OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 03-005

JUDICIAL SYSTEM:
Chief Justice's Role
in Sale of Allerton Park
Charitable Trust Property

Ms. Cynthia Y. Cobbs
Director
Administrative Office of the
Illinois Courts
222 North LaSalle Street, 13th Floor
Chicago, Illinois 60601

Dear Ms. Cobbs:

I have your letter wherein you inquire whether, in accordance with the provisions of a trust indenture executed over fifty years ago, the Chief Justice of the Illinois Supreme Court is required to provide her written approval of the sale of certain property conveyed under the trust to the Board of Trustees of the University of Illinois. For the following reasons, it is my opinion that the Chief Justice is precluded by the Code of Judicial Conduct from participating in the administration of the Allerton Park Charitable Trust, including approval or disapproval

of the transaction in question or of the investment of the proceeds thereof.

According to the information you have provided, in October, 1946, Robert Allerton entered into a trust indenture with the Board of Trustees of the University of Illinois, whereby Allerton donated some 1500 acres of woodlands now known as Allerton Park, together with nearby farm property, all of which is located in Piatt County, Illinois, to the Board of Trustees of the University of Illinois in trust, under terms and conditions providing for the maintenance of a park. The indenture authorized the Board of Trustees of the University of Illinois (the "Board of Trustees") "[t]o have and to hold the said property upon the following charitable trust, terms and conditions, viz:"

> 10. The Grantee may, with the written approval of the President of the Alumni Association of the University of Illinois and the Chief Justice of the Supreme Court of the State of Illinois, sell the Farm or any portion thereof at any time by public or private sale for such price and upon such terms as the Grantee in its discretion may deem advisable and the President of the Alumni Association of the University of Illinois and the Chief Justice of the Supreme Court of the State of Illinois shall approve. The proceeds of such sale shall be put, kept, invested and reinvested by the Grantee in income-bearing securities selected by the Grantee and approved by the President of the Alumni Association of the University of Illinois and the Chief Justice of the Supreme Court of the State of Illinois without restriction as to

> the kind or character of investment, and the net income arising therefrom shall be used by the Grantee solely for the management, care, preservation, maintenance, use, operation, improvement and development of the Woodland Property and for the other authorized purposes set forth in Paragraph 9 hereof.
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> 15. At such of the times referred to in Paragraph 10 hereof as the Alumni Association of the University of Illinois shall not be in existence, the President, or other Chief Executive if there [is] no President, of the association of alumni of the University of Illinois which comprises a larger number of such alumni than any other association of such alumni, shall act in lieu of and shall have the same rights and authority as are vested, by said Paragraph 10, in the President of the Alumni Association of the University of Illinois. (Emphasis added.)

Your question concerns whether the Chief Justice is obligated by the terms of the indenture to execute the nonjudicial duties imposed upon her therein.

At the time that Allerton and the Board of Trustees entered into the indenture, section 1 of "AN ACT relative to property conveyed, devised or bequeathed to the state in trust for charitable purposes" (the "1874 Charitable Trusts Act") (Ill. Rev. Stat. 1945, ch. 23, par. 1) provided:

> Whenever any grant, gift, donation, devise or bequest of real or personal property has been or shall be, directly or indirectly, made to or for the use of the state or any state hospital or asylum for the insane, or other charitable or educational institution of the state, and the deed, will or other instrument by which such grant, gift, donation, devise or bequest is made, declares that such property shall be held, managed, improved and invested or otherwise disposed of for the benefit of such institution or other charitable use, the title to such property may and shall be taken to be vested in the state for the use so expressed, and shall be held, managed, improved, invested or disposed of by the trustees of such institution, or other officers thereto duly authorized, in such manner as will best promote and carry into effect the purpose and intention of the person making such grant, gift, donation, devise or bequest, as expressed in the instrument by which the same was or shall be so made. (Emphasis added.)

Under the language quoted above, it is clear that as an educational institution of the State of Illinois (see generally Ill. Rev. Stat. 1945, ch. 144, par. 1 et seq.; Ill. Rev. Stat. 1945, ch. 144, par. 22 et seq.; now 110 ILCS 305/0.01 et seq. (West 2000)), the University of Illinois was authorized to accept a gift of real property for educational and other charitable purposes. This statute also makes it clear that the Board of Trustees of the University was the appropriate body or officer to accept title to the property on behalf of the University and to act as trustee of the Allerton Park Charitable Trust. Nothing in

the language of the 1874 Charitable Trusts Act, however, may be interpreted as imposing any duty upon the Chief Justice of the Illinois Supreme Court to participate in the administration of a charitable trust. Moreover, my review of the other pertinent statutes and supreme court rules in effect at the time that the indenture was created has not revealed any other provision expressly authorizing the Chief Justice to participate in the administration of a charitable trust. Therefore, it is necessary to analyze whether the Chief Justice is otherwise obligated to undertake any role in the administration of the Allerton Park Charitable Trust.

The powers and duties of a trustee are determined primarily by the instrument creating the trust. (Stuart v. Continental Illinois National Bank and Trust Co. of Chicago (1977), 68 Ill. 2d 502, 523; Harris Trust & Savings Bank v. Wanner (1946), 393 Ill. 598, 606.) The duties assigned to the Chief Justice in the indenture, to authorize the sale of the trust property, to approve the terms of the sales contract, and to provide for the investment of trust moneys, are all duties of the nature performed by a trustee or other fiduciary of a trust. (See generally In re Hartzell's Will (1963), 43 Ill. App. 2d 118; Lowell v. Lowell (Ariz. 1925), 240 P. 280; King College v. Anderson (Tenn. 1923), 255 S.W. 374.) It is my opinion, there-

fore, that the Chief Justice's role with respect to the Allerton Park Charitable Trust may be characterized as that of a co-trustee or other fiduciary with limited and contingent powers and duties. The foregoing duties were not imposed on the Chief Justice by law, but rather were agreed upon by the parties executing the trust indenture.

