

**JUDICIAL ETHICS COMMITTEE
ADVISORY OPINION NO. 09-01**

August 5, 2009

The Judicial Ethics Committee has been asked to provide a written opinion regarding situations which may arise when a trial court presides over a class action case in which the parties have agreed pursuant to the *cy pres* doctrine that a portion of a settlement or judgment be donated to a charitable organization. Specifically, the inquiry seeks advice as to whether Canons 1A, 2A, and 2B of the Code of Judicial Conduct are implicated in such cases, particularly if the trial court is asked by the parties to designate a charity which would be an acceptable recipient of the residual funds or if the charity chosen by the parties has no direct relationship to the underlying class action suit. The inquiry further seeks guidance on whether there are ethical implications involved when the trial court “questions the amounts of the attorneys’ fees which in turn could affect the amount of charitable donations.”

The *cy pres* doctrine is “a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be*, when it would be impossible or illegal to give it literal effect.” Black’s Law Dictionary, 6th ed. (1990). In the context of class action litigation, the doctrine generally comes into play when some members of a class to whom a portion of a settlement or judgment is owed cannot be located or it would be impractical to distribute funds to them. Under this doctrine, the unclaimed portion of the judgment or settlement is instead given to a charity or charities deemed most likely to advance the interests of the class.

Rule 23.08 of the Tennessee Rules of Civil Procedure, which became effective on July 1, 2009, provides guidance as to certain of the requests presented by this inquiry:

Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of all approved: class member claims, expenses, litigation costs, attorneys’ fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

It shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds. A distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court’s own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement

of residual funds in a manner consistent with this rule.

In brief, Rule 23.08 provides, as to the disposition of residual funds, that the trial court, in exercising its discretion, may “approve the recipient(s) of residual funds.” As for possible recipient(s) of these funds, the rule states that, regardless of the nature of the class action suit, it is “permissible but not required” that the funds be distributed “to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation,” which was established by Tennessee Code Annotated section 16-3-821.

We will consider to what extent a trial court’s actions regarding the disbursement of residual funds implicate the Code of Judicial Conduct. Canons 1 and 2 of the Code relate to a judge’s duty to uphold the integrity and independence of the judiciary and to avoid impropriety and the appearance of impropriety in all activities. Canon 1A provides:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Tenn. Sup. Ct. R. 10, Canon 1A.

Canon 2A provides that “[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Tenn. Sup. Ct. R. 10, Canon 2A.

Canon 2B provides:

A judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Tenn. Sup. Ct. R. 10, Canon 2B.

Our review of case law reveals, in general, that a trial court’s decision with respect to the beneficiary of unclaimed funds in a class action suit generally is afforded wide deference so long as *cy pres* principles are followed, in that “the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of the class members, and the interests of those similarly situated.” In re Airline Ticket Comm’n Antitrust Litig.,

307 F.3d 679, 682-83 (8th Cir. 2002); see also In re Holocaust Victim Assets Litig., 424 F.3d 158, 165 (2nd Cir. 2005); Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990) (“Federal courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds. . . . The district court’s choice . . . should be guided by the objectives of the underlying statute and the interests of the silent class members.”) (citations omitted).

We conclude that a trial court’s decision with respect to the recipient(s) of unclaimed funds in a class action litigation should not implicate Canons 1 and 2 of the Code of Judicial Conduct so long as the trial court follows the appropriate principles of *cy pres* distribution. Since the function of the court, as stated in Rule 23.08, is to approve or disapprove the recipient(s) of the residual funds, if any, the court should not suggest to the parties, even if asked to do so, what recipients would be appropriate or acceptable. Rather, the court should refer the parties to Rule 23.08 and then decide, after the parties have selected the recipient(s) of the residual funds, whether the recipient(s) are acceptable to the court. We conclude that the court’s taking part in the selection of the recipient(s) of the residual funds, or suggesting what recipient(s) would be acceptable, is not authorized by Rule 23.08 and, depending upon the circumstances, could violate Canons 1A, 2A, and 2B. The court’s doing so could be looked upon as showing favoritism to a particular group or charity.

As for the question regarding whether there are ethical considerations in the setting of attorney’s fees, the amount of which could affect the amount of charitable donations, we do not conclude that Canons 1 and 2 are implicated so long as the court concludes, in its discretion, that the fee amount is not unreasonable, following case law, any applicable statutes, and Rule 1.5 of the Rules of Professional Conduct. See Denver Area Meat Cutters & Employers Pension Plan v. Clayton, 209 S.W.3d 584 (Tenn. Ct. App. 2006).

FOR THE COMMITTEE:

ALAN E. GLENN, JUDGE

CONCUR:

CHANCELLOR THOMAS R. FRIERSON, II
JUDGE CHERYL A. BLACKBURN
JUDGE JAMES F. RUSSELL
JUDGE BETTY THOMAS MOORE
JUDGE PAUL B. PLANT
JUDGE SUZANNE BAILEY