

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

P. O. Box 4266
Frankfort, KY 40604
Phone (502)564-1231
FAX (502)564-1233
www.courts.ky.gov

FOR INTERNAL USE ONLY

JCC Case Number: _____

Meeting Date(s): _____

COMPLAINT FORM

The Commission's preliminary investigation shall be confidential under Rule 4.130 of the Rules of the Kentucky Supreme Court.

Please be advised that the Commission only has authority over Commonwealth of Kentucky judges, trial commissioners, domestic relations commissioners, master commissioners and attorneys who are candidates for judicial office.

The Commission does not have authority to review a case for judicial error or to direct a different result in the case. Those functions are to be handled through the appeals process available through the state's appellate courts. If you seek to change the outcome of your case, discuss this with an attorney without delay.

In addition, allegations stemming from a judge's rulings or exercise of judicial discretion do not provide a basis for action by the Commission. Personal dissatisfaction alone cannot be grounds for an investigation.

Please type or print legibly. NOTE: This form can be filled in online then printed OR printed and then filled out.

I. COMPLAINANT INFORMATION:

Mr. Mrs. Ms.

Name: SEE ATTACHED

(Last)

(First)

(Middle)

Address: _____

(Street, No., Route)

(City, State)

(Zip)

Home Phone: () _____

Cell Phone: () _____

II. COMPLAINT AGAINST:

Please check the box next to the appropriate judicial office:

District Judge	<input type="checkbox"/>	Court of Appeals Judge	<input type="checkbox"/>	Domestic Relations Commissioner	<input type="checkbox"/>
Circuit Judge	<input type="checkbox"/>	Supreme Court Justice	<input type="checkbox"/>	Trial Commissioner	<input type="checkbox"/>
Family Court Judge	<input checked="" type="checkbox"/>	Master Commissioner	<input type="checkbox"/>	Attorney Running for Judicial Office	<input type="checkbox"/>

Name: Nance

W.

Mitchell

(Last)

(First)

(Middle)

Address: 202 Courthouse Square

Glasgow, KY

42141

(Street, No., Route)

(City, State)

(Zip)

III. ADDITIONAL INFORMATION:

a) If your complaint arises out of a court case, please answer the following:

1. Case Name: SEE ATTACHED

Case County: _____

Case No: _____

2. What kind of case is it?

Criminal _____ Civil _____ Family Juvenile _____ Other _____
(Please specify)

3. What is your relationship to the case?

Plaintiff/Petitioner _____ Defendant/Respondent _____ Attorney _____ Witness _____
Other Civil rights organizations and constitutional law scholar

b) When and where did the alleged judicial misconduct occur?

Date: _____ Time: _____ Location: _____

Date: _____ Time: _____ Location: _____

c) If you were represented by an attorney in this case, please identify the attorney:

Name: _____

Address: _____
(Street, No., Route) (City, State) (Zip)

Phone: () _____

d) Identify any other attorney(s) who represented any party in the case:

Name: _____

Represented: _____

Name: _____

Represented: _____

IV. ALLEGATIONS AND STATEMENT OF FACTS:

Please state the facts and circumstances you believe constitute judicial misconduct or disability. Include any details, names, dates, places, addresses, and telephone numbers to assist the Commission in its evaluation and investigation of this complaint. Attach any documents or recordings of court proceedings pertaining to this complaint.

SEE ATTACHED

I. Complainant Information

ACLU OF KENTUCKY
William E. Sharp, Legal Director
Heather Gatnarek, Legal Fellow
315 Guthrie Street, Suite 300
Louisville, KY 40202
(502) 581-9746

Sam Marcossou
Professor
Louis D. Brandeis School of Law
University of Louisville
Louisville, KY 40292
(502) 852-6369

Fairness Campaign
Chris Hartman, Director
2263 Frankfort Avenue
Louisville, KY 40206
(502) 893-0788

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Ria Tabacco Mar*
125 Broad Street
New York, NY 10004
(212) 549-2627
* Not admitted to practice in Kentucky

Lambda Legal
Currey Cook, Counsel and Youth in Out-of-Home Care Project Director*
Ethan Rice, Fair Courts Project Attorney*
120 Wall Street, 19th Floor
New York, NY 10005-3919
(212) 809-8585
* Not admitted to practice in Kentucky

III. Additional Information

This Complaint arises from General Order 17-01 entered on April 27, 2017 for the 43rd Judicial Circuit Court (Barren and Metcalfe Counties) - Second Division (Family Court).

IV. Allegations and Statement of Facts:

Introduction

We write to lodge a complaint against Judge W. Mitchell Nance of the 43rd Judicial Circuit.

On April 27, 2017, Judge Nance entered General Order 17-01 for the 43rd Judicial Circuit - Second Division (Family Court), entitled: UNDERSIGNED JUDGE'S *SUA SPONTE* RECUSAL AND DISQUALIFICATION IN ADOPTION ACTIONS INVOLVING A HOMOSEXUAL PARTY OR PARTIES (copy attached) (the "Order").