Subsequent to the execution of the indenture, the voters of the State of Illinois approved a new Constitution. Under article VI, section 13 of the Illinois Constitution of 1970, the Illinois Supreme Court is required to adopt rules of conduct for judges and associate judges. Pursuant to this constitutional mandate, the Illinois Supreme Court has adopted the Code of Judicial Conduct. (134 Ill. 2d 28, Code of Judicial Conduct.) Supreme Court Rule 65, also referred to as Canon 5 of the Code of Judicial Conduct (155 Ill. 2d R. 65), governs the permissible scope of a judicial officer's extrajudicial activities. This Rule provides, in pertinent part:

CANON 5

A Judge Should Regulate His or Her Extrajudicial Activities to Minimize the Risk of Conflict With the Judge's Judicial Duties

* * *

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary,

> except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of the judge's judicial duties. * * *
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> G. Extrajudicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, State, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities. (Emphasis added.)

As used in the Code of Judicial Conduct, the term "judge" includes "circuit and associate judges and judges of the appellate and supreme court." (145 Ill. 2d xxviii, Code of Judicial Conduct, Terminology.)

It is well established that supreme court rules have the force of law, and the presumption is that they will be obeyed and enforced as written. (Robidoux v. Oliphant (2002), 201 Ill. 2d 324, 332.) Under the express language of Rule 65(D), a judge may "not serve as * * * [a] trustee * * * or other fiduciary, except for the * * * trust * * * of a member of the judge's family." Moreover, Rule 65(G) provides that a judge "should not accept appointment to a governmental * * * position that is concerned with issues of fact or policy on matters other than the

improvement of the law, the legal system, or the administration of justice." Because the Chief Justice's role with respect to the Allerton Park Charitable Trust is in the nature of a trustee or fiduciary of the trust, it is my opinion that the provisions of Rule 65 preclude the Chief Justice from participating in the administration of the Allerton Park Charitable Trust.

Moreover, the enforcement of the provisions of the indenture would violate the important considerations of public policy that underlie the prohibition found in Rule 65. It is well settled that the rules of contract construction apply to trust agreements. (Northern Trust Co. v. Tarre (1981), 86 Ill. 2d 441, 450; Bornstein v. First United (1992), 232 Ill. App. 3d 623, 630.) Under Illinois law, a contract is unenforceable to the extent that it is contrary to public policy. (Dowd & Dowd, Ltd. v. Gleason (1998), 181 Ill. 2d 460, 481; Scentura Creations, Inc. v. Long (2001), 325 Ill. App. 3d 62, 72.) Rule 65 is intended, among other things, to ensure that there exists an independent, fair and competent judiciary (145 Ill. 2d xxvii, Code of Judicial Conduct, Preamble) by minimizing the risk of a conflict between a judge's extrajudicial activities and his or her official duties. Specifically, the commentary on Canon 5(D) of the American Bar Association's Code of Judicial Conduct, upon which Rule 65 is based, indicates that there was a concern, in

the fiduciary situation where a judge appears in court as a representative of a party, of the impact of the judge's appearance on the public, other litigants and lawyers representing other parties. Thus, the American Bar Association committee determined that the danger of the appearance of an advantage when a judge acts in a fiduciary capacity was sufficiently real to justify severe limitations on fiduciary activities unless the circumstances present important countervailing considerations, such as a family relationship. (Thode, Reporter's Notes to Code of Judicial Conduct 87 (ABA 1973).) Consistent with that rationale, to require (or even to permit) the Chief Justice to participate in the administration of the Allerton Park Charitable Trust would conflict with the public policy underlying Rule 65. In these circumstances, the public policy must prevail, notwithstanding that the participation of the Chief Justice in the administration of the trust might not have been so constrained at the time of the creation of the trust. Therefore, it is my opinion that the Chief Justice is precluded from participating in the administration of the Allerton Park Charitable Trust and the provisions of the indenture so requiring may not be enforced.

In so concluding, I note that it has long been established that the law looks with favor upon charitable trusts and that liberal rules of construction will be applied to sustain

them. (Stubblefield v. Peoples Bank of Bloomington (1950), 406 Ill. 374, 384; Northern Illinois Medical Center v. Home State Bank of Crystal Lake (1985), 136 Ill. App. 3d 129, 151.) Thus, equity will not allow a charitable trust to fail for want of a trustee, for uncertainty or because the manner specified for managing the gift cannot be carried into exact execution. (Continental Illinois National Bank & Trust Co. of Chicago v. University of Notre Dame Du Lac (1945), 326 Ill. App. 567, 575, reversed on other grounds, 394 Ill. 584 (1946); French v. Calkins (1911), 252 Ill. 243, 257; see generally Eychaner v. Gross (2002), 202 Ill. 2d 228, 278-9.) It is my opinion, therefore, that the mere elimination of the role of the Chief Justice from the administration of the Allerton Park Charitable Trust would not be so significant as to cause the trust to fail.

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL