

PROBATE JUDGE:

May resign office.

February 3, 1944



Honorable M. K. McMurtrey
Probate Judge
West Plains, Missouri

Dear Judge McMurtrey:

We are in receipt of your request for an opinion,
dated January 31, 1944, which reads as follows:

"I am writing you this letter at the suggestion of the Prosecuting Attorney of the county. I am holding the office of probate judge of the county by virtue of section 2462. Some of the lawyers are of the opinion that a probate judge cannot resign his office. This question I presented to the Prosecuting Attorney. The duly elected Judge is very ill and has indicated his intentions of wanting to resign, but was advised he could not.

"An opinion from your office would clear up this situation."

Article VI, Section 32, of the Missouri Constitution provides:

"In case the office of judge of any court of record become vacant by death, resignation, removal, failure to qualify, or otherwise, such vacancy shall be filled in the manner provided by law."

Article 6, Section 34, of the Missouri Constitution, and Section 1990, R. S. Missouri, 1939, provide that a probate court shall be a court of record.

Section 11509, R. S. Missouri, 1939, provides:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election * * * *."

It is stated in 35 C. J. 943, Section 43:

"The term or tenure of a judge, in reference to the incumbent, may become terminated by reason of his resignation. In order to have a resignation become effective it must be accepted by the proper authority."

In Mechem on Public Officers, Section 409, it is stated:

"It may be said in a general way that a public officer has the right to resign his office at any time, and some authorities have declared this right in unqualified terms. The weight of authority, however, and the obvious dictates of public policy require that the right shall be declared in a more restricted manner."

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The restrictions, Mr. Mechem goes on to state, in Sections 412, 413 and 414, are that the said resignation must be made to the proper authority and that it must be accepted. In Section 415 he states the acceptance may be manifested either by a formal declaration or by the appointment of a successor.

CONCLUSION

It is, therefore, the opinion of this office that a probate judge may resign his office provided he submits his resignation to the proper authority, in this instance the Governor, and also provided that the Governor accepts said resignation.

Respectfully submitted

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Assistant Attorney General

APPROVED:

ROY McKITTRICK
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RJF:HR