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COMMONWEALTH OF KENTUCKY
ETHICS COMMITTEE OF THE KENTUCKY JUDICIARY

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JUDICIAL ETHICS OPINION JE-36

FORMAL

QUESTION 1: If a judge drew a will for a client and friend before January 1, 1978, may he serve as executor under that will? There was no family relationship.

ANSWER: No, unless he received letters of appointment before that date.

QUESTION 2: May a judge who has been handling the business affairs of a former client under a power of attorney for several years, beginning before January 1, 1978, continue in that capacity? May he act as executor of the will of the client, who is now mentally incompetent, in a nursing home and without any close relatives, where the will was drawn before January 1, 1978?

ANSWER: He may continue to handle the client's business affairs, but he may not serve as executor.

QUESTION 3: May a judge serve as executor under the will of a former client who was also a close personal friend and whose child is married to a first cousin of the judge?

ANSWER: No.

REFERENCES: SCR 4.30, Canon 5D; Judicial Ethics Opinion JE-11.

OPINION:

Canon 5D reads in part as follows:

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.... "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.... (Emphasis added)

This Canon (5D. Fiduciary Activities) shall not prohibit a judge from continuing to perform fiduciary duties under an appointment accepted prior to January 1, 1978, the date on which the Canons were adopted as a part of these Rules. (Emphasis added)

The last sentence of Canon 5D clearly was intended to "grandfather in" those judges who were already serving in a fiduciary capacity before the adoption of the Code of Judicial Conduct. It does not apply to a situation where a judge did not qualify or "accept" the appointment prior to January 1, 1978, even if the instrument naming him was drawn before that date. Until a fiduciary named in a will or other instrument actually receives letters of appointment under KRS 395.105, he cannot be said to have accepted the appointment. If this did not occur before January 1, 1978, the last sentence of Canon 5D has no relevance to the situation.

For this reason, we hold that the judge should not act as executor in the situation described in question 1 unless he actually became the executor prior to January 1, 1978.

As for question #2, we hold that the last sentence of Canon 5D operates to permit the judge to continue to handle the business affairs of his former client because he was acting in that capacity before January 1, 1978. He should not, however, become her executor upon her death because there does not appear to be any familial relationship involved. It is unfortunate that she is no longer in a position to name another executor, but the fact remains that Canon 5D makes no allowance for this kind of situation unless a familial relationship exists. Absent evidence of such a relationship, we reluctantly hold that the judge should not act as her executor upon her death.

The third question requires an examination of the meaning of "close familial relationship" as used in Canon 5D. In our Judicial Ethics Opinion JE-11, which involved the question of a judge serving as executor of an uncle's estate, we stated that it is a question of fact in each case. We further pointed out that the Canon "seems to contemplate the inclusion of more than the judge's immediate family within the permissible group...." The opinion goes on to list some criteria:

If, for instance, the uncle stood more or less in loco parentis during the judge's childhood or adolescence, or if there was a close bond of friendship between them, or if the person is regarded as a member of the judge's extended family, it would surely be "a close familial relationship."

In the instant situation, there is, of course, no blood relationship between the judge and the decedent, although there were close ties of friendship and a somewhat remote relationship by marriage. We think that these elements, without more, do not create "a close familial relationship." For this reason, we hold that the judge should not serve as executor.


B. M. Westberry, Chairman
Ethics Committee of the Kentucky Judiciary