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A.C.J.C.

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO: ACJC 2019-420

IN THE MATTER OF

ARTHUR BERGMAN,
JUDGE OF THE SUPERIOR COURT

FORMAL COMPLAINT

Maureen G. Bauman, Disciplinary Counsel, Advisory Committee on Judicial Conduct (“Complainant”), complaining of Superior Court Judge Arthur Bergman (“Respondent”), says:

Facts

1. Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1981.
2. At all times relevant to this matter, Respondent served as a Judge of the Superior Court of New Jersey, assigned to the General Equity Division in the Middlesex Vicinage, a position he continues to hold.
3. Michael J. Hennessy (“Plaintiff”) instituted a legal action against his brother seeking the removal of John J. Hennessy, II (“Trustee”) as trustee of two trusts established by their parents for the benefit of the Hennessy children, which included Plaintiff, Trustee, and their siblings Joelyn Hennessy Melzl, Jacqueline Hennessy Fishbein, and Jeffrey Hennessy. Plaintiff also sought an accounting of the trusts and to compel the sale of the home in which the decedents previously lived (the “Millstone home”).

4. The Hennessy siblings subsequently became parties to the action titled In the Matter of the J & V Trust and Hennessy Family Trust, Docket No. 259170, in the Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex Vicinage. Respondent presided over this litigation.
5. In or about August 2016, the Trustee informed his siblings that he would accept the Millstone home as his in-kind trust distribution. Initially, there was no objection to the Trustee's proposal from his siblings.
6. The Trust granted to the Trustee broad powers to preserve, repair and/or improve the Millstone home.
7. The Trustee's daughter, Thiel Hennessy Dragon ("Ms. Dragon"), acted as caretaker for the Millstone home and property.
8. Beginning in early 2017, the Trustee utilized his own funds and began making repairs and improvements to the Millstone property, which, according to the Trustee, were "necessary to maintain and/or improve" the premises.
9. In or about November 2017, Plaintiff asserted that the Trustee had no right to accept the Millstone home as an in-kind distribution.
10. On or around March 14, 2018, Respondent denied Plaintiff's requested relief for removal of the Trustee, but granted Plaintiff's demand for an accounting by the Trustee and ordered the Trustee to sell the Millstone home to the highest bidder, which could include an offer from any beneficiary.
11. On or around May 15, 2018, Respondent ordered any interested beneficiary seeking to purchase the Millstone home to submit bids no later than June 11, 2018.
12. Plaintiff and the Trustee made competing offers on the Millstone home and Plaintiff ultimately acquired the property.

13. On or around September 14, 2018, the Trustee filed a motion for partial summary judgment on three separate \$100,000 payments made by the Trustee to his mother, who died shortly after payment was made to a joint account payable on her death to the Trustee. Because this payment contravened the express terms of the Trust, Respondent ordered the Trustee to repay the funds to the Trust.

14. On or around January 2, 2019, prior to the return date of the partial summary judgment motion, the Trustee filed a motion seeking reimbursement for himself and his daughter, Ms. Dragon, for personal funds expended for improvements to the Millstone home.

15. Plaintiff objected to the Trustee's reimbursement motion on the basis that some of the expenses incurred were for the personal benefit of the Trustee and his daughter, who was living in the home at the time, and not for the benefit of the estate.

16. On or around February 22, 2019, Respondent heard oral argument on the Trustee's reimbursement motion during which the Trustee provided evidence of the costs incurred, individually, by him and his daughter for the repairs and improvements made to the Millstone home, which totaled \$83,922.32 and \$28,103.12, respectively.

17. Respondent withheld awarding any reimbursement to the Trustee pending receipt from the Trustee of supplemental sworn certifications from those persons or entities retained to perform the work in question stating that the work was done for the benefit of the Trust. Those certifications were to be submitted to the court in lieu of a plenary hearing.

18. On or around March 8, 2019, the Trustee submitted supplemental certifications by contractors who performed work on the Millstone home. One of the individuals that submitted a certification was Ben Oskierko, owner of Boss Landscaping. Mr. Oskierko's certification included an invoice from Boss Landscaping for work performed on the Millstone home.

19. Prior to making his determination in respect of the Trustee's motion for reimbursement, and without notification to the parties, Respondent conducted outside research and his own fact-finding investigation.

20. As part of that investigation, Respondent sought to speak directly with Mr. Oskierko and searched online for a telephone number for "Boss Landscaping" at which Mr. Oskierko could be reached. Finding no relevant information, Respondent continued his search utilizing the New Jersey Division of Consumer Affairs license verification service, which also yielded no results for "Boss Landscaping." Respondent then performed an online search for "Benjamin Oskierko" and uncovered information that included Mr. Oskierko's business address, the length of time his business had been operating, the number of employees the business employs, and the business's estimated annual revenues.

21. On or around July 19, 2019, using the information gleaned from his online research, Respondent telephoned Mr. Oskierko to discuss, *ex parte*, Mr. Oskierko's certification. Respondent's call, however, was routed to Mr. Oskierko's voicemail where Respondent left his name, "Judge Bergman," and that he "wanted to ask [Mr. Oskierko] a couple of questions about his March 8, 2019 Certification."

22. Respondent did not reference in his voicemail message to Mr. Oskierko an anticipated plenary hearing in the Hennessey Family Trust matter or seek information from Mr. Oskierko as to his schedule to attend such a hearing.

23. In addition to researching Mr. Oskierko and his business, Respondent sought more information about Ms. Dragon's marriage date and whether she owned her own "marital home" while living in the Millstone home.

24. At Respondent's request, his law clerk spoke with the Registrar for Vital Statistics to determine the dates of Ms. Dragon's marriage and the birth of her child, the Trustee's grandchild.

25. Respondent also personally researched real estate tax records to verify when Ms. Dragon and her husband purchased their marital home.

26. On or around July 22, 2019, Respondent issued his Opinion and Statement of Reasons rejecting most of the Trustee's application and ordered that the proceeds of the Trust be distributed.

27. Respondent made various findings concerning both the Trustee and his daughter as to their intent for the Millstone home, their living preferences, and their lack of credibility.

28. Respondent relied principally on the results of his independent research when making these findings of fact, without first advising the parties of his intention to do so or providing them the opportunity to challenge the accuracy of those factual findings at a plenary hearing.

29. In his July 22, 2019 Opinion, Respondent stated:

The main reason for the reluctance of the Court to accept the Trustee's certifications was his prior track record in this case, regarding actions taken and lack of candor. In addition to the approbation and reprobation regarding the in-kind distribution sought by, and asserted by, the Trustee, he had already been rebuked for his withdrawal of some three hundred thousand dollars (\$300,000.00) from the Trust's corpus, which had been improperly removed.

30. In denying the Trustee's Motion for Reimbursement of \$112,025.44 in expenses incurred personally by the Trustee for the maintenance and improvement of the Millstone home, Respondent noted there was no showing by the Trustee that all of the expenditures were for the benefit of the Trust and awarded the Trustee only \$4,475.46.

31. Respondent, likewise, determined that Ms. Dragon was not entitled to reimbursement for any expenses she personally incurred on the Millstone home, stating:

To the extent that there are payments alleged for which she has not been reimbursed, her remedy should have been to ask the Trustee to reimburse her. That she did not do so to the tune of over \$28,000 dollars tends to substantiate, in the Courts (sic) mind, that she was working on the house as her future residence, and was willing to pay for certain personal choices in exchange for the privilege of living in it rent free.

32. Respondent provided counsel with a proposed form of order in respect of Respondent's July 22, 2019 rulings and requested that "any errata or issues found should be brought to the Court's attention."

33. On or around July 31, 2019, Respondent entered an order memorializing his July 22, 2019 opinion.

34. On or around August 8, 2019, counsel for the Trustee moved for Respondent's recusal and to vacate the July 31, 2019 order on learning, for the first time, about Respondent's *ex parte* telephone call to Mr. Oskierko in July 2019.

35. On September 11, 2019, prior to deciding the Trustee's recusal motion, Respondent issued a Supplemental Statement of Reasons ("SSR") responding directly to the allegations in the recusal motion and enclosing another copy of his July 31, 2019 order.

36. In his SSR, Respondent, when addressing the propriety of his decision to telephone Mr. Oskierko, *ex parte*, stated:

The reason the Court sought to contact Mr. Oskierko directly was due to the suspicious nature of his invoices submitted by Trustee and his daughter. One concern the Court had is that there might be no actual person signing the documents who performed the services, nor an actual firm, as the invoices appeared without any address or phone number in the record as submitted by the Trustee and his daughter. Moreover, as the Court indicated in its July 22 opinion, one of the invoices appears to be altered. Rather than rely on the Trustee to produce a witness, I considered it my duty to determine the availability of the witness, and then I would advise counsel that I would set a plenary hearing on whatever dates would be convenient to the witness.

37. Though believing himself “duty” bound to determine Mr. Oskierko’s availability for a plenary hearing, Respondent did not wait for a return telephone call from Mr. Oskierko before issuing his decision in the matter on the next business day.

38. In defense of his decision to conduct the additional independent research concerning the Trustee’s daughter, Respondent relied on a theory of judicial notice, stating that “Each of the facts set forth in the statement of reasons is based upon the use of judicial notice, as expressly permitted by N.J.R.E. 201 (c).”

39. Respondent scheduled oral argument on the Trustee’s motion for September 24, 2019 and indicated that he would consider any objection to any of his findings of fact determined by judicial notice at that time.

40. On September 24, 2019, counsel and the parties appeared before Respondent for oral argument on the Trustee’s recusal motion, which was based, in part on the information obtained as a result of Respondent’s *ex parte* communications, his *sua sponte* investigation, and his alleged bias against the Trustee.

41. During oral argument, Respondent denied contacting Mr. Oskierko to discuss his certification. The following colloquy between Respondent and the Trustee’s counsel occurred:

COUNSEL: So Your Honor is admitting that one of the reasons you contacted Mr. Oskierko was to discuss his certification and the information contained within the certification?

RESPONDENT: No. I wanted to make sure he signed it.

COUNSEL: So you had concerns about his signature?

RESPONDENT: No. I had concerns about the individual I reached out to was the person who signed it because there were two Benjamin Oskierkos listed online.

COUNSEL: You're suggesting that another individual with the same name may have signed the certification?

RESPONDENT: I'm suggesting that there's two Benjamin Oskierkos. It looks like a father and son.

COUNSEL: Your Honor, I have no way of knowing whether that's true or not. I'll take your word for it that there are two Mr. Oskierkos who have the same name. I'm not sure it really matters, Your Honor.

RESPONDENT: It does.

COUNSEL: The point is that reaching out to a witness in connection - - particularly, when there's a pending motion and Your Honor is the trier of fact, concerning factual issues in dispute is simply a violation - -

RESPONDENT: What factual issue - - what factual issue in dispute was I seeing?

COUNSEL: You, apparently, had concerns about the falsity of the certification and the invoice that was attached to it is reflected in your supplemental submission.

RESPONDENT: Right.

COUNSEL: These are Your Honor's own words. I'm not adding anything here.

RESPONDENT The point is, my concerns were - - my contact with him was strictly for scheduling purposes.

42. Respondent denied the Trustees' recusal motion finding no basis for disqualification.
43. On or about October 9, 2019, Plaintiff filed a motion to surcharge the Trustee, to which the Trustee objected, seeking reimbursement for legal fees and costs incurred in the defense of the Trustee's recusal motion.
44. On or about October 15, 2019, the Trustee filed an interlocutory motion for leave to appeal Respondent's denial of his recusal motion, which the Appellate Court denied on November 18, 2019.

45. On or about November 29, 2019, the parties appeared before Respondent for oral argument on the Motion for Surcharge.

46. On or about February 13, 2020, Respondent issued an order granting Plaintiffs' surcharge request, finding that the Trustee's reimbursement and recusal motions were not for the Trust's benefit but were for the Trustee's and his daughter's personal benefit.

47. Respondent ruled that the associated costs should not be borne by the Trust and surcharged the Trustee the amount of \$22,755 for the Motion for Leave to Appeal an Interlocutory Order and \$7,902.50 for time spent on the motion to recuse.

48. Respondent also opined that:

Of concern to the Court is the lack of any fees reported as incurred for the reporting of these allegations of misconduct. For example, in the Brief for Interlocutory Relief, to the Appellate Division, the Trustee noted at page 8 that "on July 31, 2019, counsel for both parties met with Assignment Judge Alberto Rivas in his chambers to informally discuss the court's *ex parte* communications and use of non-record information evidence in the Reimbursement decision." Nowhere is there any time charged for this meeting. There also appear to be gaps in the records provided. The Court therefore reserves the right to adjust the surcharges if there are other instances of fees relating to the motion for reimbursement and the denial of the recusal motion that are not disclosed in the materials provided to the Court pursuant to the Order as hereinafter set forth.

49. Respondent ordered the Trustee, or his counsel, "to submit a copy of **all** invoices for legal fees in unredacted form to the Court for *in camera* review for all services rendered in this matter," despite the fact that the Plaintiff's motion for reimbursement was limited to the fees incurred for the recusal motion and the appeal.

50. Counsel for the Trustee construed Respondent's February 13, 2020 order requiring the Trustee to submit a copy of his invoices for legal fees in unredacted form as an act of retaliation for initiating this judicial ethics matter.

Count I

51. Complainant repeats the allegations contained in the foregoing paragraphs as if each were set forth fully and at length herein.

52. Respondent, by claiming to the parties and their counsel, as well as to the ACJC, that he contacted Mr. Oskierko , *ex parte*, to inquire about his availability to appear for a plenary hearing and then failing to hold that plenary hearing or even address with or solicit from counsel their respective availability for such a hearing, created the appearance that he was being less than candid with the parties and their counsel when offering this justification, thereby impugning his integrity and that of the Judiciary, in violation of Canon 1, Rule 1.1 and Canon 2, Rule 2.1, of the Code of Judicial Conduct.

Count II

53. Complainant repeats the allegations contained in the foregoing paragraphs as if each were set forth fully and at length herein.

54. By initiating and engaging in an *ex parte* communication about a pending matter with Mr. Oskierko, a potential witness for the Trustee, Respondent violated Canon 3, Rule 3.8 of the Code and impugned the integrity and impartiality of the Judiciary, in violation of Canon 1, Rule 1.1 and Canon 2, Rule 2.1, of the Code.

Count III

55. Complainant repeats the allegations contained in the foregoing paragraphs as if each were set forth fully and at length herein.

56. By instructing his law clerk to conduct an independent factual investigation to obtain personal information about the Trustee's daughter, done without the parties' knowledge, on which Respondent ultimately relied when drawing negative inferences about the Trustee's credibility,

Respondent created the appearance of a bias against the Trustee, in violation of Canon 3, Rule 3.6(C) of the Code of Judicial Conduct.

57. By this same conduct, Respondent impugned the integrity and impartiality of the Judiciary in violation of Canon 1, Rule 1.1 and Canon 2, Rule 2.1 of the Code.

WHEREFORE, Complainant charges that Respondent has violated the following Canons of the Code of Judicial Conduct:

Canon 1, Rule 1.1, which requires judges to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved;

Canon 2, Rule 2.1, which requires judges to avoid impropriety and the appearance of impropriety and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary;

Canon 3, Rule 3.6(C), which requires judges, in the performance of judicial duties, to refrain from using words or conduct which manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice or harassment on the bases specified in Rule 3.6 (A); and

Canon 3, Rule 3.8, which prohibits a judge from initiating *ex parte* communications concerning a pending or impending proceeding.

DATED: October 19, 2020



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