

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 10-314

Complainant: No. 1405910098A

Judge: No. 1405910098B

ORDER

The complainant alleged that a superior court judge engaged in improper ex parte communications and violated the rights of several probate litigants by failing to follow the law and denying them the right to be heard. After reviewing the allegations and the judge's response, the commission found no evidence of ethical misconduct on the part of the judge. The complaint is dismissed in its entirety pursuant to Rules 16(a) and 23.

Dated: June 7, 2011.

FOR THE COMMISSION

/s/ Keith Stott

Executive Director

Copies of this order were mailed to the complainant and the judge on June 7, 2011.

This order may not be used as a basis for disqualification of a judge.

COMPLAINT
of
Violations of Code of Judicial Conduct

This complaint is made to the Arizona Supreme Court Commission on Judicial Conduct that exercises supervisory authority over Judges. In addition, a copy is being provided to the Presiding Judge of Pima County Division of Arizona Superior Court The Honorable Jan E. Kearney.

THE PRIMARY FOCUS OF THIS COMPLAINT IS THE VIOLATIONS OF Due Process and Judicial Code of Conduct responsibilities by the **HONORABLE**

Specifically the actions of Judge _____ resulted in the loss of property without due process by Estate of _____ and residuary beneficiaries Ginger Rodgers _____ and Anne _____
The civil rights of Ginger Rodgers _____ and Anne _____ were also violated.

The underlying lawsuit has been settled and dismissed with prejudice, except for pending objections to the accountings of the Public Fiduciary in front of Judge Charles Harrington. The record in this matter, Pima County Division of Arizona Superior Court File GC2007 Conservatorship of Cherie Van Dyke Adams extends from February 2, 2007 until it was dismissed with prejudice on October 18, 2010 in accordance with a Court Ordered Settlement agreement entered into between the Estate of Adams and the Estate of _____ (*Exhibit 25*). A related suit between the Salonic family and the Estate of _____ was also settled contemporaneously with the primary suit. (*Exhibit 26*). Both of the principals passed away – _____ on April 26, 2010 and Ms. Adams in June 1, 2010. The names, addresses and contact information of all pertinent parties appear on Table One of this ethics complaint.

Attached to this complaint are copies of portions of the record in the primary court file. TABLE TWO lists the relevant transcripts of proceedings in order by date. Relevant minute orders and Orders are included with the transcripts in the file folder notated with the appearance date. All other items are labelled in numerical order as Exhibits.

OVERVIEW: On Feb 2, 2007 the Hon. _____ of the Pima County Division of

Superior Court issued an injunction under ARS 46-455 to prevent _____ from accessing his liquid and real property assets. This injunction was made permanent by Order dated Feb 8, 2007 but is referred throughout this complaint as the Feb 2, 2007 injunction. This was on the petition of the Pima County Public Fiduciary. In particular, all of Professor

Bank of America accounts totaling two million, one hundred seventy-seven thousand dollars (\$2,177,000.00) were subject to the injunction, as well as his home and other real estate holdings. At that time one account at Bank of America with a balance of four thousand, five hundred, six-two dollars (\$4,562.00) was held jointly with Cheri Van Dyke Adams and the rest of the liquid assets were in Professor _____ name individually. *Exhibit 1*. In an Order dated May 14, 2007, after a hearing on April 23, 2007 the court authorized the Public Fiduciary to take possession of the Bank of America Funds. In an order dated August 1, 2007, based on an ex-parte Status Conference on June 7, 2007, the _____ authorized the Pima County Public Fiduciary to hire 'special counsel' and use the seized assets to pay for litigation expenses. On August 24, 2007 Judge _____ entered an order sanctioning Professor Rappeport the entire amount of his deposits at Bank of America based on a July 10, 2007 hearing conducted without benefit of counsel and that occurred prior to the time that the _____ responses were due. See Court of Appeals Opinion, October 16, 2008, page 15, Paragraph 23 *Exhibit 16*.

Judge _____ August 24, 2007 Order was not based on any violation of the vulnerable adult statutes A. R. S. 46-456 or 46-455. Rather the Order based the sanctions exclusively on deficits in Mr. _____ discovery responses. *Exhibit 15*. The Sanctions Order of August 24, 2007 was vacated by the Court of Appeals in a memorandum opinion dated October 16, 2008. Judge _____ apparently biased against Mr. _____ (by ex parte communications), acted **with** the Public Fiduciary to seize _____ property **without due process**. Judge _____ to whom it was apparent that an 83 year old and ill attorney Professor _____ was having difficulty in responding to the legal matter, **encouraged** the Public Fiduciary to seek a confiscatory amount of assets as a sanction of Mr. _____ for a June 5, 2007 accounting deemed incomplete by the court **without notice** or a hearing. The transcripts of April 23, 2007 and June 7, 2007 clearly show the inappropriate conduct of the Honorable _____

The Pima County Public Fiduciary in this matter acted well beyond her role to protect and preserve

property and instead pursued a prosecutorial vendetta against Mr and Mrs. in complete disregard of their **civil rights – this conduct was encouraged and solicited by Judge** During the 3 years and 9 months of the proceedings not one evidentiary hearing was held to establish the ownership of the seized funds. No hearing established that Mr. had used a power of attorney to convert funds belonging to Ms. Adams or that his accounting was false. In fact the Public Fiduciary's discovery showed that Ms. Adams signed for all combined or joint accounts with Mr.

Of the two million, one hundred seventy-seven thousand dollars (\$2,177,000.00) that was subject to the Feb 2, 2007 injunction, only \$1,213,000 (as of November, 2010) was returned to the family of Pursuant to the Ordered Settlement, \$400,000 was allocated to the estate of Cheri Adams, and \$50,000 was allocated to Norma Salonic. The balance of the funds, **a total of approximately \$514,606** (\$2,177,606 minus the sum of \$1,213,000 +\$450,000 is equal to \$514,606) **were either spent by the Pima County Public Fiduciary or lost by her in stock market.**

This complaint will show that the Honorable failed to exercise appropriate judicial conduct, engaged in inappropriate ex-parte communications, operated to violate due process by confiscating assets without adequate hearing, and failed to observe normal judicial decorum.

The injunction was issued because while Professor then age 83, was in Texas seeking innovative medical treatment for long term chronic pain, a long time family friend, business associate and client, Cherie Adams, then age 89 and living alone in her home, had problems with her utility bills and her ability to prevent herself from falling when she lost her balance. Ms Adams ended up at the University Medical Center in Tucson, AZ, a block away from her home. . The Pima County Public Fiduciary's office instituted a vulnerable adult investigation including Mr handling of Ms Adams financial affairs. Ms Adams was widowed in 1999 and had no children or other relatives or family members and had been a frequent visitor to the household. **Exhibit 6.** The March 15, report of the social worker indicates that Ms.

Adams primary social contact was the family. Mr. had included Ms. Adams in arranging financial assets for many years and also had recorded a deed from Ms. Adams in favor of himself. Many of the financial records of their bank accounts, which went back to the late 1990's were in Ms. Adams' possession. (Page 3 Transcript of February 8, 2007) Ms. Adams told a social worker in March 2007 *Exhibit 6* that her relationship with Mr. was strictly business. An investigator in the Public Fiduciary's office had several telephone conversations with Mr. in January of 2007 and an appointment had been arranged for Mr. to meet with the Public Fiduciary and review any questions or concerns. This appointment was arbitrarily cancelled by the Public Fiduciary and instead the court proceedings were initiated February 2, 2007: the public fiduciary was appointed temporary conservator for Ms. Adams and the injunction was issued. The temporary conservatorship of Ms. Adams eventually became permanent and ultimately was converted into a guardianship.

A review of the record in the matter of the Pima County Public Fiduciary as Conservator for Cherie Adams v. et al, Pima County Court File No GC2007 reveals violations of several of the rules of Canon 2 of the Judicial Code of Ethics. Specifically, Judge violated current rules 2.3, 2.6, 2.7, 2.8 and 2.9 (Former Canons 3B(4) 3B(8) Canon 2A, and Canon 3B(7)); Canon 2A – the Judge is to comply with the law, Canon 1A the judge is charged with upholding the integrity of the judiciary and Canon 3B(7), and Rule 2.6 Ensuring the Right to be Heard Judge in general failed to provide for due process of law and ensure the right to be heard.

1. Issuance of an injunction under ARS 46-455 without any showing of the elements necessary to justify the injunction.
2. Refusing to grant a continuance to a party with a medical excuse.
3. Engaging in ex-parte communications.
4. Failure to provide notice and an opportunity to be heard prior to transferring title to assets thereby violating basic due process
5. *Sua sponte* encouraging one party to short cut the necessary process for determining the facts of the underlying dispute.

6. Sanctioning a party the full amount in controversy for deficits in discovery responses- prior to the time their responsive pleadings were due.
7. Not following the rules of civil procedure.
8. Not ensuring the right to be heard.

Part One. Failure to apply the law and ensure the right to be heard

The court originally cited ARS 46-455 on February 2, 2007 as the basis to impose an injunction claiming that Mr. _____ left a defenseless vulnerable adult alone in a dark and unheated house. This section of the Arizona Statutes does not apply on its face and actually defines physical endangerment of a vulnerable adult a felony – which means rather than court seizure of property, a referral to the county attorney for appropriate investigation and prosecution would be appropriate. There was no evidence presented on the record that Mr. _____ had undertaken the personal care of Ms. Adams or was in any way at fault for her hospitalization. Transcripts of February 2, 2007 and February 8, 2007. The Pima County Public Fiduciary's office knew that Mr. _____ was seeking medical treatment in Texas. By February 8, 2007 Mr. _____ had attempted on several times to communicate with the court for the purpose of seeking a continuance. See Transcript of February 8, 2007 pages 1 and 2.

On April 23, 2007 the court authorized the Public Fiduciary to remove the liquid assets already subject to the February 2, 2007 injunction from Bank of America to her "bank account at Alliance bank." Transcript Record page 12 to page 13. Particular reference is made to page 13 lines 14 through 18 where the Public Fiduciary represented to the court that the funds would be going into a bank account in trust at Alliance Bank of Arizona.

The court Order dated May 14, 2007 (entered as a result of the April 23 hearing) states "That Bank of America, N.A. shall turn over all funds it is holding in all accounts pursuant to the court's previous Order to the Pima County Public Fiduciary. **The Public Fiduciary shall place these funds in its trust account at Alliance Bank of Arizona pending the outcome of this case.**" (emphasis added).

Frankly the transcript of April 23, 2007 taken in its entirety is shockingly bereft of due process. No evidence was produced of any conversion of assets and it appears on its face that the court has had

ex- parte communications with the Public Fiduciary and allowed those communication to influence the court's judgment in violation of Canon 3B(7). In addition, there was no formal motion for a change in the custody of the disputed funds and nothing other than the statements of counsel Anita Royal suggesting that she 'had problems' getting information from Bank of America in the record to support a finding that Bank of America was not actually complying with the injunction.

The Order of May 14, 2007, based on the April 23, 2007 hearing authorized the Public Fiduciary to remove funds from Bank of America to the Public Fiduciary's 'trust account' at Alliance Bank. **As a result of this Order, one million, eight hundred thousand dollars (\$1,800,000.00) of certificates of deposit held in the name of _____ (apparently structured to take advantage of FDIC insurance and certain interest rates available at Bank of America) were transferred into a mutual fund by the Public Fiduciary with exposure to stock market risk. (See Exhibit 1, Exhibit 2 and compare with Schedule 1, Item 9 of Exhibit 3)**

Arizona Statutes 14-5603 requires that the Public Fiduciary present a plan to the court before placing assets into any non- guaranteed investment outside the control of the county treasurer. (It is possible that Judge _____ was unaware of the change in the investment nature of the funds made by the Public Fiduciary).

Once the Public Fiduciary took possession of the disputed funds in June of 2007, the Public Fiduciary became a fiduciary not only for Cherie Adams but also for Mr. _____. (See In re United States Currency, 199 Ariz. 291, 18 P 3d 85 (App. 2000) . The Public Fiduciary has investigative powers under her statutory authority (ARS 14-5601 to 5606) but the Public Fiduciary, instead of attempting to ascertain the true owner of the funds and a measure of damages to be awarded in accordance with Arizona Revised Statutes 46-456, chose (in contravention of her fiduciary duty to the owners of the funds) to ask the court to sanction Mr. _____ so that he would lose all title and interest in the seized funds. **This course of conduct was encouraged by Judge _____ in the Transcript of the April 23, 2007 hearing at page 12 where the court first states that Defendant Rappeport can be jailed for failure to comply with the court Order to account and the court *sua sponte* states that all the Bank of America funds will be forfeited to Ms. Adams. Page 12.**