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October 4, 1995

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ADVISORY OPINION NO. 95-70

Honorable Patricia Yeager Fuhrmeister
Judge of Probate
Shelby County
Post Office Box 825
Columbiana, Alabama 35051

Conflicts Of Interests/
Probate Judge - Issuing
Certificates of Warning
To Redeem/Law Firm Of
Spouse Representing Fire
District.

There is no prohibition
under the provisions of
the Alabama Ethics law
against a Probate Judge
issuing Certificates of
Warning to Redeem when
the fire district is
represented by a member
of said judge's spouse's
law firm and the foreclo-
sure deed is prepared by
the firm; provided
however, the judge's
spouse receives no
benefit from the
transaction.

Dear Judge Fuhrmeister:

The Alabama Ethics Commission is in receipt of your request
for an Advisory Opinion of this Commission, and this opinion is
issued pursuant to that request.

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QUESTION PRESENTED

May a Probate Judge issue Certificates of Warning to Redeem when the fire district is represented by a member of said judge's spouse's law firm and the foreclosure deed is prepared by the firm?

FACTS AND ANALYSIS

By way of reference, this opinion is issued pursuant to a request by the Honorable Patricia Yeager Fuhrmeister, Judge of Probate, Shelby County. Judge Fuhrmeister took office as Probate Judge of Shelby County in January, 1995. Prior to that time, Judge Fuhrmeister practiced law in Shelby County for a number of years and had, most recently, been associated with a local law firm, Griffin, Allison, May, Alvis, and Fuhrmeister. Judge Fuhrmeister's spouse is still a member of that firm.

Since taking office, Judge Fuhrmeister has tried to avoid any conflicts of interest involving her former practice and her former law firm. However, because the county has only one Probate Judge, and certain matters must be handled in the Probate Court, a problem occasionally arises. They have dealt with the problem by asking the Supreme Court to appoint a "Special Probate Judge" to sit on cases in which a potential conflict exists. Judge Fuhrmeister does not hear cases in which any member of her husband's firm is an attorney, and she does not make appointments to any member of the firm. Since the remaining members of the law firm do not handle a great deal of probate work, Judge Fuhrmeister believes that potential conflicts will become fewer and fewer.

However, a situation has recently arisen which involves Judge Fuhrmeister's non-judicial duties as the official in charge of the Recording Department of the Probate Office. Code of Alabama, Section 11-48-57 requires the Probate Judge to issue a "Certificate of Warning to Redeem" to those persons whose properties have been foreclosed for non-payment of certain municipal

assessments. One of the partners in Judge Fuhrmeister's husband's firm represents two local fire districts. When the fire district conducts a foreclosure sale and the redemption period has passed, the Probate Judge must issue such a certificate to the property owners. A probate court case is not opened, and no hearing is held.

Judge Fuhrmeister has issued five such Certificates of Warning to Redeem since assuming office in January; however, the 60 day period allowing for redemption following the Certificate of Warning has not yet expired. Judge Fuhrmeister is questioning whether or not she can, as Probate Judge, issue these Certificates of Warning to Redeem where the fire district is represented by a member of her husband's law firm and the foreclosure deed is prepared by the firm. Also, does it make a difference if her husband does not receive any portion of the attorney's fee for his firm's representation of the fire district? If it is not proper for her to issue the Certificate, should she, at this point, void the handful of Warnings which have been issued under her name and ask the Supreme Court to appoint a Special Probate Judge for reissuance?

Section 11-48-57, Code of Alabama, 1975, requires a Probate Judge at the time of application for entry of a Certificate of Warning To Redeem to notify any person who has been shown on the tax assessment records as follows:

"Take notice that there has been recorded in my office a deed book _____ at page _____ a deed of which the attached is a correct copy. You are warned that unless you, or those claiming under you, take prompt steps to redeem from those claims under said deed all rights of redemption may be lost this _____ day of 1995."

After the notice is mailed, the Judge of Probate enters on the margin of the record, a Certificate of Warning, and signs the same with the date of entry. At the expiration of 60 days after the date of the certificate the rights to redeem are lost.

No file is opened and there are no court proceedings in the matter. The function is purely ministerial on the part of the Probate Judge and does not involve any judicial decision, policy making, or discretion, but is a function required by law.

In a related matter, Judge Fuhrmeister assumes that there is no prohibition which would keep her husband or members of his

firm from filing deeds and other instruments which they have prepared in the Recording Department. She bases this assumption on the fact that overseeing the instruments must be recorded in the office of the Probate Judge, and on the fact that no significant discretion is exercised in the recording of such instruments. However, if there are additional safeguards which the Commission feels should be taken, Judge Fuhrmeister would appreciate it if the Commission would advise her of such. Again, Judge Fuhrmeister does not consider the particular functions in question as judicial in nature; however, in the event that they are interpreted as such, she has forwarded a copy of this request to the Judicial Inquiry Commission with a request that these problems be reviewed and addressed from its standpoint, as well.

The Alabama Ethics law, Code of Alabama, 1975, Section 36-25-5(a) states:

"No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

In the case at hand, it appears that this public official is not using her official position to obtain direct personal gain specifically to her husband's law firm, but rather is performing the required duties which are necessary as Probate Judge. Therefore, such use and gain are specifically authorized by law.

Section 36-25-10 states:

"If a public official or public employee, or family member of the public employee or family member of the public official, or a business with which the person is associated, represents a client or constituent for a fee before any quasi-judicial board or commission, regulatory body, or executive department or agency, notice of the representation shall be given within 10 days after the first day of the appearance. Notice shall be filed with the commission in the manner prescribed by it. No member of the legislature shall for a fee, reward, or other compensation represent any

person, firm, or corporation before the public service commission or the state board of adjustment."

CONCLUSION

The Alabama Ethics Commission can find no prohibition under the provisions of the Alabama Ethics law against allowing a Probate Judge to issue Certificates of Warning to Redeem when the fire district is represented by a member of said judge's spouse's law firm and the foreclosure deed is prepared by this firm; provided however, Judge Fuhrmeister's spouse receives no benefit from the transaction. It is the further opinion of the Alabama Ethics Commission that the Judicial Inquiry Commission and the Office of the Attorney General be contacted to ascertain whether any other rules or laws are applicable in this matter.

AUTHORITY

By 4 - 1 vote of the Alabama Ethics Commission on October 4, 1995.



H. Dean Buttram, Jr.
Chairman
Alabama Ethics Commission