

NEPOTISM:

Judge of Probate Court receiving personal service from relative within fourth degree does not violate Sec. 13 Art. XIV where such relative is not appointed to an official position.

June 24, 1938

Hon. Lee C. Phillips
Judge of Probate Court
New Madrid County
New Madrid, Missouri



Dear Judge Phillips:

We acknowledge your letter of June 18 in which you inquire as follows:

"I would like to have your opinion and legal advice on the matter of appointing a clerk in the Probate Court.

"Would it be legal to appoint as clerk a relative of the Probate Judge who would serve without pay in this capacity.

"Thanking you for your advice in this matter, I am."

Sec. 13 of Art. XIV of the Constitution of the State of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint

any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the above section of the Constitution any public official who names or appoints any person within the fourth degree either by consanguinity or affinity to render services to the State makes himself liable to forfeiture of office. This office has taken the position, however, that the proper construction to be placed upon such constitutional provision is that such relative must be appointed to hold an official position existing under the laws or Constitution of this State. We can see a distinction between a person rendering service to the State in an official capacity and the rendering of service to an individual official because of the relationship. The test as we understand it is whether or not the person is appointed to fill an official position and as such to render service to the State. Where a public official has in his office a member of his family who does not occupy an official position, nor as such render service to the State, but whose services are rendered personally to the official involved without expense to the State, and only to the officer by reason of the family relationship, we do not believe that such situation comes within the meaning of the Nepotism Law.

You did not give us many facts in your inquiry and we are assuming that the relative you have in mind comes within the fourth degree. We also assume from your letter that the relative you wish to have assist you is not to be employed as, nor is he to be considered as a statutory clerk in any sense. We are assuming that such relative will merely be assisting you personally; that he will not take an oath of office or perform either in his own name or in the name of a principal any of the duties of a statutory clerk. If this is the case, then

June 24, 1938

we do not believe that the Nepotism Law will be violated by the arrangement you have in mind.

On the other hand, if the relative is within the fourth degree of relationship and you plan to have such relative perform the duties of a statutory clerk, such an arrangement would be in violation of the constitutional provision whether you paid such clerk a salary or not.

CONCLUSION

It is therefore the opinion of this department that if the services to be performed by a relative of yours are merely personal to you and that such relative will not hold any official position existing under the laws or Constitution of this State, that the Constitution will not be violated.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA/w