

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

OF THE

DISTRICT OF COLUMBIA COURTS

ADVISORY OPINION NO. 11

(October 29, 2002)

**DISQUALIFICATION OF JUDGE BECAUSE OF CHILD'S RECEIPT OF
SCHOLARSHIP FROM UNIVERSITY WHICH IS A LITIGANT BEFORE JUDGE**

A judge of the Superior Court has requested a formal advisory opinion as a result of her child's award and acceptance of a significant scholarship to a University that, through its related hospital, might be a litigant in cases before the judge. For reasons that follow, we advise that, unless the parties consent after full disclosure, the judge should recuse from any case that involves the child's University. We first set out the facts on which our opinion is based and then consider the relevant ethical considerations.

A.

The judge currently sits on the Probate and Tax Division of the Superior Court. The judge's 17-year old child, while a senior in high school, received offers for admission to seven colleges and universities. Two of them offered full four-year merit scholarships, one valued at \$155,000, the other at \$145,000. The judge's child decided

to accept the offer of admission and scholarship from one of them ("the donor University") and is now attending that institution.¹

The judge hears cases in the Probate and Tax Division of the Superior Court. Of relevance to this request for advice, the Division considers adult intervention matters pursuant to the District of Columbia Guardianship, Protective Proceedings and Durable Power of Attorney Act of 1986, D.C. Code § 21-2001, et seq. (2001). Under the act, a court may appoint a conservator and/or guardian for a person found to be incapacitated. The court may also be called upon to make critical decisions concerning an incapacitated person's treatment. Hospitals in the Washington, D.C. area, including a hospital affiliated with the donor University, petition the court with respect to patients in their care. The hospitals are not necessarily "interested parties" in such proceedings as that term is commonly understood, but there are instances in which a hospital participates actively in the proceedings and in which a hospital's own actions vis à vis the patient can

¹ The donor University issued a press release announcing the scholarships awarded to nine high school seniors in the District of Columbia. According to the release, the donor University "selects students based on their class rank, GPA, SAT scores, course of study, teacher recommendations, leadership qualities, community service and other extracurricular activities and achievements. The scholarships are renewed annually provided the recipients meet the University's academic progress standards."

become an issue in the proceedings. The question we have been asked is whether the judge should recuse in cases involving the donor University's Hospital.²

B.

We begin by noting that there is no impropriety in the acceptance of the scholarship. The Code of Judicial Conduct expressly provides an exception to the general rule that a judge³ shall "not...accept, a gift, bequest, favor or loan from anyone," Canon 4D(5), in the case of "a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants," Canon 4D(5)(g).

That a scholarship may be accepted, however, does not mean that its acceptance is without consequence to the judge's adjudicatory responsibilities. The section of the Code permitting scholarships is not limited, as in the case of the section permitting "any other gift, bequest, favor or loan" only to situations where the donor "is not a party or other person who has come or is likely to come or whose

² We note that the donor University, its partly-owned Hospital or other related entity could also come before the judge while sitting in the Probate and Tax Division as a beneficiary of a will, or in a tax-related case, or in a case before another division to which the judge might be assigned. The general principles we discuss in this opinion relating to recusal would apply in those situations as well. See note 7 *infra*.

³ Judges must "urge members of the judge's family residing in the judge's household" to do likewise. Canon 4D(5).

interests have come or are likely to come before the judge." Canon 4D(5)(h). It therefore appears that the Code does not categorically preclude a judge from presiding over a case in which a litigant or interested party has been the donor of a scholarship to the judge or a member of the judge's family. A commentary to Canon 4D, however, notes that:

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required.

A scholarship is not a "gift" in the ordinary sense, but a scholarship to a minor child may be considered an indirect benefit or subsidy to the parent who otherwise would likely be financially responsible for the child's college education. Furthermore, unlike a past completed gift, the scholarship at issue here is in a sense a continuous benefit during its four year duration and thus contemporaneous with any adjudication on which the parent judge might sit during that period. Therefore, even though not every scholarship may necessarily require disqualification in cases involving the donor, the caution in the commentary applies here in light of the substantial

monetary value of the scholarship and its competitive selection process.⁴ Thus, we turn to consider whether, and on what terms, disqualification may be required.

Canon 3E provides:

1) A judge shall disqualify himself or herself in a proceeding in which the Judge's impartiality might reasonably be questioned...

Although receipt of a scholarship is not one of the enumerated instances requiring disqualification, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in section 3E(I) apply." Commentary to Canon 3E(1). Moreover, "this [Canon 3] is to be read in connection with Canon 2, which states '[a] judge should avoid impropriety and the appearance of impropriety in all activities.'" Committee on Codes of Conduct, Advisory Opinion No. 27, October 29, 1973 (Revised July 10, 1998). Specifically, Canon 2A provides that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." As the commentary to Canon 2A notes, "[t]he test for appearances

⁴ We distinguish this scholarship from a generally available benefit, tax credit or deduction, where the judge would not be viewed as having the same kind of gratitude toward the donor University of a scholarship awarded to only a few students as a result of a competitive process.

of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." As Justice Frankfurter put it, "[t]he guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 467 (1952).

The standard we apply is whether "from the perspective of 'the average person,' a fully informed person might reasonably question whether the judge 'could decide the case with the requisite aloofness and disinterest.'" *Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) (en banc) (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985) (holding that trial judge violated Canon 3C(1) by presiding over criminal trial in which the U.S. Attorney's Office was prosecutor while judge was concurrently negotiating employment with U.S. Department of Justice). We think that a litigant or other person affected by litigation involving the donor of a substantial scholarship to the judge's minor child might reasonably perceive that the judge's impartiality could be impaired by a feeling of gratitude to the donor for the award, or desire for continuation of the scholarship during the whole of the student's college

education - the "specter of partiality that the Canon and the Supreme Court entreat all judges scrupulously to avoid." *Id.* Therefore, the judge is disqualified from proceedings involving the donor University and its Hospital.⁵ Because disqualification is based on the appearance of impropriety, and not personal bias, the disqualification is subject to remittal after disclosure to the parties pursuant to Canon 3F, a discretionary option open to the judge. *See* D.C. Courts' Advisory Committee on Judicial Conduct, Advisory Opinion No. 9 (May 3, 2001). Upon disclosure, the parties would be able to evaluate on a case-by-case basis whether the donor's interest in a particular case is such as to warrant excluding the judge from participating in the proceeding.

⁵ According to the donor University Hospital's website, since 1997 the Hospital "has been jointly owned and operated by a partnership" between the donor University and another entity. In light of the significant interest of the donor University in the Hospital, we consider that the Hospital and the donor University are the same for purposes of this opinion.