NEPOTISM:
PROBATE JUDGE:
PROBATE COURT:
INHERITANCE TAX APPRAISER:

The Nepotism provision of Article VII, Section 6, of the Constitution is not violated by the appointment by the Probate Judge of his father as Inheritance Tax Appraiser.

OPINION NO. 279

July 27, 1966

FILED
279

Honorable Gerald Kiser
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Kiser:

This is in response to your request for an opinion dated April 13, 1966, as follows:

> "Is a Probate Judge of a county of the second class, namely Clay County, Missouri, in violation of Article 7, Paragraph 6, of the Missouri Constitution of 1945, being the nepotism law, when he appoints as an inheritance tax appraiser his natural father and allows a fee for such services of his father out of the funds of the estate being appraised for inheritance tax purposes?"

This question involves an interpretation of the nepotism provision of the Missouri Constitution, Article VII, Section 6, which provides:

> "Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

We are unable to find any cases directly in point in which the Courts have construed this provision. In examining the history of this provision we find that in Article XIV, Section 13 of the 1875 Constitution the nepotism provision was somewhat different and provides as follows:

> "Any public officer or employee 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."

It is apparent that the language of these two provisions is significantly different. The problem is - Was there a genuine change in meaning of this Constitutional provision. Our examination of the constitutional debates is not enlightening. The Constitutional Convention approved the nepotism provision of the 1875 Constitution and referred it to the committee on drafting and the committee on drafting for reasons not explained in the debates revised the language.

The Constitution, Article VII, Section 6, prohibits with the penalty of forfeiture of office any public officer from appointing a relative within the degrees named to public office or employment. Under the facts stated it is clear that the Probate Judge who made the appointment is a public officer within the meaning of this provision. Likewise the appointment of his father is within the prohibited degree of relationship. The problem is whether an inheritance tax appraiser under the law of Missouri is a "public office or employment".

This then requires a detailed examination of the statutes or position of an inheritance tax appraiser. Section 145.140 to 145.190, inclusive, RSMo 1959, deals with this subject. Particularly Sections 145.150 and 145.160 deal with the relative duties of the Probate Court and the inheritance tax appraiser. They provide as follows:

> " 145.150. - 1. The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, has jurisdiction to determine the amount of the tax provided for in this chapter and the person, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction.

"2. The court shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the court, that the estate is not subject to the tax provided for in this law, its finding and opinion shall be entered of record in the court and thereupon the provisions of section 145.210 become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement is shown.

3. If it appears that the estate may be subject to such tax, the court shall set a day for the hearing and determining the amount of the tax and shall cause notice thereof to be given in the same time and manner and to the same parties as is herein provided for appraisers, or the court, before determining such matters, may of its own motion, or on the application of any interested person, including the director of revenue, the prosecuting attorney or attorney general, appoint some qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in the estate or the attorney for any of the parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under this chapter.

4. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county.

> "5. When proceedings are instituted under sections 473.090, 473.093, 473.097 and 473.103, RSMo, the court may proceed under subsection 3, or it may determine in a summary manner the amount of tax, if any, provided for in this chapter, and the parties liable therefor."
>
> "145.160 - 1. The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath.
>
> 2. He shall make report of his appraisement to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

The St. Louis Court of Appeals in Trieseler v. Ratican, 173 S.W. 2d 595, considered the function of an inheritance tax appraiser as follows, l.c. 598:

> "The whole question in this case resolves itself into one of whether an appraiser appointed under the act is entitled to receive such per diem compensation for time spent, not in actually placing a valuation upon the estate for the purpose of assessing the inheritance tax, but in attempting to discover assets which, if found and accounted for, would be subject to a tax under the provisions of the act.

> Having due regard for the limited function which the appraiser is designed to serve, we cannot escape the conclusion that the answer must be in the negative.
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> The law is explicit upon the question of what the appraiser's duties shall be and of the character of service for which he shall be entitled to receive compensation.
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> [2,3] As his official title implies, his function is to appraise the estate at its clear market value, in the accomplishment of which he is authorized to hear evidence relating to such question, and at the conclusion of which he is required to make a report of his appraisement to the court. To be sure, the identification of the property as having belonged to the decedent at the time of his death, or as having been transferred by him in contemplation of death, must necessarily precede its valuation for the purpose of determining the amount of the inheritance tax, but as our act is written, all such matters are judicial questions for the court, and are to be shown either by the inventory filed by the administrator, or else upon the application of an interested party representing the state, which has the burden of showing that the particular estate is subject to inheritance tax. In re Franz' Estate, 344 Mo. 510, 127 S.W. 2d 401. The appointment of an appraiser in no sense supplants the application of the ordinary proceedings for the discovery of assets, nor does the appraiser, by virtue of his appointment, become a representative of the state so as to have an interest and occupy a position adverse to that of the heirs and transferees." (Emphasis ours)

We then turn to a consideration of the law as to the meaning of "public office or employment". The Supreme Court of Missouri has on several occasions discussed the rules and meaning of the term "public office". In State ex rel Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 637, the Court said:

"2. A public office is defined to be 'the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Mechem, Pub. Off. 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer. The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. State v. Valle, 41 Mo. 30; People v. Langdon, 40 Mich. 673; Rowland v. Mayor, etc., 83 N.Y. 376; State v. May, 106 Mo. 488, 17 S.W. 660. Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts. They are required to take the oath of office, which is to be indorsed upon the appointment, and filed in the office of the clerk of the circuit court. After appointment and qualification, they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' Rev. St. 1889 §§ 8181, 8182. The right, authority, and duty are thus created by statute. He is invested with some portions of the sovereign functions of the government, to be exer ised for the benefit of the public, and is, consequently, a 'public officer,' within any definition given by the courts or text writers. It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state; the authority is derived from the law; and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be 'a public charge or employment.' U. S. v. Maurice, 2 Brock,

> 96 Fed. Cas. No. 15,747. Whether a public employment constitutes the employe a public officer depends upon the source of the powers and the character of the duties. The constitution (article 14, §6) requires 'all officers, both civil and military, under the authority of this state,' before entering on the duties of their office, to take and subscribe a prescribed oath. The statute requires a deputy sheriff to take 'the oath of office,' and his powers and duties are made equal to those of the sheriff himself. The deputy sheriff is certainly a 'public officer', under the laws of this state, and his power and authority are co-extensive with that of sheriff. State v. Dierberger, 90 Mo. 369, 2 S.W. 286."

Again in the Supreme Court En Banc in State ex rel Pickett v. Truman, 64 S.W. 2d 105, in a divided decision held that a delinquent tax attorney was not a public officer, considered the criteria for determining whether a particular position is a public office, l.c. 106:

> "[1] Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. 46 C.J. p. 928, § 19, n. 1; 53 A.L.R. p. 595. It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority (Mechem on Public Officers, p. 7 §9; Throop on Public Officers, pp. 2,3, §2), although designation by law has some significance. 46 C.J. p. 931, §24; State ex rel v. Gray, 91 Mo. App. 438, 445; State ex rel. Cannon v. May, 106 Mo. 488, 505, 17 S.W. 660; State ex rel. v. Shannon, 133 Mo. 139, 164, 33 S.W. 1137; Gracey v. St. Louis, 213 Mo. 384, 393, 394, 111 S.W. 1159.
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> [2] In Mechem on Public Officers, pp. 1 and 2, §1, it is said: 'A public office is the right, authority

> and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332, 36 S.W. 636, 33 L.R.A. 616, State ex rel. v. Hackmann, 300 Mo. 59, 254 S.W. 53,55, and Hasting v. Jasper County, 314 Mo. 144, 282 S.W. 700, 701; and it appears to be in harmony with the great weight of authority. * * *"

Again the Supreme Court En Banc in State ex inf McKittrick v. Bode, 113 S.W. 2d 805, 806, discussed the definition of the word "public office" or "public officer":

> "[1] It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered. * * *"

The Supreme Court of North Dakota in the case of Baird v. Lefor, 201 N.W. 997, 38 A.L.R. 807, had under consideration the question of whether or not a receiver appointed by the Court was a "civil officer" within the meaning of the provision of the North Dakota Constitution prohibiting a member of the legislative assembly from being appointed or elected to any civil office in that state during the term for which he was elected. The Court

in considering the question of whether a receiver appointed by the Court was a civil officer within the meaning of that provision said, l.c. 811:

> "We think that a receiver appointed by a court is not the holder of a civil office within the meaning of that term as used in the Constitution. It is true that he is an officer of the court, See Hoffman v. Bank of Minot, 4 N.D. 473, 61 N. W. 1031; State ex rel Miller v. People's State Bank, 22 N.D. 583, 135 N.W. 196; Platt v. Beach, 2 Ben. 303, 1 Thomp. Nat. Bank Cas. 182, Fed. Case. No. 11,215; Beach, Receivers § 29; 34 Cyc. p. 236, and cases cited. But he is not a public officer. See Platt v. Beach, 2 Ben. 303, 1 Thomp. Nat. Bank Cas. 182, Fed. Cas. No. 11,215; Cohnen v. Sweenie, 105 Mich. 643, 63 N.W. 641; Citizens' Commercial & Sav. Bank v. Circuit Judge, 110 Mich. 633, 68 N. W. 649; High, Receivers, § 2; 22 R.C.L. 398.
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> And Blackstone says: An office is 'a right to exercise a public or private employment and to take the fees . . . thereunto belonging . . . whether public as those of magistrates, or private, as of bailiffs, receivers, and the like.' 2 Bl. Com. §36.
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> A receiver is an officer of the court in the sense that he is the agent or representative of the court in holding any property that the court may acquire jurisdiction over, and in disposing of the same -- the hand and arm of the court, through whom the court acts. He is appointed by, and is removable at the pleasure of, the court. He is responsible to no one but the court. His compensation is fixed by the court. He can sue or be sued, but only under the direction and with the permission of the court. His authority comes from the court, and in its exercise he has no discretion independent of the court. He exercises none of the powers of civil government. He is no more a civil officer than is an attorney at law, or a guardian, or a referee, or a jury commissioner, or a juryman, or any 'officer' appointed by the court to enable it to properly function as a court."

It is at once apparent from an examination of the statutes applicable to inheritance tax appraisals that the duty is placed upon the Probate Judge to make the appraisal. The Probate Judge may, if he desires, seek the advice of an appraiser which he appoints and which makes investigation and recommendations to the Judge. The Judge has the right to either accept or reject the recommendations of the appraiser. We think, therefore, that while some of the criteria for public officer is present in the position of inheritance tax appraiser, not all are present and particularly the element of the exercise of sovereign power is lacking. We, therefore, believe that an inheritance tax appraiser is not a public officer within the meaning of the nepotism provision of the Constitution.

We then turn to the term of "employment". Certainly the use of the word "employment" can not be applied to private employment. The nepotism provision of the Constitution certainly does not prohibit the Probate Judge from employing his relative as a laborer on his farm, or as a carpenter on his private residence, hence we read this provision as though the word "public" modifies the word "employment". We then must seek the meaning of "public employment" as applied to the facts in this case.

We find a good many authorities that discuss the distinction between "public office" and "public employment". See Words and Phrases, Volume 35, Page 155, 156, et seq. However, the authorities which make the distinction between public employment and private employment are much more difficult to find. Yet the problem with which we are concerned involves this precise distinction. Black's Law Dictionary, Fourth Edition, Page 617, defines employ:

> "To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs; and when used in respect to a servant or hired laborer the term is equivalent to hiring which implies a request and a contract for a compensation, and has but this one meaning when used in the ordinary affairs and business of life."

We think that the word employment used in this constitutional provision is used in the context of an employer-employee relationship, or a principal and agent relationship, or a master and servant relationship. The Supreme Court of Ohio in State ex rel Cooper v. Roth, 44 N. E. 2d 456, 458, said:

> "[3,4] The crucial question then is whether service in the United States **army** constitutes public employment. * * *
>
> The term 'employment' connotes service or that which engages one's time or attention. It may be with or without compensation. Public employment means employment by some branch of government or body politic as contrasted with private employment. The military forces of the United States are a branch of the United States Government, recognized as such by the Constitution of the United States, and service in this department of government is known and recognized as public service or public employment. The compensation for such service is paid by the government from the national treasury. Private service or private employment could not be so paid or compensated."

There are certainly several factors which must be considered in determining whether a particular work, job or position, is public or private employment. Certainly one of the important factors is the source of the pay received by the employee. Respecting payment, 81 C.J.S. Section 53, Page 973, states:

> "Payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state."

This statement is in part supported by McDaniel V. Moore, 118 S.W. 2d 272, 276 (Supreme Court of Arkansas) referring to county public welfare directors, "They are paid by the state and this is a very strong circumstance showing they are state employees."

The Supreme Court of Missouri, En Banc, in Rider v. Julian, 282 S. W. 2d 484, was considering whether employees of public utilities which had been seized by the state were state employees so as to impose liability on the state for such employees' torts. Judge Storckman for the Court said, l.c. 493:

"We are presently interested in determining whether Julian entered into any hiring or contract of employment with the operating personnel of the utility on behalf of the state. State employment, while it must be authorized by law, generally has its basis in contract, express or implied, the same as any other hiring. 67 C.J.S., Officers § 5(4), p. 114, states that '* * *an employment, although it may be created by law, usually arises out of a contract between the government and the employee; * * *

[10, 11] This court has adopted the definitions of master and servant found in §2, Restatement of the Law of Agency; Smith v. Fine, 351 Mo. 1179, 175 S.W. 2d 761, 765; Mattan v. Hoover Co., 350 Mo. 506, 166 S.W. 2d 557, 564. Section 2 of the Restatement defines a master as follows: 'A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.' A servant is 'a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.' The record is devoid of any evidence that Julian controlled or had the right to control the physical conduct of the operating employees of the utility.

[12,13] None of the utility employees were paid by the state. This is a strong factor indicating that they were not state employees. Williams v. Gideon-Anderson Lumber Co., Mo. App. 224 S.W. 51, 53. In 81 C. J. S., States § 53, p. 973, with reference to state employees, it is stated: 'Payment of particular persons by the state is a very strong circumstance showing that they are state employees, and it has been held that one becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the state. * * * An independent contractor, working for the state, has been held not "an employee of the state".' Under the evidence, we must hold that there was no contract of employment, either express or implied, between Julian on behalf of the state and the operating personnel of the utility."

It is clear that the inheritance tax appraiser's fee is to be allowed by the Court and paid out of the estate, Section 145.190 RSMo 1959. No part of the fees or expenses paid to an inheritance tax appraiser is paid from any public funds.

Turning now to other elements to be considered in whether employment is public or private. The 8th Circuit Court of Appeals had under consideration whether attorneys employed by the State Insurance Department were employees of the State or a political subdivision thereof so as to exempt them from the Federal Income Tax in Lohman v. Commissioner of Internal Revenue, 133 Fed. 2d 977, 979, said:

> "* * *It is not always possible to draw a sharp and definite line of distinction between those who are state employees or officers and those who are not. In final analysis the decision in each case must be made upon its own facts. But, in general, the courts have held one receiving compensation for services to a State or its political subdivisions, not an officer or employee, where no oath of office was taken or required, no bond was given for the faithful discharge of the employment, where the employment was not for a definite or continuous term or for the performance of duties fixed by law, and where the services were not under the direct control of the public agency receiving them, both as to results to be obtained and the method of obtaining them; and also where the party claiming exemption as an employee was free, while engaged in the service in question, to accept other and concurrent employment. Later cases held that one claiming exemption from federal income taxation on the ground that his income was received as a state employee or officer must show that his services to the State were in the discharge of an essential governmental function and that taxation of the income received for those services imposed a real and not merely a conjectural burden upon the exercise of that function by the State. * * *"

It is apparent that some, but not all, of the criteria are present for an inheritance tax appraiser. An oath but no bond is required of an appraiser while the employment is not for a definite or continuous term. The duties of an appraiser are fixed by law and

are under the control of the Probate Judge but the results of the appraiser and the methods employed are subject to complete review by the Judge. Almost all appraisers do have their own private business or occupation and hence do conduct other and concurrent employment. The job of inheritance tax appraiser is almost always a side line and not the principal business of the person who accepts the employment.

When we place in the balance those elements which weigh in favor of public employment and those elements which weigh against it, it is manifest that the scales do not clearly and undeniably weigh in favor of public employment. We think it should do so for us to so hold. It appears from examination of Section 145.160, RSMo 1959, that the inheritance tax appraiser shall "make report" of his appraisment to the Court in writing and that the Court has jurisdiction to determine the amount of the tax provided for in this chapter. (Section 145.150). It thus appears that the duty of assessing an inheritance tax is placed directly upon the Court. The appraiser acting merely as an arm of the Court in assembling the facts pertinent to the Court's assessment of the tax acts as an arm of the Court and an advisor to the Court. The Court exercises the perogative of sovereignty and has the responsibility therefor. His appointee has no authority whatever outside the scope of the statutes and the authority given him by the Court. This authority of the appraiser does not, in our opinion, amount to the exercise of sovereignty or the participation in the exercise thereof.

We think this is similar to the situation of a receiver appointed by the Court and considered in the case of Baird v. Lafor by the Supreme Court of North Dakota, 201 N. W. 997, 38 A.L.R. 807, supra, in which the Court held that the receiver although he is an officer of the Court and is the hand and arm of the Court, is appointed by and removable at the pleasure of the Court, he is responsible only to the Court but he exercises none of the powers of government and he is therefore no more a civil officer than an attorney at law, guardian, referee, or a jury commissioner, jury man or any other officer appointed by the Court to enable it to properly function as a Court.

It is recognized that some of the criteria of public employment is present in the obligations and duties of an inheritance tax appraiser. Certainly a strong argument can be made that such work is public employment. However, we think that we must construe the words "public employment" with reasonable strictness. This for

the reason that the constitutional provision imposes a severe penalty - forfeiture of office. Penal laws must be construed strictly. Unless the job of inheritance tax appraiser falls clearly and unarguably within the meaning of public employment then we think we do not have the license to so hold. We therefore conclude that an inheritance tax appraiser is not public employment within the meaning of Article VII, Section 6, of the Constitution.

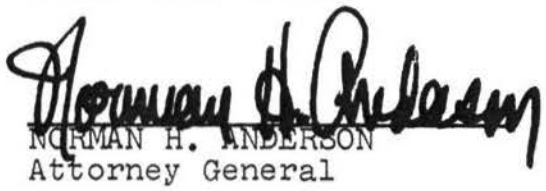
The practice of a Probate Judge of appointing his relatives as inheritance tax appraiser is surely not to be condoned and the practice could certainly be prohibited by the Legislature. We find, however, that the nepotism provision of the Constitution, Article VII, Section 6, does not prohibit the practice.

CONCLUSION

The Nepotism Provision, Article VII, Section 6, of the Constitution is not violated by the appointment by the Probate Judge of his father as inheritance tax appraiser because the position of inheritance tax appraiser is not a public office or employment within the meaning of the State Constitutional provision.

The foregoing opinion, which I hereby approve, was prepared by my Assistant J. Gordon Siddens.

Yours very truly,



NORMAN H. ANDERSON
Attorney General