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COURTS, PROBATE—JUDGE—VACANCY BY RESIGNATION—ELECTION FOR UNEXPIRED TERM; NOMINATION OF PERSONS FOR THE UNEXPIRED TERM—NECESSITY FOR WRITE-IN—FAILURE TO NOMINATE— §§3513.01, 3513.14, 3513.256, 3513.31, 3505.05 R.C.

SYLLABUS:

1. Where a vacancy in the office of probate judge occurs by resignation, on March 1, 1958, of an incumbent theretofore elected for and serving in a six-year term beginning on February 9, 1955, such vacancy for the unexpired term must be filled by election at the general election in November, 1958, as provided in Article IV, Section 13, Ohio Constitution.
2. Section 3513.01, Revised Code, requires in such case that a primary election be held in May, 1958, to nominate candidates of political parties for such office thus to be filled in such general election.
3. Such vacancy having occurred later than the ninetieth day prior to the date of such primary election, it became impossible, under the provisions of Section 3513.05, Revised Code, for any candidate in such primary election to have his name printed on the ballots; but blank spaces should have been provided thereon, as required by Section 3513.14, Revised Code, so as to permit voting for candidates whose names are written in such blank space by the electors as provided in Section 3513.33, Revised Code.
4. It is not possible in such case for any person to qualify as an independent candidate for such office for the reason that nominating petitions for independent candidates are required under the provisions of Section 3513.256, Revised Code, to be filed not later than the ninetieth day before such May, 1958, primary election.

5. Where a vacancy in any elective office, including a judicial office, occurs by death of the incumbent subsequently to the one-hundredth day before the day of a primary election and prior to the fortieth day before the next general election, and if such vacancy may be filled by election at such general election, the appropriate committee of each political party may select such party's candidate in such general election and the name of such candidate must be printed on the ballot in such general election, all as provided in Sections 3513.31 and 3505.05, Revised Code; but no such provision is made by law in the case of a vacancy which occurs otherwise than by death of the incumbent.

6. In such case of vacancy by resignation in the office of probate judge, and where there is such failure to achieve a nomination by any political party in such primary election, there is no authority in law for the printing on the ballot in such general election of the name of any candidate for such unexpired term, but in such general election the electors may vote for candidates whose name they write in the blank space provided on such ballot as required by Section 3505.04, Revised Code.

Columbus, Ohio, June 26, 1958

Hon. Sumner J. Walters, Prosecuting Attorney  
Van Wert County, Van Wert, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"On March 1st, 1958, the Probate Judge of Van Wert County, Ohio, resigned; on March 4th, 1958, a successor was appointed by the Governor to fill the vacancy. This, of course, was too late for anyone to get their name printed on the ballot for the primary election in May. When the ballots were printed for the May primary, the office of Probate Judge was not included and, of course, there was no blank space left so that votes could be cast for the nomination of a person to fill the unexpired term of Probate Judge, and, as a result, no one was nominated for the office. It is my belief that the Constitution of Ohio, Article IV, Section 13, and the Revised Code of Ohio, Section 3505.05 clearly provides, or rather requires, that a person must be elected to fill the unexpired term at the general election to be held in November of 1958.

"Having reference to Revised Code of Ohio, Section 3513.31, the last paragraph, which provides, if a person holding an elective office *dies* subsequently to the seventieth day before the day of the primary election and prior to the eightieth day before the day of the next general election and if, under the laws of this state, a person may be elected at such general election to fill the unexpired term of the person who has died, the appropriate committee of each political party acting as in the case of a vacancy in a party nomination, etc.—

"1. Can this statute be considered broad enough to cover a resignation as well as a death and may the political parties by their appropriate committees supply candidates whose names may be printed on the ballot at the November general election to be elected to the unexpired term of Probate Judge in this county?"

"Having reference to Revised Code of Ohio, Section 2513.28—

"2. May the present appointee who is now serving as Probate Judge in this county at any time prior to the general election to be held in November of 1958, file a nominating petition and thus cause her name to be printed on the ballot in November of 1958, as a candidate for election to the unexpired term of Probate Judge?"

"3. If so, on what date must such nominating petition be filed?"

"4. Is there any way in which persons who wish to be candidates for the unexpired term of Probate Judge may cause their names to appear on the ballot in November of 1958?"

"5. If there is no way that candidates can have their names appear on the ballot for election to the office of Probate Judge in November, 1958, then what, if anything, must the election board of Van Wert County, do concerning the office of Probate Judge?"

"As the time for election is drawing nearer, I think that these questions should be answered at the earliest possible date in order to give prospective candidates plenty of time to do whatever they may do concerning this office. Therefore, we will greatly appreciate your prompt answer to these questions."

Section 13, Article IV, Ohio Constitution, reads as follows:

"In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term."

In Section 7, Article IV, and in Section 2, Article XVII, Ohio Constitution, it is provided that the term of office of judges of the probate court shall be "six years." The term here involved is the six-year term begin-

ning on February 9, 1955, and it is readily apparent that such term will not expire within one year immediately following the November 1958 general election, that being the first general election occurring "more than forty days after the vacancy shall have occurred," in this instance on March 1, 1958.

In this situation I agree with your view that an election to fill the unexpired term of probate judge in Van Wert County must be held in November, 1958.

This being so, we may note the following provision in Section 3513.01, Revised Code :

"On the first Tuesday after the first Monday in May of each year, primary elections shall be held for the purpose of nominating persons as candidates of political parties for election to offices to be voted for at the next succeeding general election. \* \* \*"

This provision plainly requires the holding of a primary election even in those cases where the vacancy in an office occurs at a date later than ninety days prior to such primary, *i.e.* on such a date that it has become impossible for any candidate to file a declaration of candidacy in such time as to have his name printed on the ballot. See Section 3513.05, Revised Code. In such case, however, it is possible to achieve a party nomination by the writing of names of candidates in the blank spaces provided on primary ballots as provided in Section 3513.14, Revised Code. See Section 3513.23, Revised Code. In the case at hand, however, you indicate that the office of probate judge, with appropriate blank spaces, was wholly omitted from the ballot, and there was thus no party nomination achieved for that office.

Coming now to the first specific question propounded, in Section 3513.31, Revised Code, as amended effective January 1, 1956, there is the following provision :

"If a person holding an elective office *dies* subsequently to the one-hundredth day before the day of a primary election and prior to the fortieth day before the day of the next general election, and if, under the laws of this state, a person may be elected at such general election to fill the unexpired term of the person who *has died*, the appropriate committee of each political party, acting as in the case of a vacancy in a party nomination, as provided in the first four paragraphs of this section, may select a person as the candidate of its party for election for such unexpired term at such general election, and certify his name. Thereupon

such name shall be printed as such candidate under proper titles and in the proper place on the proper ballots for use at such election. In the event that a person has been nominated in a primary election, the authorized committee of that political party shall not select and certify a person as the candidate of such party." (Emphasis added)

This language, referring to a vacancy which occurs when the incumbent of an office "dies" is clear beyond the least ambiguity, and there is thus no basis whatever for an interpretation which would include a vacancy due to resignation. See *Slingluff v. Weaver*, 66 Ohio St., 621.

As to your second question, we may first note that Section 3513.28, Revised Code, provides in part:

"Each person filing a nominating petition for independent nomination as a candidate for election to the office of judge of the supreme court, court of appeals, court of common pleas, probate court, and such other courts as are established by law, in addition to designating in such nominating petition the office to which he seeks such nomination shall, if two or more judges of the same court are to be elected at any one election, designate the term of the office for election to which he seeks such nomination by stating therein, if a full term, the date of the commencement of such term as follows: 'Full term commencing..... (Date).....,' or by stating therein, if an unexpired term, the date on which such unexpired term will end as follows: 'Unexpired term ending..... (Date).....,' and such candidate shall be nominated only for the term so designated. \* \* \*"

As to such nominating petitions of independent candidates, however, the *time* of filing is fixed in Section 3513.256, Revised Code, as follows:

"\* \* \* Such petition shall be filed with the board of elections not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election."

In view of this provision, it is obvious that it would now be impossible for the present incumbent, or any other person, to file such a nominating petition, and it would have been impossible to do so at any date after the vacancy you describe had occurred. This being so, it becomes unnecessary to consider your third question.

As to your fourth question, I know of no way in which the names of candidates for this office can be *printed* on the ballots in the November, 1958, election.

The names of such candidates may thus "appear" on the ballots in such election only by the process of being written in by the electors. In this connection, Section 3505.04, Revised Code, provides:

"\* \* \* No blank spaces shall be provided on such ballot wherein an elector may write in the name of a person for whom he desires to vote except that if no candidate has been nominated for an office for which an election is to be held, blank spaces shall be provided under the title of said office equal in number to the number of persons to be elected to such office."

This provision appears to dispose of your final question, for it seems clear that it is the duty of the board of elections to provide a single blank space on the November, 1958, ballot, whereby the electors may write in the names of such candidates as they choose, and may cast their votes for such candidates.

Accordingly, it is my opinion:

1. Where a vacancy in the office of probate judge occurs by resignation, on March 1, 1958, of an incumbent theretofore elected for and serving in a six-year term beginning on February 9, 1955, such vacancy for the unexpired term must be filled by election at the general election in November, 1958, as provided in Section 13, Article IV, Ohio Constitution.

2. Section 3513.01, Revised Code, requires in such case that a primary election be held in May, 1958, to nominate candidates of political parties for such office thus to be filled in such general election.

3. Such vacancy having occurred later than the ninetieth day prior to the date of such primary election, it became impossible, under the provisions of Section 3513.05, Revised Code, for any candidate in such primary election to have his name printed on the ballots; but blank spaces should have been provided thereon, as required by Section 3513.14, Revised Code, so as to permit voting for candidates whose names are written in such blank space by the electors as provided in Section 3513.33, Revised Code.

4. It is not possible in such case for any person to qualify as an independent candidate for such office for the reason that nominating petitions for independent candidates are required, under the provisions of Section 3513.256, Revised Code, to be filed not later than the ninetieth day before such May, 1958, primary election.

5. Where a vacancy in any elective office, including a judicial office, occurs by death of the incumbent subsequently to the one-hundredth day before the day of a primary election and prior to the fortieth day before the next general election, and if such vacancy may be filled by election at such general election, the appropriate committee of each political party may select such party's candidate in such general election and the name of such candidate must be printed on the ballot in such general election, all as provided in Sections 3513.31 and 3505.05, Revised Code; but no such provision is made by law in the case of a vacancy which occurs otherwise than by death of the incumbent.

6. In such case of vacancy by resignation in the office of probate judge, and where there is such failure to achieve a nomination by any political party in such primary election, there is no authority in law for the printing on the ballot in such general election of the name of any candidate for such unexpired term, but in such general election the electors may vote for candidates whose name they write in the blank space provided on such ballot as required by Section 3505.04, Revised Code.

Respectfully.

WILLIAM SAXBE  
Attorney General