Maryland Judicial Ethics Committee

Opinion Request Number: 1979-12

Date of Issue: October 29, 1980

O Published Opinion **G** Unpublished Opinion **G** Unpublished Letter of Advice

Judge May Act as Co-Trustee but Not Hear Cases Involving Trust or Corporations in Which Trust Holds Stock of Value Exceeding $1,000

The Committee has been asked for an opinion with respect to a judge's continuing to act as co-trustee of two trusts, relationships acquired prior to his appointment to the bench in 1968.

We are informed in the letter of inquiry that the trusts were established by a former client and friend, and that the other trustee is a bank. Upon his appointment to the bench, the judge proffered his resignation to the life beneficiary of the trusts, the only son of the deceased settlor, but he requested the judge not to do so. The beneficiary is now and was, when the trust instruments were executed, a spendthrift. The trusts are discretionary and the judge feels a moral obligation to continue to act.

It is to be noted at the outset that under the provisions of the Maryland Code, Estates and Trusts Article § 14-104, a judge of any court established under the laws of the State or United States may not serve as a trustee of any inter vivos or testamentary trust, unless he is the surviving spouse of the grantor or related to the grantor within the third degree, or "unless he was actually serving as a trustee of the trust on December 31, 1969." The judge in this case was serving prior to the date specified.

Turning to the applicable Canons and Rules of Judicial Ethics, of which the inquiring judge is fully cognizant and to which he has referred in his communication, of immediate application is Canon XXVI entitled "Executorships and Trusteeships." This Canon provides:

> "While a judge is not absolutely disqualified from holding a fiduciary position, he should not accept or continue to hold any such position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially or to be involved in questions of law to be determined by him."

The second sentence of Rule 2 of the Rules of Judicial Ethics is also relevant:

> "He [the judge] shall not participate in any matter in which he has a significant financial interest or in which he previously acted as a lawyer."

In addition, certain of the provisions of Canon XXV, entitled "Personal Investments and Relations," are also of possible application. These are:

> "A judge shall abstain from making personal investments in enterprises which are apt frequently to be involved in litigation in the court. (Emphasis added.)
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> "A judge should inform himself about his personal and fiduciary financial interests...."

Finally, we observe that under the Maryland Public Ethics Law, Code, Art. 40A, Sec. 1- 101,

et seq.[*], while a judge may not participate in any matter in which he has an "interest," Sec. 3-101[**], the statute specifically excludes "an interest held in the capacity of a personal representative, agent, custodian, fiduciary or trustee, unless the holder has an equitable interest therein." Sec. 1-201(m)(1).[***] (Emphasis added.)

The Committee has reviewed the inquiry in two aspects) the first relating to the propriety of the judge's continuing to act as co-trustee; and the second, absent any impropriety, pertaining to his participation or not in cases involving business entities in which the trust may have a stock or other ownership interest.

First, it is the conclusion of the Committee that there is no impropriety in his remaining as co-trustee. It is apparent from his letter that insofar as Canon XXVI is concerned, the retention of his position as a fiduciary does not involve any significant expenditure of his time, and certainly does not encroach upon his judicial time and performance of his judicial duties. We are also assured that nothing in the trust instruments nor the business interests of the beneficiaries "require[s] investments in enterprises that are apt to come before him judicially or to be involved in questions of law to be determined by him."

On the other hand, it is disclosed that the trusts do hold stock in corporations that are "occasionally" involved in litigation which does come before the judge and that it has been his custom either to disqualify himself or offer to do so in such situations. In this respect, attention is invited to [Opinion Request No. 1979-10 (unpublished)], issued subsequent to the date of this inquiry, which concerns itself generally with the question of stock ownership interests by a judge and contains a re-definition of "significant financial interest" as that phrase is employed in the portion of Rule 2 above quoted.

It is the opinion of the Committee that the judge should (a) disqualify himself in any case in which the trust or trusts of which he is a co-trustee may be a litigant, consent of counsel notwithstanding; and (b) disqualify himself in any case involving a business entity in which the trust or trusts may hold stock or other type of ownership representing a "significant financial interest" in the business entity, consent of counsel notwithstanding.

It is also our opinion that, in the spirit of the first portion of Canon XXV, above quoted, and in accordance with the views expressed by the Committee in [Opinion Request No. 1979-10 (unpublished)], if a business enterprise (or enterprises) in which the trusts have an interest, significant or not, becomes "frequently involved" in the future in litigation in his court, a serious question would arise as to the propriety of his remaining as a co-trustee. We are not prepared to conclude at this time

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[*] As of editing date [July 10, 2006], recodified generally as Maryland Code, State Government Article, Title 15.

[**] As of the editing date [July 10, 2006], Maryland Code, State Government Article, § 15-501.

[***] As of the editing date [July 10, 2006], Maryland Code, State Government Article, § 15-102(t)(2)(i).

that his resignation under such circumstances would be required; but we do believe that in such eventuality a presentation of the pertinent facts to the Committee and a request for a formal opinion would be indicated.

In the closing paragraph of the letter of inquiry, reference is made to the rejection by the Court of Appeals of Amendments to Canons XXVI and XXVIII, recommended by the Judicial Conference in 1979. These amendments would have deleted the first full paragraph of Canon XXV and added the second and third paragraphs of that Canon to Canon XXVIII; and they would have deleted in their entirety the provisions of Canon XXVI which we have previously quoted. It is the judgment of the Committee that the rejection by the Court of Appeals of the proposed changes contains no negative implications with respect to the judge's continuing to act as a fiduciary.