

OFFICERS: Public Administrator does not forfeit his office by moving from the county to another county within this State.

October 22, 1941

Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnell:

We are in receipt of your request for an opinion under date of October 16, 1941, which reads as follows:

"(a) Does the person who was elected to the office of Circuit Clerk and Recorder of Deeds in Texas County in 1938, for a term beginning January 1, 1939 to December 31, 1942, surrender one of the offices, and if so which of said offices does he surrender?"

"(b) If the Public Administrator of Texas County is no longer a resident of the county; what legal determination, if any, would be required as to his change of residence to justify the appointment of a man to fill the vacancy?"

Answering paragraph (a) in your above request, will state that this Department gave an opinion upon the same question and in reference to the same office in the same county. We are enclosing a copy of this opinion, which was given on August 23, 1941, at the request of Mr. Homer H. Martin, Circuit Clerk, and Recorder, Texas County, Houston, Missouri. This opinion held that although the population of Texas County exceeds 19,000 at this time there is no vacancy in the office of Recorder of Deeds or Circuit Clerk and the offices should not be separated until the expiration of the term of the present holder of both offices, which will occur in 1942.

In answering paragraph (b) in your request, we wish to state that the office of public administrator is not an office created or set out in the Constitution of Missouri, but derives his authority solely from the laws enacted by the legislature.

In an early case in Missouri, *State ex rel. Attorney General v. Woodson*, 41 Mo. 227, l. c. 230, the court said:

"The power of the state to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office is as clear and unquestioned as is the power to fix the qualifications of voters."

The state may fix the qualifications of those who shall hold state offices, and subject to such limitations as may be imposed by the State Constitution, such power may be exercised by the state legislature. 46 *Corpus Juris*, page 936. And at page 938, Section 35 of the same text, it is said:

"In the absence of a constitutional or statutory provision residents within the district of which the jurisdiction of the officer extends is unnecessary to eligibility."

In *Mechem* on public officers, Section 438, page 280, it is said:

"Where the law thus requires the officer to reside within the district which he represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result."

And, conversely, where the law does not require one to reside in a district, a removal of an officer does not create a vacancy in the office.

The legislature in creating the office of public administrator enacted Section 295, R. S. Mo. 1939, which reads as follows:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the Constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and the court may from time to time, as occasion shall require, demand additional security of such administrator, and, in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

It is very noticeable under the above section that the eligibility or qualification of a public administrator is not designated as to his being a resident of the county, neither is there a proviso which provides for a forfeiture of the office by an administrator if he should remove from the county.

Section 298, R. S. Mo. 1939, provides that the public administrator may be removed from office in the same manner and for the same causes as judges of the county court. In checking the section which authorizes the election of judges of the county court, which is Section 2475, R. S. Mo. 1939, we further find that said section does not set out any qualifications, neither does it define the eligibility of the judges to be elected as to residence under that section.

Under Section 295, supra, the only provision as to removal of the public administrator is to the effect that he may be removed by the probate judge if he does not put up sufficient security as a bond for the performance of his duties. And, it further provides that in case of such removal the probate judge may appoint another public administrator.

After a careful research we find no provision that a public administrator, or any other administrator, forfeits his office on account of removal from the county in which he has been elected or appointed. Under Section 6, R. S. Mo. 1939, it provides that no judge or clerk of any probate court, in his own county, or his deputy, and no male or female person under twenty-one years of age, or of unsound mind, shall be executor or administrator. Under this disqualification no mention is made that the public administrator forfeits his office if he should remove from the county. Also under Section 10, R. S. Mo. 1939, it specifically prohibits the appointment of an administrator who is a non-resident of this State and makes no mention of a non-resident of the county. Also under Section 209, R. S. Mo. 1939, if an executor or administrator should be temporarily absent from the State he shall appoint an agent to act for him in the handling of the estate. This limitation specifically says "absent himself from this State" and does not say "absent himself from his county."

In preparing this opinion we have not overlooked the case of *In Re Estate of Isaac Walker, dec'd.*, 1 Mo. App. 404, which ruling was made that to disqualify an administrator he must be out of the State.

Also in the case of *Vosler v. Brock*, 84 Mo. 574, an executor disqualified himself by removal from the State.

Also in the case of *Chouteau's Executor v. Burlando, et al.*, 20 Mo. 305, it was held that letters of administration

could be revoked by reason of the administrator becoming a non-resident of the State.

In the three cases above, the administrator or executor had moved from the State and not from one county to another county within the State.

Since non-residence of the county is not a forfeiture of the office by a public administrator, the question then arises as to whether or not a public administrator can be ousted from office for failure to personally devote his time to the performance of the duties of such office.

Article II, Section 18, Constitution of Missouri provides as follows:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

By reason of the above section of the Constitution the legislature saw fit to enact Section 12828, R. S. Mo. 1939, which reads as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his

duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Under the above section if the public administrator shall fail personally to devote his time to the performance of his duties as public administrator, he forfeits his office and may be removed by the prosecuting attorney of the county, under the provisions set out in Section 12829, R. S. Mo. 1939. Section 12829 reads as follows:

"When any person has knowledge that any official mentioned in section 12828 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain

and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

Under the above section if the public administrator who now resides in another county does not personally perform the duties of the public administrator he may be removed by proper action of the prosecuting attorney.

If the public administrator is removed and his office forfeited by the action of the prosecuting attorney as above set out in Section 12829, supra, a vacancy would exist which should be filled by the Governor under Article V, Section 11 of the Constitution of Missouri, which reads as follows:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

Of course, under Section 10, Article VIII of the Constitution of Missouri, no person shall be elected or appointed to any office in this State who is not a citizen of the United States and who shall not have resided in this State one year next preceding his election or appointment. This section does not mention that the residence of any electee or appointee should be in the county for any specified time.

CONCLUSION.

In view of the above authorities it is the opinion of this Department that the public administrator of Texas County continues in office as public administrator until the expiration of his term for which he was elected, even though he has moved permanently from Texas County, to any other County,

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and if the public administrator is not personally devoting his time to the performance of the duties of such office he may be removed by proper action brought by the prosecuting attorney of Texas County as set out in the above opinion.

It is further the opinion of this Department that if the public administrator should move out of the State of Missouri he would forfeit his office for the reason that he would not be qualified as an administrator as set out by the statutes on administration.

Respectfully submitted,

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APPROVED:

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WJB:CP