

**NEPOTISM:** If a candidate for presiding judge is elected and votes for the appointment of his wife's blood nephew as Superintendent of the Infirmary, he is subject to ouster; if he does not conspire, connive or agree to the appointment and votes against the same, he is not subject to ouster.

July 29, 1938

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Honorable Walter G. Stillwell  
Prosecuting Attorney  
Marion County  
Hannibal, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of July 19th, wherein you make the following inquiry:

"I would deeply appreciate an opinion from your office as soon as possible on the following: Stephen Drake is now acting in the capacity of Superintendent of the County Infirmary, having been heretofore appointed to such a position by the County Court. Mr. Drake is a blood nephew of Mrs. C. G. Tarleton whose husband is now a candidate for the office of Presiding Judge of Marion County, Missouri.

"If Mr. Tarleton should be elected to the office of presiding Judge of this county, would the then County Court violate the constitutional provision as to nepotism by re-appointing Mr. Drake to this position?"

Your request involves the construction of Article XIV, Section 13 of the Constitution of Missouri, or, in other words, commonly referred to as the "nepotism section." Said section is as follows:

"Any public officer or employe 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."

The general principle which this Department has followed with reference to determining relationship by affinity is contained in 2 C. J. 378, as follows:

"Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include the person related to the spouse simply by affinity."

The principle is found enunciated in the Encyclopaedia Britannica, 11th Ed., Vol. 1, page 301 as follows:

"The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

Applying that principle to the relation which you state exists with reference to the blood nephew of Mrs. Tarleton, whose husband is a candidate for presiding judge.

of Marion County, we are of the opinion that the relation existing is one prohibited by the nepotism section.

We next discuss the affect of Mr. Tarleton in the event he is elected, and Mr. Drake is re-appointed as Superintendent of the County Infirmary.

A situation similar in nature and wherein the principle can be applied, arose in a decision from Miller County, Missouri, in the case of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, l. c. 101. In discussing the nepotism provision, Judge Gantt says:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

In the case of State ex inf. Ellis v. Ferguson, 333 Mo. 1177, Judge Hays hold that a mayor in appointing his first cousin to the position of pumper of the water works, is subject to ouster as follows:

"A mayor of a city of the third class, in appointing his first cousin to the position of pumper of the waterworks system of the city, violated the nepotism amendment to the State Constitution, Section 13, Article XIV, and thereby forfeited his right and title to the office and was subject to ouster in quo warranto proceeding."

A more recent case is that of State ex rel. McKittrick v. Becker, 81 S. W. (2d) 948, which decision was also written by Judge Hays and will be referred to again in our ultimate conclusion. The court held as follows:

"Two of judges of Court of Appeals could in exercise of their jurisdiction appoint first cousin of third judge as commissioner, and such appointment would not violate provision of Constitution forbidding officers to appoint relatives to public service, where third judge refrains from voting and other judges exercise appointive power free from connivance, agreement, or conspiracy (Const. art. 14, sec. 13, adopted in 1924)."

Another decision with reference to nepotism is that of State ex inf. Norman v. Ellis, 325 Mo. 154, which was really the pioneer decision with reference to the nepotism act in this State.

#### Conclusion.

We are of the opinion that, if the party now a candidate for Presiding Judge of Marion County should be successful in his candidacy and become the Presiding Judge of the County Court, and is confronted with the question of appointing his wife's nephew as Superintendent of the County Infirmary, he will violate the nepotism section and be subject to ouster if he votes for or participates in naming the said Superintendent. On the other hand, if he refrains from voting and the other members of the County Court exercise the appointive power, free from connivance, agreement, conspiracy or collusion, directly or indirectly, on the part of the Presiding Judge with any other member, then the said

Hon. Walter G. Stillwell

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Presiding Judge will not have violated the nepotism section.

Respectfully submitted,

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APPROVED:

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J. W. BUFFINGTON  
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