

EXECUTORS OF WILLS : Judge of Circuit Court may act as  
TRUSTEES OF ESTATES : executor of will and trustee of  
CIRCUIT COURT JUDGES: estate.

March 25, 1942

3-27

Honorable J. C. McDowell  
Judge, 28th Judicial Circuit  
Charleston, Missouri

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Dear Judge McDowell:

Your letter of March 20, 1942, requesting our opinion, is as follows:

"An old friend of mine in the County here died leaving a considerable estate and, in the will, he willed about \$50,000.00 to me to hold in trust for a certain heir. He also made me executor of the Will. There was considerable question in my mind about me acting in that capacity and I would appreciate an opinion from you about the matter. I doubt whether any litigation would ever come up but, if it did, it would come up in my Court."

The limitations placed upon the non-judicial actions of a citizen who has become Judge of a Circuit Court are contained in the following statutes:

Section 2024, R. S. Missouri, provides:

"No judge of any court of record, \* \* \* \* \* shall practice or act as counselor or attorney in any court within this state, except as otherwise permitted by law: \* \* \* \* \*"

Section 2026, R. S. Missouri, 1939, provides:

"No judge \* \* \* \* \* of any court shall have any partner practicing in the court of which he is judge \* \* \* \* \*."

Our examination of the statutes does not disclose any other law which places restrictions upon any non-judicial activity in which a Circuit Judge might desire to engage, except, of course, the implied restraint on his personal non-judicial actions that arise from the powers vested in the General Assembly to impeach a Circuit Judge "for high crimes or misdemeanors and for misconduct, habits of drunkenness or oppression in office." (Art. 7, Sec. 1, Mo. Const.)

These being all the restraints, express and implied, upon the non-judicial action of a Circuit Judge, it is obvious that there is no legal prohibition to his acting as executor of a will and trustee of the estate created thereby.

The law pertaining to appointment of executors contains no limitation that would affect the right of a Circuit Judge to serve in that capacity. The only limitation is contained in Section 6, R. S. Missouri, 1939, which provides:

"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. \* \* \* \* \*"

Other than this limitation the suitability of a person named executor in a will seems to rest largely with the Probate Court.

Section 11, R. S. Missouri, 1939, provides:

"After probate of any will, letters testamentary shall be granted to the persons therein appointed executors. \* \* \* \* \* Unless it shall be shown to the satisfaction of the court, or the judge in vacation, that the person or persons so named are incompetent, unsuitable or improper persons to execute said will, in which case some other person than the executor named may be appointed."

It would seem that under this section it is incumbent upon the probate judge to respect the wishes of the deceased and grant letters testamentary to the person named in the will, unless there is an affirmative showing that that person is "incompetent, unsuitable or (is an) improper," person to execute the will. As heretofore shown, there is no law rendering a Circuit Judge disqualified to act in this capacity and the above qualities seem to relate more to personal ability to perform the tasks and absence of adverse interest than anything else. (Arrington v. McCluer, 34 S. W. (2d) 67, 71 (Mo. Sup.).)

While it is true any litigation arising over this will and the trust estate created would be cognizable in the Court of which you are judge, and that any action to remove the trustee of a trust so created (City of St. Louis v. Wenneker, 145 Mo. 230) and to appoint another trustee in case of vacancy (Brendell v. Kerr, 242 Mo. 317), would also be cognizable in said court, we do not think that fact creates a disqualification.

Section 2012, R. S. Missouri, 1939, provides:

"No judge of any court of record, who is interested in any suit \* \* \* \* \* pending

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before him, shall \* \* \* \* \*  
sit on the trial or determination  
thereof."

Adequate provision is made by other sections of the statutes for calling in another judge in case the regular judge may be disqualified for the causes stated in Section 2012.

It thus appears that the Legislature has expressly recognized that cases might arise in which a Circuit Judge would have an interest, and thus tacitly have permitted (by silence and failure to prohibit such functions) such judge to engage in non-judicial activities which may culminate in litigation in the judge's court. Indeed, it is difficult to see the need of barring a Circuit Judge from engaging in all non-judicial activities merely because such activities might result in litigation being instituted in the court of which he is judge, when, as here, provision is already made for the judge's disqualification from sitting on such case, and provision is made for obtaining an impartial special judge to take his place.

CONCLUSION.

It is, therefore, our opinion that merely because one is judge of a Circuit Court does not disqualify such person from acting as executor of a will and trustee of an estate created by such will.

Respectfully submitted,

APPROVED:

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llb/rv