mandamus, prohibition and certiorari.” Circuit courts have jurisdiction over all civil cases at law over twenty-five hundred dollars (\$2500.00); all civil cases in equity; and proceedings in *habeas corpus*, *mandamus*, *quo warranto*, prohibition, and *certiorari*. *Id.* They also have jurisdiction over all felony cases. *Id.* Circuit judges have concurrent jurisdiction with magistrates over misdemeanors. *Id.* Circuit judges also preside over civil and criminal appeals from magistrate court and make final decisions in mental hygiene cases. *Id.* The chief judge of the circuit also has the responsibility of filling any magistrate vacancy by appointment. *See* W. Va. Code § 50-1-6.

To address the question, the Commission has reviewed Canons 2A and 3E of the Code of Judicial Conduct and two opinions of the Supreme Court of Appeals of West Virginia. The relevant Canons provide in pertinent part:

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.

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

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

- E. Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

(d) the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . .

(iii) is known by the judge to have a more than [a] de minimis interest that could be substantially affected by the proceeding.

The Code defines “de minimis” as “an insignificant interest that could not raise a reasonable question as to a judge’s impartiality.”

Whenever there is a question of disqualification, an analysis must occur of the underlying relationship and when it rises to a level causing a reasonable question 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 case. The Court declined to extend a *per se* rule to other members of the police force.

In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Court held that a judge should disqualify himself/herself from any proceeding in which his/her impartiality might reasonably be questioned. The Court noted that the avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding actual impropriety itself and that the judge should take appropriate action to withdraw from a case in which the judge deems himself/herself biased or prejudiced. *Tennant* cited the commentary to Canon 3E(1) which states that a judge should timely disclose on the record information which he/she believes the parties or their lawyers might consider relevant to the question of disqualification. Litigants and counsel should be able to rely on judges complying with the Code of Judicial Conduct. There is no obligation imposed on counsel to investigate the facts known by the judge which could possibly disqualify the judge. The judge has a duty to disclose any facts even if the judge does not feel that they are grounds for disqualification *sua sponte*.

Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or

unfairness made against the judge. The Court noted that the standard for recusal is an objective one. Facts should be viewed as they appear to the well-informed, thoughtful and objective observer rather than the hypersensitive, cynical and suspicious person.

In applying the foregoing to the factual scenario, the Commission is of the opinion that the judge is precluded from presiding over any cases that were previously handled by his/her spouse in magistrate court. The Commission notes that this decision is consistent with our prior rulings concerning the disqualification of a judicial officer when a close family member is involved in the proceeding. *See* JIC Advisory Opinion 2013-03 (a judicial officer, whose daughter and fiancé work in different local law firms, cannot preside over any cases directly involving them; however, the judicial officer is not disqualified from presiding over cases involving other members of the law firms but must disclose the familial relationships in every case) and JIC Advisory Opinion 7/19/2010 (magistrate must disclose that her son is chief of police in all cases involving that agency, and if he has any involvement in the case she must disqualify herself). Our decision is also consistent with JIC Advisory Opinion 2013-05 in which we held that a circuit judge would not be permitted to hear the appeal of a matter over which he/she had presided while serving as a Family Court Judge.

Lastly, our position is consistent with the decisions of other states. *See* Kansas Judicial Advisory Opinion JE-116 (2004) (the spouse of a district judge who is not the chief judge may serve as a district magistrate judge as long as the district judge does not consider appeals from decisions made by the spouse); Alabama Judicial Advisory Opinion 97-632 (a circuit judge whose spouse is a municipal judge may hear any appeal from the municipal court, as long as the judge's spouse did not participate in any aspect of the proceeding below); and Michigan Judicial Advisory Opinion JI-31 (1990) (a circuit judge whose spouse is a district court judge or friend of court referee should not review decisions of his or her spouse, but the other judges on the court may review the spouse's decisions). As was noted in the Michigan Opinion:

Both spouses as judicial officers owe duties to the administration of justice to avoid any situation where the impartiality of the presiding judge or the fairness of the judicial proceedings is called into question. The judge's recusal avoids the appearance that the judge is allowing family relationships to influence judicial conduct, avoids the appearance of impropriety and upholds the integrity of the judicial system.

Id. Conversely, colleagues on the same court as the judge are not disqualified from reviewing actions of the judge's spouse.

To the extent that this decision conflicts with JIC Advisory Opinion 11/5/1990 (a judge whose spouse is a family law master in the county may only enter final orders on uncontested divorces where there is a settlement agreement between the parties and no children are involved), the earlier decision is overruled.



Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat