

STATE OF SOUTH CAROLINA) JUDICIAL MERIT SELECTION COMMISSION
)
COUNTY OF CHARLESTON)

IN RE:)
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THE HONORABLE)
FRANCES P. SEGARS-ANDREWS)
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**AFFIDAVIT OF
NATHAN M. CRYSTAL**

PERSONALLY APPEARED BEFORE ME the undersigned Affiant, who, having been duly sworn, deposes and says as follows:]

1. Qualifications. I am offering this affidavit as an expert witness on legal and judicial ethics in support of Judge Francis Segars-Andrews' request for a new hearing before the Judicial Merit Selection Commission. My qualifications to give expert testimony include the following: I am admitted to practice law in South Carolina. I am a Distinguished Visiting Professor of Law at the Charleston Law School and Class of 1969 Distinguished Professor Emeritus of Professional Responsibility and Contract Law at the University of South Carolina School of Law. I have taught professional responsibility, including judicial ethics, and related subjects for more than 30 years. I am the author or coauthor of three books on Professional Responsibility and Legal Ethics, along with numerous articles in this field. My book, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION (3rd ed. Aspen 2008), contains extensive material on judicial ethics, including judicial disqualification. One of my books, THE ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT (2005 ed., 2009 ed. forthcoming) (with Professor Robert Wilcox), is a comprehensive treatment of professional ethics in this state. I write a bi-monthly column for the South Carolina Lawyer on

17
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ethical issues entitled "Ethics Watch." I have been a member of the South Carolina Bar's Ethics Advisory Committee for more than 15 years and have authored a number of opinions that were adopted by the Committee on issues of legal ethics. I was appointed by the President of the South Carolina Bar as chair of the committee from 2002-2003. I also represented the South Carolina Bar in its petition to the Supreme Court in 1990 to adopt the South Carolina Rules of Professional Conduct. I have delivered more than 100 speeches, presentations, and continuing legal education programs to law firms, bar organizations, and other groups, both in South Carolina and nationally. I have appeared as an expert witness by way of testimony, deposition, or affidavit in more than 40 cases involving questions of professional responsibility, legal ethics, and judicial ethics.

2. Disqualification Issues Involved in *Simpson v. Simpson*. I was an expert witness by way of affidavit on behalf of the defendant, Becky H. Simpson, in the case of William R. Simpson, Jr. v. Becky H. Simpson and Wade Ingle, on the issue of whether Judge Segars-Andrews should recuse herself because of the following two circumstances: (a) Attorney Lon H. Shull, III was at the time of this case a partner in the Mount Pleasant law firm of Andrews & Shull. Mark Andrews is the husband of Judge Segars-Andrews. Mr. Shull gave an affidavit on the issue of attorney's fees in the domestic case between Mr. Simpson's parents. (b) James T. McLaren, one of Ms. Simpson's counsel, was cocounsel with Mr. Shull in a personal injury case that was settled for a substantial amount more than a year before the *Simpson* case came before Judge Andrews.

3. My Affidavit and Updated Opinion. In my affidavit, which I understand has been filed with the Commission, I stated that in my opinion Judge Segars-Andrews was not disqualified from deciding the *Simpson* case because of these two situations. I have reviewed my

affidavit, the testimony given at Judge Segars-Andrews' hearing before the Commission, the record and decision of the Court of Appeals in *Simpson v. Simpson*, and the decision of the Judicial Conduct Commission dismissing charges against Judge Segars-Andrews. I have done additional research regarding the disqualification issues raised in the *Simpson* case. I reaffirm the conclusions reached in my original affidavit that Judge Segars-Andrews was not disqualified from hearing or deciding the case because of the two situations mentioned above. In this affidavit I offer additional reasons why in my opinion Judge Segars-Andrews was not disqualified, and I express my opinion that Judge Segars-Andrews is clearly qualified to be reelected to her Family Court Judgeship.

4. Judge Segars-Andrews was not Per Se Disqualified Because of These Two Situations. There is no contention that Judge Segars-Andrews was disqualified under any of the specific disqualification rules. Canon 3(E)(1)(a)-(d). The only basis for disqualification is the general language of Canon 3(E) stating that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"

5. Important Factors with Regard to Judge Segars-Andrews' Impartiality. In deciding whether Judge Segars-Andrews' impartiality might reasonably be questioned, I find several factors to be particularly important:

- First, Judge Segars-Andrews' decision in the *Simpson* case could have no financial or personal impact on either her or any member of her family. Both of the matters that were the basis of the claim of partiality were completed at the time of the *Simpson* case.
- Second, Judge Segars-Andrews had already made detailed findings on how to equitably divide the assets of Mr. and Mrs. Simpson and had included them in her "Instructions for Order" before her husband happened to remind her that Mr. McClaren and Mr. Shull had

been cocounsel in the personal injury case. On March 13, 2006, Judge Segars-Andrews issued her Instructions for Order and asked Mr. Warner and Mr. McLaren to prepare an order. After that date during a casual conversation her husband reminded her that his partner, Mr. Shull, had been cocounsel with Mr. McLaren in the personal injury case. She disclosed this matter at a hearing on Mr. Simpson's motion for a new trial on April 14, 2006. That relationship could have had no impact on her decision in the *Simpson* case because she had already made her decision.

- Third, Judge Segars-Andrews was the person who raised the issue of disqualification. If she was truly partial to Ms. Simpson's counsel, she could simply have kept quiet, and if the matter had been later discovered she could have claimed that she had forgotten about the relationship. Only she and her husband knew that she was aware of the relationship at that time.
- Fourth, Mr. Simpson and her counsel have never presented any expert opinion contrary to my affidavit, even though they had the opportunity to do so before Judge Segars-Andrews, before the Commission on Judicial Conduct, and before the Selection Commission.

6. Scope of Authorities Supporting the Conclusion that Judge Segars-Andrews was not Disqualified. Case law, other provisions of the Code of Judicial Conduct, and Ethics Advisory Opinions all show that this is not a case in which Judge Segars-Andrews' impartiality might reasonably be questioned. In a separate affidavit, Judge William L. Howard, Sr., a former Circuit Court and Court of Appeals Judge, carefully analyzes the disqualification issue that Judge Segars-Andrews faced and reaches the same conclusion: "I believe she acted appropriately and in keeping with the duties of her office, and I believe I would have reached the same conclusion

regarding recusal were I placed in the same position as Judge Segars-Andrews.” Howard affidavit, Par. 24.

7. Case law. Several cases have held that a relationship that is more significant than the ones involved in this case was not disqualifying. In *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (Ct. App. 1995), the Court of Appeals held that the trial judge in a domestic case was not disqualified because counsel for the wife had previously represented the judge in a matter. In *Lyvers v. Lyvers*, 280 S.C. 361, 312 S.E. 590 (Ct. App. 1984), the court held that the trial judge was not disqualified because the judge had represented the counsel for the husband in a domestic case four year earlier. In *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998), the Supreme Court held that a referee, who was a “judge” under the Code of Judicial Conduct, was not disqualified when the referee issued an award to the plaintiff similar to an award the plaintiff’s attorney had issued to the referee in a previous case in which the plaintiff’s attorney served as referee.

8. Other Provisions of the Code of Judicial Conduct. Other provisions of the Code of Judicial Conduct show that more significant relationships than those involved in this case are not disqualifying.

Under Canon 3(E)(1)(b) a judge is not disqualified from hearing a matter in which a former partner of the judge is counsel of record unless the matter was in the office when the judge practiced with the partner.

Under Canon 3E(1)(d) the fact that a relative of a judge is a member of a firm that is counsel of record in a case does not mandate disqualification unless the relative has an interest that could be substantially affected by the outcome of the case.

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9. Judicial Advisory Opinions. Judicial Advisory opinions also support the conclusion that Judge Segars-Andrews was not disqualified. In Opinion #24-2006, the Committee advised that a judge was not per se disqualified when the judge's former firm appeared before the judge. The Committee indicated that the judge should weigh a number of factors in deciding disqualification, particularly whether the judge had any financial interest in the firm. The Committee also advised that the judge was not disqualified when a former client appeared before the judge, but the judge should disclose the matter on the record. See also Opinion #30-2001 (no per se disqualification when former firm appears before judge) and ABA Informal Opinion 1372 (no disqualification when judge's father's law partner or associate appears before judge). Compare Opinion #28-1996, where the Committee advised that a judge should recuse himself when the attorneys in the case were currently counsel in an unrelated divorce case involving the judge's brother.

10. Mr. Simpson's claim that he did not have the opportunity to present evidence in support of his motion to disqualify. At the hearing before the Selection Commission Mr. Simpson and his lawyer argued that they did not have an opportunity to argue or present evidence contrary to my affidavit. This is factually incorrect. On March 12, 2006, Judge Segars-Andrews issued written instructions for a Final Order and asked Mrs. Simpson's counsel to prepare the order. On April 14, 2006, at a hearing on Mr. Simpson's order for a new trial, Judge Segars-Andrews sua sponte raised the issue of whether she should be disqualified because her husband's law partner had cocounseled a significant personal injury case with Mr. McLaren. On April 24, Ms. Simpson's counsel filed my affidavit. On April 25, Mr. Simpson's counsel submitted a letter in response to my affidavit. He did not offer any expert testimony in support of his position. On June 8, 2006, Mr. Simpson filed a motion for reconsideration. A hearing was

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held on this motion on July 26, 2006. Thus, from April 14, 2006, until July 26, 2006, more than 3 and ½ months, counsel for Mr. Simpson had an opportunity to present argument and affidavits to support Mr. Simpson's motion for recusal, but failed to do so.

11. Appearance of Impropriety. At the Selection Commission hearing, one member raised the question of whether Judge Segars-Andrews reversal of her decision to recuse herself created an appearance of impropriety. In my opinion it did not. The judge had dispelled any appearance of impropriety by raising the issue on her own motion. She expressed a tentative opinion that she should recuse herself, but she offered the parties an opportunity to brief and submit affidavits on the issue. After reviewing this material, she concluded that she had a duty to sit on the case. These facts show a judge who is committed to the principle of full disclosure, thoughtful and deliberate in her decision-making, and respectful of due process. I find no appearance of impropriety.

12. Judge Segars-Andrews' Qualifications to be Reelected to the Bench. I understand that the Commission is receiving a wealth of materials showing Judge Segars-Andrews' qualifications to be reelected to the Family Court, so I will only comment briefly on her qualifications. The statute creating the Judicial Merit Selection Commission lists nine areas for the Commission to consider in determining a judge's qualifications. Of the nine areas, an issue exists with regard to Judge Segars-Andrews as to only one category, "ethical fitness," and that issue is in a single case during Judge Segars-Andrews' 16 years on the bench. Moreover, in that one case, both the Court of Appeals and the Commission on Judicial Conduct have found that Judge Segars-Andrews did nothing wrong ethically. In addition, the Court of Appeals found no error in her substantive rulings in the case.

Because the hearing before the Selection Commission focused only on the *Simpson* case, there was no evidence or discussion of Judge Segars-Andrews' unblemished record as a judge during her 16 years on the bench. I note in particular that Judge Segars-Andrews has been a leader in creating innovative programs dealing with the full range of problems that appear in Family Court. The following are significant programs initiated by Judge Segars-Andrews:

- Auxiliary Probation Office Program,
- Juvenile Drug Court
- Attendance Accountability Court
- Second Chance Program
- Mediation Program for Abuse and Neglect Cases

In my opinion, such work should be given far more weight than the complaint of a disappointed litigant about a contested issue of disqualification, when the litigant's complaint has been rejected by both the Court of Appeals and the Commission of Judicial Conduct.

13. Policy Implications. The Selection Commission serves an important public purpose in helping the Legislature select highly qualified judges. It also provides a forum for expression by lawyers and litigants of concerns about a judge's performance. However, scrutiny of individual cases by the Selection Commission poses significant risks to principles of separation of powers when cases have been fully litigated and to judicial independence. I know that the Selection Commission does not intend to interfere with the independent judgment of judges in this state, but if the Commission rejects the decisions of both the Court of Appeals and the Judicial Conduct Commission on the merits of a disqualification motion, the message that it sends to every judge of this state is "If you deny a disqualification motion, you place your job at risk." I am sure the Commission will carefully consider not only the merits of Judge Segars-

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Andrews' decision, which was the correct one, but also the policy implications in deciding whether to grant Judge Segars-Andrews a new hearing, at which it is hoped the Selection Commission will find her to be qualified to be reelected to her seat.

FURTHERMORE, AFFIANT SAYETH NOT.

Nathan M. Crystal
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SWORN TO BEFORE ME, a Notary Public, this
30th day of November, 2009.

Diane S. Rynroad
(Signed)
Notary Public for South Carolina,
My Commission Expires: 4/7/2019

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