

OFFICE OF PROBATE JUDGE:
VACANCY:

Elections:

Nomination of candidate where
vacancy occurs in the office by
death of the incumbent after primary
election.

August 24, 1944.



Hon. Alvin D. Walker
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

This department is in receipt of your telegram of
August 16, 1944, which is as follows:

"Sullivan Co. elected a probate judge
at general election in 1942 for 4
years. Judge died August 13, 1944.
What is proper procedure for nomina-
tion and election to fill vacancy."

Your telegram, after setting out the facts which have
caused the vacancy in the office of probate judge of Sullivan
County, submits for reply the question: "What is proper
procedure for nomination and election to fill vacancy?"

Section 2438, R. S. Mo. 1939, provides that at the
general election in the year 1878 and every four years
thereafter a judge of probate shall be elected by the quali-
fied voters in every county.

Section 2439, R. S. Mo. 1939, provides that when a vacancy
shall occur in the office of judge of probate * * * the Governor
shall fill such vacancy by appointing some eligible person to
said office, who, when qualified, shall continue in office
until the next general election, when a successor shall be
elected for the unexpired term.

We also have Section 11509, Article 2, Chapter 76, R. S.
Mo. 1939, respecting the filling of vacancies in any public
office from any cause, which section is as follows:

"Vacancies, how filled. Whenever any vacancy,
caused in any manner or by any means whatso-
ever, 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--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

It will be observed that Section 11509 provides that all offices in which a vacancy may occur with certain exceptions shall be filled by an appointment by the Governor which appointee shall serve until the first Monday in January following the first ensuing general election -- at which general election a person shall be elected to fill the unexpired portion of such term.

It will thus be seen that the office of judge of the probate court is not one of those excepted in Section 11509, and there is no authority given to the Governor or any other authority to call a special election to fill such vacancy. The vacancy must be filled by following the process directed in Section 11509 for all other officers, not so excepted, by putting in motion the primary and general election laws. Section 11509 has recently been before our Supreme Court in the case of State ex rel. Bothwell v. Green, County Clerk, 180 S.W. (2d) 12, advance sheets of June 13, 1944. In holding that in connection with a statute pertaining to the filling of a vacancy in any particular office, that the general statute - 11509 - on filling vacancies must be read in conjunction therewith, the court, l.c. 14, said:

"We must read in conjunction with the statute on collectors the general statute on filling vacancies. This was the ruling in State ex inf. Barker v. Koeln, 270 Mo. 174, 192 S.W. 748, in which we held it was proper to elect in an off year for the unexpired term of the office of collector a successor to one who was

appointed to fill a vacancy. It was also held in State ex inf. Major v. Amick, 247 Mo. 271, 152 S.W. 591, supra, that the general statute on filling vacancies is to be considered together with the statutes relating to the offices to which it applies. See also State ex inf. Hadley v. Herring, 208 Mo. 708, 106 S.W. 984. Clearly in this case the office became vacant upon the incumbent's death and Section 11509 furnished the authority to fill the vacancy and the conditions on which it was to be filled.

"Applying the provisions of Section 11509 to this case we find: a vacancy occurred upon the death of Greer; the vacancy was filled by the appointment of Hazel Palmer; her term under the appointment expires at the day designated for the beginning of the term, that is, March 1, after the first ensuing general election, namely, the general election to be held in November, 1944; and her successor should be elected to serve the remainder of the term at the general election in November, 1944."

This case was decided before the time for filing declarations of candidates for the primary election had expired and does not touch upon the authority of county committees to fill vacancies on party tickets. The point decided in the case was that a vacancy in any office originally filled by election by the people --with the exceptions noted--shall be filled by electing some person at the first ensuing general election to serve the remainder of the term. The strength and effect given by the Supreme Court to Section 11509 would therefore seem to demand a clarification of the apparent conflict between that section and Section 11538 and 11562 as they now stand.

Prior to the session of the legislature of Missouri, 1941, Sections 11538 and 11562 governed the filling of vacancies on a party ticket for any cause by the county committees of the respective political parties. At that session of the legislature those two sections were repealed and new sections were enacted in lieu thereof numbered 11538, page 354, and 11562, pages 353 and 354, Laws of Missouri, 1941.

With these changes in the statutes with respect to the procedure to be followed in filling vacancies on party tickets after a primary election, unless such vacancies occur by the resignation or death of such party nominee, there is much doubt as to the intent of the legislature by repealing those two

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sections and reenacting the two new sections. These new sections have not been construed by the Supreme Court or the Courts of Appeals of Missouri. There is much doubt in the minds of members of the bar and public officials as to what procedure may be employed to fill such vacancies as the one to which you call attention.

The law on this subject is in such an unsettled state that the subject matter of any opinion as to the authority of party county committees to fill such vacancies on the party tickets by naming party candidates for the November general election, unless the vacancy should occur after a primary election by the resignation or death of a person nominated at such primary election, would ultimately have to be submitted to the appellate courts to clarify such controversial questions as are involved.

Conclusion

Therefore, without undertaking to render an opinion in reply to your telegram it is respectfully suggested that a proper procedure, in the existing emergency, to submit this question to the courts for decision in time for both political parties to fill such vacancy on their party tickets for the November general election, would be for a county central committee to proceed to fill a vacancy on their party ticket by nominating some person and certifying his name to the county clerk as the party nominee, and then let a mandamus suit be filed against the county clerk by the person so nominated to compel the printing of his name on his party ticket. This procedure would be of great public benefit and would prevent possible suits to contest the right of persons to hold offices who might be placed on their party tickets and elected under the present unsettled condition of the law as to the right of county committees to act in such emergencies.

The uncertainty of the meaning of the statutes involved and the doubtful authority of county committees to fill such vacancies will finally have to be submitted to and considered and determined by our Supreme Court to decide what was the intention of the legislature on the subject when said statutes were amended. That result would best be obtained immediately in time to fill vacancies on party tickets for the following election, if the Supreme Court so decides.

Respectfully submitted

APPROVED:

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