

OFFICERS: The probate judge of a county under 200,000 population may be city clerk of a city under 200,000 population at the same time.

December 9, 1938

Honorable William E. Stewart
Prosecuting Attorney
Knox County
Edina, Missouri



Dear Sir:

We have your letter of December 7, 1938, which reads as follows:

"Charles E. Normile was elected Probate Judge of Knox County at the last general election and will qualify for that office the 1st of January. Normile now is and has been for several years City Clerk, appointed to that position by the Board of Aldermen of the City of Edina. At the regular meeting of the board last Monday night Normile informed the board that he did not intend to resign and would hold the office of City Clerk and also the office of Probate Judge. They have requested me to write for an opinion on the matter and know if it is legal for Normile to hold both offices at the same time. I would appreciate it if you would give me your opinion before the first of the year."

According to the Federal Census of 1930, Knox County had a population of 9,658. The population of the city of Edina is 1,532, which designates the city as a city of the fourth class.

The holding of two offices such as city clerk and probate judge is not expressly forbidden in counties and cities under 200,000 population, as set out in Section 18, Article IX, of the Constitution of Missouri, which reads as follows:

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

In the case of Nickelson v. City of Hardin, 221 S. W. 358, 1. c. 360, the court said:

"This court once stated (State ex rel. v. Watson, 71 Mo. loc. cit. 473) that it had 'grave doubts' of the correctness of the construction which we are now asked to put on section 18 of article 9.

"The question is not free from difficulty, but we are of opinion that the proper construction of the section is that it applies only in counties and cities having more than 200,000 inhabitants. This disposes of the only question presented by the briefs."

In this case the court held that the city marshal and the township constable performed duties that were not incompatible, inconsistent or subordinate to each other. In the case of a marshal and constable a situation is more likely to occur where their duties may conflict, but the court held that their duties were not incompatible.

There is no question but that both a city clerk and a probate judge are public officers even though one acts in a judicial capacity and the other in a ministerial capacity. The rule in determining if one is a public officer is set out in *Hasting v. Jasper County*, 232 S. W. 700, 1. c. 701, where the court said:

"The individual who is invested with the authority and is required to perform the

duties is a public officer. The authorities all agree, substantially, that, if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. State ex rel. Hamilton v. Kansas City, 259 S. W. 1045, 303 Mo. 50, loc. cit. 67; Gracey v. St. Louis, 111 S. W. 1159, 213 Mo. 384, loc. cit. 394; State ex rel. Walker v. Bus, 36 S. W. 636, 135 Mo. 325, loc. cit. 331, 33 L. R. A. 616."

Since the holding of the office of probate judge and the office of city clerk of Edina, Missouri, is not prohibited by Article IX, Section 18, of the Constitution of Missouri, one must refer back to the common law to ascertain if the duties of the office of the city clerk of Edina and those of the judge of the probate court are incompatible, conflicting or inconsistent. In reference to this matter, 46 C. J., pp. 941, 942, Sec. 46, states as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

In the case of State ex rel. Walker, Attorney General v. Bus, 135 Mo. 325, l. c. 338, the court said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

Section 6093, R. S. Mo. 1929, reads as follows:

"All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class."

Since the population of Edina, according to the last Federal Census of 1930, is only 1,532, it should be classed as a city of the fourth class. In cities of the fourth class, Section 6968, R. S. Mo. 1929, sets out the method of the election of the city clerk and prescribes his duties as follows:

"The board of aldermen shall elect a clerk for such board, to be known as the city clerk, whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city."

In setting out the duties of the probate judge, Sections 2046 and 2058, R. S. Mo. 1929, read as follows:

"Sec. 2046. - Said court shall have jurisdiction over all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators and guardians, and the sale or

leasing of lands by administrators, curators and guardians, and over all matters relating to apprentices; and such judges shall have the power to solemnize marriages."

"Sec. 2058. - Probate courts, in the exercise of their jurisdiction, shall be governed by the statutes in relation to administration, to guardians and curators of minors and persons of unsound mind, to apprentices, and such laws as may be enacted defining and limiting the practice in said courts."

In reading the duties of the city clerk and the duties of the probate judge as above set out, it can be readily seen that the duties do not conflict and are not incompatible or inconsistent, and either is not a subordinate of the other.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Charles E. Normile can hold the office of Probate Judge of Knox County and also can hold the office of City Clerk of the City of Edina at the same time, although there are some authorities which by innuendo and dictum claim that it is against public policy.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR