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HENRY McMASTER  
ATTORNEY GENERAL

April 6, 2006

Rachel Harper, Associate General Counsel  
South Carolina Department of Insurance  
P. O. Box 100105  
Columbia, South Carolina 29202-3105

Dear Ms. Harper:

In a letter to this office you questioned whether the promotion of a forestry employee with the State Forestry Commission to the position of a "special law enforcement officer" would prohibit his wife from maintaining her bail bondsman license and operating a bail bond business. I am informed that the employee was formerly a licensed bail bondsman but has since relinquished that license.

S.C. Code Ann. § 38-53-190 states:

No sheriff, deputy sheriff, other law enforcement officer, judicial official, attorney, parole officer, probation officer, jailer, assistant jailer, employee of any court of this State, or other public employee assigned to duties relating to the administration of the court may become a surety on a bail bond for any person. No person covered by this section may act as agent for any bonding company or professional bondsman, nor may he have an interest, directly or indirectly, in the financial affairs of any firm or corporation whose principal business is acting as bondsmen. Nothing in this section prohibits any person designated above from being a surety upon the bond of his spouse, parent, brother, sister, child, or descendant. (emphasis added).

It is my understanding that there is no question that an individual holding the position as a "special law enforcement officer" with the State Forestry Commission would be considered a "law enforcement officer" for purposes of Section 38-53-190. See: S.C. Code Ann. § 48-23-96 ("The State Forestry Commission shall appoint law enforcement officers...These officers shall carry out the law enforcement responsibilities of the commission."). Obviously, therefore, pursuant to Section 38-53-190, the Forestry Commission officer could not become a surety on a bail bond for any individual or act as an agent for a bonding company or bondsman. However, the question remains as to whether as to the situation addressed in the request letter, the Forestry Commission officer would be deemed to "have an interest, directly or indirectly, in the financial affairs" of his wife's bail bond business within the prohibition of such provision so as to prohibit his wife from maintaining

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her bondsman's license and operating a bail bond business if he becomes a "special law enforcement officer" with the State Forestry Commission.

According to a separate letter forwarded to this office, the individual in question states that he has "no right, title, or share in the bondsman's (wife's) financial affairs." He stated that he has his own construction and retail store business, is employed by the Forestry Commission, all banking accounts are separate, the residence is in the wife's name only with no mortgage, and all vehicles owned by the couple are in separate names.

Also forwarded to this office was a decision by the Administrative Law Division in the case of Blackmon v. State Department of Insurance (Docket No. 95-ALJ-09-0696-CC). In that case there was the question of whether a bondsman's wife, who was an attorney, held either directly or indirectly, an interest in the financial affairs of the husband's bail bond business within the prohibition of Section 38-53-190. As noted, such provision prohibits an attorney from having "an interest, directly or indirectly, in the financial affairs" of a bail bond business. That decision, citing the case of May v. McGowan, 97 F.Supp. 326 (D.C.N.Y. 1950), construed the word "interest" for purposes of Section 38-53-190 as "a right, title, or share which may be shown by demonstrating the party has obtained an advantage, profit or responsibility." There was a finding in the Blackmon case that

There is insufficient persuasive evidence demonstrating the wife obtained any right, title, or share in any activity associated with the bail bondsman's financial affairs. The evidence demonstrates the wife has no involvement in the business. She is not an officer, employee or agent. She does not profit from the business and makes no referrals to the business.

The case determined that in the situation in Blackmon, "[n]o attorney obtained any right, title or share in the bondsman's financial affairs" and, as a result, the attorney's husband could be a licensed bail bondsman. See, contra, e.g., Op. Ala. Atty. Gen. dated November 2, 2001 ("The fact that a person...(who is the spouse of a bail bondsman)...with an indirect financial interest in a...(bail bonding)...company is an attorney disqualifies the bail bondsman from operating in the county.").

In a somewhat analogous situation, in an opinion of this office dated June 5, 1975, former Attorney General Daniel McLeod stated that

...the ownership by a wife of stock in an insurance company does not per se have any effect upon the husband's employment by the Department of Insurance unless there are some extrinsic circumstances, of which I am unaware, which would have the effect of vesting some interest in the husband.

The opinion further stated that

(t)he "direct or indirect" interest in the business of an insurer which would preclude an individual from being employed with the Department of Insurance must, in my opinion, be an interest relating to or held by him but the mere ownership of insurance stock by the wife is not such a direct or indirect interest in the business of that insurer so as to preclude employment of the husband by the Department of Insurance in all circumstances.

A prior opinion of this office dated November 19, 1990 dealt with the question of whether a law enforcement's officer's wife could be a bail bondsman. While the opinion referred to Section 38-53-190, the conclusion of the opinion resulted from a construction of former Rule 604, SCACR, which stated:

No attorney or other officer of the court shall become a surety upon any recognizance or upon any undertaking in the courts of this State. No attorney or other officer of the court shall be directly or indirectly involved in the surety business or involved in business with any person or persons becoming surety upon any recognizance or upon any undertaking in the courts of this State. Attorneys and other officers violating this rule shall be punished as for a contempt of court.

Furthermore, no court or clerk of court in this State shall accept in any case pending before a court in this State, or appealed to a court in this State, any bail bond or surety bond in respect of which an attorney or court official, or any agent or employee of an attorney or court officer, or any member of the immediate family of an attorney or court officer, or any corporation in which any person aforesaid owns an interest, acts, indirectly or directly, as bail or surety, provided, however, that this prohibition shall not apply to any bond in which any attorney, court officer, agent, employee, or family member, as defined above, may be the principal. The phrase "any member of the immediate family" shall include the spouse, father, mother, father-in-law, mother-in-law, son, daughter, brother, sister, brother-in-law, or sister-in-law of any such attorney or court officer. (emphasis added).

The opinion stated that "[s]uch rule therefore forbids acceptance of a bail bond or surety bond where a member of the immediate family, which would include a spouse, of a "court officer" acted as bail or surety." Referencing State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983), it was determined that a law enforcement officer would be considered a "court officer".

Rule 604, SCACR, was amended effective May 17, 1993 to state:

- (a) An attorney or other officer of any court of this State shall not:
- (1) Be, directly or indirectly, a surety upon any recognizance or undertaking in any court of this State;
  - (2) Be, directly or indirectly, involved in the surety business or in business with any person or persons becoming surety upon any recognizance or undertaking in any court in this State;

(3) Refer a person, directly or indirectly, to any surety or bondsman who is an immediate family member of the attorney or court officer. An immediate family member includes the spouse, father, mother, father-in-law, mother-in-law, son, daughter, brother, sister, brother-in-law, and sister-in-law.

(b) A clerk of court shall not accept any recognizance or undertaking on which an attorney or other officer of any court of this State has acted, directly or indirectly, as a surety.

(c) An attorney or court officer violating a provision of this Rule shall be guilty of contempt. The prohibitions contained in this Rule shall not apply to any recognizance or undertaking in which the attorney, the court officer, an immediate family member of the attorney or court officer, or an agent or employee of the attorney or court officer is the principal.

Not present in the amended Rule is the provision that states "...no court or clerk of court in this State shall accept in any case pending before a court in this State, or appealed to a court in this State, any bail bond or surety bond in respect of which an attorney or court official, or any agent or employee of an attorney or court officer, or any member of the immediate family of an attorney or court officer, or any corporation in which any person aforesaid owns an interest, acts, indirectly or directly, as bail or surety...." As to interests in a surety business, such Rule only presently states that an officer of the court, which would include a law enforcement officer, shall not "[b]e, directly or indirectly, involved in the surety business or in business with any person or persons becoming surety upon any recognizance or undertaking in any court in this State...." Therefore, such provision is similar to the provisions of Section 38-53-190 which state that no law enforcement officer shall "...have an interest, directly or indirectly, in the financial affairs of any firm or corporation whose principal business is acting as bondsmen...."

Consistent with the above, the question remains as to whether a Forestry Commission officer in the situation addressed would be deemed to "have an interest, directly or indirectly, in the financial affairs" of his wife's bail bond business or "be, directly or indirectly, involved in the surety business or in business with any person or persons becoming surety upon any recognizance or undertaking". A definitive response to such question would involve the determination of facts. Prior opinions of this office have stated that the investigation and determination of facts "are beyond the scope of an opinion of this office." See: Ops. Atty. Gen. dated January 26, 2006 and November 28, 2005. As referenced previously, the individual in question has indicated that he has "no right, title, or share in the bondsman's (wife's) financial affairs" and that his occupational, business, and property interests are totally separate from those of his wife.

In researching this matter, an opinion of the West Virginia Attorney General dated August 9, 1949 came to my attention. Such opinion construed a statute that stated that it was unlawful for any member of a board of education "to be or become directly or indirectly, pecuniarily interested in the proceeds of any contract or service." The opinion concluded that the employment of a wife as a teacher in the public schools where the husband was a member of the school board that employed the individual constituted "a contract in which the husband is directly or indirectly

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pecuniarily interested.” The opinion cited the decision in Haislip v. White, 22 S.E.2d 361 (W.Va. 1942) stating that “...the husband is legally bound to support his wife...and he is relieved of that duty to the extent of the salary that his wife receives under the appointment.” See also: Op. Tenn. Atty. Gen. dated March 28, 1979 (“A police officer who is married to a bail bondsperson would clearly be in a position to receive at the very minimum indirect benefit from every bond written by his spouse. Any financial gain by one spouse would certainly strengthen the economic situation of the other spouse.”).

The financial duty on the part of a husband toward his wife was recognized by the State Supreme Court in its decision in State v. Bagwell, 125 S.C. 401, 118 S.E. 767, 768 (1923) where the Court stated that “[m]arriage imposes upon the husband the duty at common law of providing the wife with a reasonably adequate and suitable home and support.” Similarly, in Towles v. Towles, 256 S.C. 307, 311-312, 182 S.E.2d 53, 55 (1971), the Court indicated that

Among the essential incidents to marriage is the duty of the husband to support his wife...An agreement whereby the husband is relieved of this obligation to support his wife, as a condition of the marital relationship, is against public policy and void.

However, in its decision in Hardee v. Hardee, 355 S.C. 382, 388, 585 S.E.2d 501, 504 (2003) at fn.3, the Court overruled Towles “in light of its outdated views concerning women.” The Court further stated that

(w)e find Towles represents an outdated and unwarranted generalization of the sexes which is no longer warranted in today’s society...As we have done in other cases, we find the distinction between men and women is based on “old notions” that females should be afforded special protection.

Ibid. In its decision, the Court held that prenuptial agreements which waived alimony and support were not *per se* unconscionable or against this State’s public policy.

Consistent with Hardee and Towles, in my opinion, there is no absolute basis to conclude that a husband is necessarily financially interested in a wife’s separate business. Such interest could be assumed if there was the continued obligation of the husband to provide monetarily for his wife. As noted in the decision by the Administrative Law Division in Blackmon, the word “interest” for purposes of Section 38-53-190 may be construed as “a right, title, or share which may be shown by demonstrating the party has obtained an advantage, profit or responsibility.” Consistent with these findings, it is my opinion that it could be determined in a given situation that a law enforcement officer does not have an interest, directly or indirectly, in the financial affairs of his wife’s bail bond business for purposes of Section 38-53-190. Likewise, it could be determined that this officer is not directly or indirectly involved in his wife’s surety business for purposes of Rule 604, SCACR. However, any such determinations would be factual conclusions. As I indicated previously, the investigation and determination of facts are matters beyond the scope of an opinion of this office. Such instead, in my opinion, would be a matter for resolution by the Department of Insurance as to

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the particular situation involved. See: 1081 Op. Okl. Atty. Gen. dated February 4, 1981 (“...it is a question of fact as to whether the bail bondsman spouse or affiliate has provided a benefit enuring to one listed in exchange for the execution of a bail bond.”).

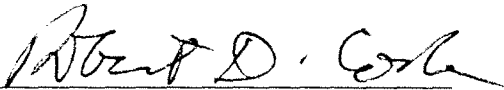
With kind regards, I am,

Sincerely,



Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General

cc: The Honorable Vincent A. Sheheen  
Frank B. McMaster, Esquire