

February 25, 1965



Honorable William D. Kimme
Prosecuting Attorney of Franklin County
Union, Missouri

Dear Sir:

In your letter of February 13, 1965, addressed to this office you request an opinion or a recommendation on the following:

"Can a probate Judge disqualify himself if he feels prejudiced against any one party in any matter before him or in which he might have an interest? This, of course, is the case where no objections have been made and no jury has been asked for in the matter."

Section 472.060 RSMo 1959, paraphrased, states that no judge of probate shall sit in a case in which he is interested or in which he is biased or prejudiced against any of the interested parties. It further provides that if an objection is made, verified by affidavit, the cause shall be certified to the Circuit Court.

You state that no objection has been made.

If a judge feels that he is biased or prejudiced, in our opinion it is not only his prerogative, but his duty to state such a fact in the certificate and to certify the case to the Circuit Court.

The case of Phillips vs. Blossing 127 S.W. 2d 62, 63, is an point on this question.

Here the probate judge certified a cause to the Circuit Court and stated no reason for his having done so. The Court held as follows:

"It will be noted the proceeding was certified to the circuit court upon the motion of the probate judge; that there is nothing

in the order showing that the probate judge was disqualified to determine the cause, nor showing that any objection or suggestion was made that he was disqualified, nor does the order recite that either party in interest consented to the certification.

"[1] The probate court lacked power to certify the cause unless there was a substantial compliance with the provisions of section 2053, R.S. 1929, Mo. St. Ann. § 2053, p. 2646.

"[2] The probate court having no jurisdiction to certify the cause to the circuit court, the latter court acquired no jurisdiction. *Morris v. Lane*, 44 Mo. App. 1; *In re Estate of Albert*, 80 Mo. App. 557. If the order disclosed that the probate judge was in fact disqualified, and that the parties in interest requested or consented to the transfer, although no formal affidavit was filed as provided in section 2053, supra, a different question would be presented."

Our Supreme Court has held in a criminal case, *State vs. Selle* 367 S.W. 2d 522, that it is not only proper for a judge to disqualify himself in a matter in which he is interested, but it is his duty, the Court stating that a trial judge should retire whenever prejudice is suggested, either by affidavit, or by his own conscience.

In view of the statute and decisions of this state, we are of the opinion that a probate judge may disqualify himself and certify the case to the Circuit Court, but the certificate should contain the reason or reasons for his disqualification.

Yours very truly,

NORMAN H. ANDERSON
Attorney General