PROBATE JUDGE: Not authorized to appoint a deputy judge.

August 24, 1943

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Hon. L. M. Bywaters
Assistant Prosecuting Attorney
Liberty, Missouri

Dear Mr. Bywaters:

This will acknowledge receipt of your letter of August 20, 1943, in which you request an opinion as follows:

> "I would greatly appreciate an opinion from your office on the following question:
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> "If a Probate Judge is drafted or voluntarily enlists in the Armed Forces of his country, can he legally appoint his clerk or anyone possessing the qualifications of a Probate Judge as his deputy, to take charge of his office and serve out his term during his absence?
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> "Sections 2458 and 2462 of the Revised Statutes of Missouri of 1939 make provisions for the selection or appointment of a Probate Judge in cases wherein he cannot serve by reason of disability, but I can find nothing in the statutes applicable to the above situation.
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> "Your cooperation and assistance in this connection will be greatly appreciated."

There is no statute which would authorize the appointing of an assistant judge or deputy judge by a probate judge upon

his entrance into the military service. To arrive at the answer to your question it is necessary to refer to the case books and text books.

In Missouri, following the common law rule, it is recognized that without statutory authority a ministerial officer may appoint a deputy to perform purely ministerial acts. Hunter v. Hemphill, 6 Mo. 10; Small v. Field, 102 Mo. 104. An officer who has duties involving the exercise of discretion and also ministerial duties may delegate to an assistant or deputy the performance of the ministerial duties but cannot delegate the performance of the duties which involve an exercise of his official discretion. State ex rel. Shrainka Construction Co. v. Reber et al., 226 Mo. 229.

The same rule concerning the delegation of discretionary duties to an assistant is recognized and well established in other jurisdictions, a Kansas case and a Kentucky case each announcing the same rule are here cited and quoted from:

Moore v. Wilson (Kans. Sup.), 115 Pac. 548, l. c. 549:

> "The contention is that the duties devolving on the commissioner involved the exercise of judgment and discretion, and that, in the absence of statutory authority, no deputy could be appointed to act in his stead. The statute does empower the commissioner to appoint a clerk, a stenographer, inspectors for stockyards; to employ laborers to assist him when necessary; and to call on sheriffs and constables to execute his orders; but it is conceded that there is no statute empowering him to appoint a deputy. The general rule is that official duties of a ministerial character may be delegated to another, but those requiring the exercise of judgment and discretion cannot, unless specific statutory authority to do so is given. Likewise officers chosen because of their experience or

special fitness and capacity are not permitted to delegate or intrust such duties to deputies or other persons. The same rule has been applied to arbitrators, executors, guardians, and public trustees, in whom personal trust is confided, or who were chosen because of certain qualifications. Mechem on Agency, Secs. 188, 190. At common law officers could appoint deputies for the discharge of mere ministerial duties; but they had no authority to intrust to deputies the performance of duties of a judicial nature, or those involving judgment and discretion. In a general way, it may be said that the presumption of the law is that an office is to be held and executed by the one chosen for it, and especially where it is necessary that the officer shall possess particular qualifications. In Mechem on Public Officers, Sec. 567, it is said: 'In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment and discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another.'

"In Prell v. McDonald, 7 Kan. 426, 12 Am. Rep. 423, it was held that a marshal of a city of the second class could not appoint a deputy to act for him, in the absence of a statute or an ordinance authorizing it. In State v. Hastings, 10 Wis. 525, it was held that certain duties imposed on the Secretary of State could not be delegated to a deputy or an assistant. It was also held that a board of health could not delegate to others statutory power and discretion

specially vested in the board. Young v. County of Blackhawk, 66 Iowa, 460, 23 N. W. 923. In New York it has been held that a board of excise, whose duties involved confidence and a trust to be exercised for the public good, could not delegate its authority to another. Board of Excise v. Sackrider, 35 N. Y. 154. In Powell v. Tuttle, 3 N. Y. 396, it was held that, if the duties are partly ministerial and partly of a judicial nature, the former may be committed to a deputy, but that the latter could not be delegated. In State ex rel. v. Reber, 226 Mo. 229, 126 S. W. 397, where the duties of an officer, in a tax transaction, included some which involved discretion, and, following the performance of the duties involving the exercise of discretionary power, others of a ministerial character were to be performed, the court held that the officer, having personally performed those involving discretion, might authorize other persons to perform the remaining ones. In the syllabus it was said: 'An officer, to whom a discretion is intrusted by law, cannot delegate to another the exercise thereof, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act, such as signing instruments, to evidence the result of his own exercise of the discretion.' 126 S. W. 397, syl. par. 3. See, also, Coffee v. Tucker, 7 Humph. (Tenn.) 49; Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790; Robinson v. Chapline, 9 Iowa, 91; People ex rel. Board of Charities v. Davis, 22 Hun (N. Y.) 209; Mechem on Agency, Sec. 190; 1 A. & E. Encyc'l of L. 975; 22 A&E. Encyc'l of L. 365; 29 Cyc. 1395."

Monroes' Guardian v. Monroe (Court of Appeals of Kentucky), 285 S. W. 250:

> "The first question raised is whether or not a deputy circuit clerk may appoint a guardian ad litem. The guardian ad litem in this case was appointed pursuant to section 38 of the Civil Code by the deputy clerk of Nelson circuit court at a time when that circuit court was in vacation. It is conceded that, had the clerk himself appointed this guardian ad litem, the appointment would have been valid, but it is insisted that a deputy clerk has no power to make such an appointment, and the case of Payton v. McQuown, 97 Ky. 757, 31 S. W. 874, 31 L. R. A. 33, 53 Am. St. Rep. 437, is cited and relied upon. In that case it was held that a deputy clerk could not grant a restraining order or temporary injunction, although the circuit clerk would under the facts have had the power to do so. In that case it was pointed out that, although section 678 of the Civil Code provides that 'any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy,' yet as the granting of a restraining order or temporary injunction is a judicial or quasi judicial act, the authority to do so could not be delegated and hence could not be done by a deputy clerk. It is well settled that, in the absence of statutory authority, a deputy may not perform for his principal any duties judicial or quasi judicial in their nature, but that he may perform all other acts which his principal is authorized to do. * * * * *"

The following brief quotation stating the same rule is taken from Corpus Juris, Vol. 46, page 1063, par. 384:

> "Without statutory authority, deputies have no power with respect to the duties of an office involving the exercise of judgment and discretion, but all ministerial duties pertaining to the office which the principal could perform may be performed by a deputy. * * * * *"

Also in Mechem on Public Officers is found the following, Section 569, page 371:

> "A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him; because his judgment is relied on in matters relating to his office, which might be the reason of making the grant to him; neither can a ministerial officer depute one in his stead, if the office be to be performed by him in person; but when nothing is required but a superintendency in the office, he may make a deputy.
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> "It is clear that the judges of Westminster Hall, as well as all others having judicial authority, must hold their courts in their proper persons, and cannot act by deputy, nor in any way transfer their power to another."

The duties of a probate judge frequently require the exercise of a judicial discretion and at times are purely ministerial.

Conclusion.

As there is no statutory authority for the appointment of a deputy or an assistant by a probate judge, a probate judge cannot appoint a deputy or assistant and confer on such deputy or assistant power to perform the duties of the office

which involve the exercise of discretion. However, a probate judge may delegate to a clerk or an assistant the performance of the purely ministerial duties of the office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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