PROBATE JUDGE: Newly elected Probate Judge not disqualified in case wherein he was executor in absence of an objection, in writing, verified by party in interest.

January 22, 1951

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Honorable A. R. Alexander
Judge of Probate Court
Clinton County
Plattsburg, Missouri

Dear Judge Alexander:

This is in reply to your request for an opinion which is as follows:

> "I am very much puzzled about the following stated problem and need advice.
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> "On January 1st, 1951, I became Probate Judge in Clinton County, and by reason of the statute, Laws 1945, page 763, became disqualified to act as executor in an estate to which I was appointed heretofore.
>
> "My semi-annual settlement would have been due in February.
>
> "There are no heirs in this county, and in fact all debts have been paid.
>
> "I could not think of any other thing to do but make up a settlement, make a record of my disqualification, and name some one as administrator with the will annexed to administer the balance.
>
> "But now the question arises in my mind as to whether under the above section, 2444, I can name such administrator. I have prepared the Letter of Administration and bond has been furnished, but since this question has come up in my own mind, I am holding the letters and papers until I can hear from you.

> "I thought I had the business properly arranged, but now I am not satisfied, and await an opinion from you, and direction as to the proper action if I have been wrong."

Section 2444 is now Section 481.130, RSMo 1949, and is as follows:

> "No judge of probate shall sit in a case in which he is interested, or in which he may have been counsel or a material witness, or related to either party, or in the determination of any cause or proceedings in the administration and settlement of any estate of which he is or has been executor, administrator, guardian or curator, when any party in interest shall object in writing, verified by affidavit; and when such objections are so made, such cause shall be certified to the circuit court, which court shall hear and determine the cause; and the clerk of the circuit court shall deliver to said probate court a full and complete transcript of the judgment, order or decree made in such cause, which shall be kept with the papers in said office pertaining to said cause; nor shall any such judge be permitted to act as attorney, nor have any partner acting as attorney in any cause originating in such court, nor in which either party is or has been executor, administrator, guardian or curator of an unsettled estate under administration in said court, nor in any cause involving the partition of real property; nor shall the judge or clerk of such court draw or witness any will or make any settlement for any administrator, executor, guardian or curator over which such court may have jurisdiction, nor shall the judge of such court act as deputy or clerk for any other public official or receive any compensation for any public service other than his compensation as such judge; and an acceptance of the office of judge of probate shall operate as a revocation of all letters testamentary and of administration and of guardianship or curatorship held by him at the time of his election,

> and disqualify him from acting in any capacity in such cases in any court of this state. Any probate judge who violates any of the provisions of this section shall forfeit his office and be liable to ouster therefor, and it shall be the duty of the prosecuting attorney of the county or the attorney general to prosecute such ouster proceedings upon proper evidence of such violation being furnished to them."

The statute has been considered by the Courts before, and in the case of In re Estate of Albert, 80 Mo. App. Rep. 554, l.c. 560, the Court said:

> "The statute provides that if a judge of probate is interested, has been of counsel or is a material witness in the determination of any cause or proceeding in the administration and settlement of an estate, he shall not sit in the matter when any party in interest shall object in writing, verified by affidavit, etc. (R.S. 1889, sec, 3403). No formal objection was made in this case either in writing or otherwise to the newly elected probate judge acting on the report of sale, but the record shows that all the parties, executor and heirs and legatees appeared and consented to the certification of the case to the circuit court. The statute is that no such disqualified judge of the probate shall determine any matter in the settlement of an estate, provided a party in interest objects in writing, verified by affidavit, etc., but the statute does not in terms prohibit the judge from so certifying such a case on his own motion. By fair and reasonable implication it recognizes this inherent right, for a disqualified judge ought not to be compelled to violate his judicial conscience by deciding a cause in which he is personally interested or has been of counsel. We therefore overrule the assignment of error that the circuit court was without jurisdiction to decide the matters in controversy."

Also, the case of Phillips vs. Blessing, 127 S.W. (2d) 62, declared the law as follows, l.c. 63:

> "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."

This office has also had occasion to consider the statute in an opinion to Honorable Lee Mullins, under date of June 21, 1935, wherein there was for consideration the question whether or not a probate judge could sit in a case in which he was a witness to a Will. This office concluded that the probate court had authority to hear the case in the absence of any objection, in writing, verified by affidavit duly filed by any party in interest. The opinion also pointed out that under the Albert case, supra, the Court had the authority of certifying the case to the Circuit Court on its own motion.

In consideration of the language of the statute and in the cases which have arisen thereunder, we believe that in the absence of an objection, in writing, verified by affidavit duly filed on behalf of any party in interest, a newly elected probate judge may hear a case wherein he has been an executor.

CONCLUSION

Therefore, it is the opinion of this department that a newly elected probate judge may continue in a case wherein he has been executor, including the appointing of an administrator, executor, including the appointing of an administrator, provided that there has been no objection in writing, verified by affidavit filed on behalf of any party in interest in the case.

Respectfully submitted,

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APPROVED:

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