In the Order, Judge Nance sets forth a new procedural rule requiring attorneys to notify the court's case manager when, in any adoption action in which an initial pleading or motion will be filed, the action involves "a homosexual party or parties." [Gen. Ord. 17-01, at 3.] The purpose for this new rule is to allow the court "to *recuse* and *disqualify* himself" in any such case because of the judge's personal conviction that "under no circumstance would '... the best interest of the child ... be promoted by the adoption ...' by a practicing homosexual." [*Id.*, at 2 (emphasis in original).]¹ Additionally, on May 9, 2017, it was reported that Judge Nance has also submitted a proposed local rule change that would accomplish what he sought to achieve in the Order.²

In issuing the Order and, apparently, by submitting a proposed a local rule to the Kentucky Supreme Court, Judge Nance has violated (and continues to violate) Kentucky's Code of Judicial Conduct in at least two distinct ways.

Canon 2(A) – Eroding Public Confidence in the Judiciary

Canon 2(A) requires judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." By issuing the Order and proposing a purportedly analogous rule change, Judge Nance is committing an ongoing violation of that provision by memorializing his inability to discharge his duties for current and future litigants based upon nothing more than a demonstrably false and demeaning stereotype about their fitness to parent. [Gen. Ord. 17-01, at 2.]

¹ General Order 17-01 does not clarify what actions, if any, *pro se* litigants must take to notify the court of their sexual orientation in adoption proceedings.

² See, Ronnie Ellis, *Judge's Order on Gay Adoption Cases May be Invalid*, The Daily Independent, available at http://www.dailyindependent.com/news/judge-s-order-on-gay-adoption-cases-may-be-invalid/article_fdd72476-3508-11e7-9ca1-63c0bb0cb7e8.html (last visited May 10, 2017).

Thus, not only is Judge Nance failing to *promote* public confidence in the judiciary, but his actions are actively *eroding* it. The public cannot be confident in the judiciary's fairness and impartiality when a judge explicitly proclaims his inability to be fair to an entire class of individuals because of an immutable characteristic they share and on the basis of provably false information. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) ("As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples."). "The clear and consistent social science consensus is that children raised by same-sex parents fare just as well as children raised by different-sex parents."³

Canon 3(B)(5) – Failing to Perform Judicial Duties Impartially and Diligently

Judge Nance's order also violates Canon 3(B)(5), which prohibits judges, in the performance of their judicial duties, from manifesting "*bias or prejudice based upon . . . sexual orientation . . .*" (Emphasis added). Here, Judge Nance's Order manifests prejudice based on sexual orientation by: 1) perpetuating, in a court order, a demonstrably false stereotype regarding lesbian, gay, and bisexual (LGB) individuals' fitness to parent; and 2) creating a procedural hurdle that *only* LGB litigants must navigate in order to obtain the fair and impartial jurist to which they are entitled. The Nebraska Judicial Ethics Committee addressed this issue in an advisory opinion and determined, based on language that is nearly identical to Canon 3(B)(5), that Nebraska's Code of Judicial Conduct "does not permit a judge to disqualify himself or herself [in an adoption proceeding] based on his strongly held religious beliefs with regard to a married couple's sexual orientation."⁴

Conclusion

Because Judge Nance's actions constitute serious misconduct that violates Canons 2 and 3 *and* represent a persistent and ongoing failure to perform his judicial duties, we ask that the Judicial Conduct Commission exercise its authority to remove Judge Nance from judicial office. Judge Nance's public announcement demonstrates bias and makes clear that he is unable to abide by the Code of Judicial Conduct in any case that may arise where litigants are, or perceived to be, lesbian, gay, or bisexual. Judge Nance's refusal to perform his judicial duties in adoption cases featuring lesbian, gay, and bisexual litigants is "good cause" for his removal, and no less severe sanction would suffice. KY. CONST. § 121 (judges may be removed from office for "good cause"); SCR 4.020(1)(b)(i) (JCC

³ Brief of American Sociological Association as Amicus Curiae, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *available at* http://www.asanet.org/sites/default/files/savvy/documents/ASA/pdfs/ASA_March_2015_Supreme_Court_Marriage_Equality_Amicus_Brief.pdf.

⁴ Neb Jud Ethics Comm Op 16-2 (March 17, 2016), *available at* <https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/ethics/judges/16-2.pdf>.

authorized to impose sanction, including removal from office, for judicial “misconduct”); *id.* at § (1)(b)(ii) (judge may be removed for persistent failure to perform his duties). This proposed sanction is intended “to assure the people of Kentucky that judges will conduct themselves as judges.” *Alred v. Commonwealth*, 395 S.W.3d 417, 447 (Ky. 2012) (Venters, J., concurring (internal quotation marks omitted)). *See also Nicholson v. Judicial Ret. & Removal Com.*, 562 S.W.2d 306, 308 (Ky. 1978) (“The aim of [judicial conduct] proceedings ... is to improve the quality of justice administered ... by examining specific complaints of judicial misconduct, determining their relation to a judge’s fitness for office and correcting any deficiencies found by taking the least severe action necessary to remedy the situation.”).