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GOVERNOR FILLS VACANCY BY APPOINTMENT IF INCUMBENT JUDGE DIES AFTER FORTY DAYS PRIOR TO ELECTION—OHIO CONSTITUTION, ART. IV, SEC. 13—§3513.31, R.C.

SYLLABUS:

1. If an incumbent judge holding an unexpired term dies after forty days prior to an election, at which his successor could have been chosen had he died earlier, Section 13, Article IV, Ohio Constitution, applies and the governor fills the vacancy by appointment until a successor can be elected at the first general election for such position held more than forty days after such vacancy shall have occurred, provided that if the unexpired term ends within one year immediately following the date of such general election, no election shall be held and the appointment shall be for the entire unexpired term.

2. If an incumbent judge holding an unexpired term dies subsequent to the one-hundredth day prior to the primary election and prior to the fortieth day before the election at which his successor could be elected, election must be held to fill such vacancy and the appropriate committee of each political party may select such party's candidate in the next general election pursuant to Section 3513.31, Revised Code.

Columbus, Ohio, July 15, 1959

Hon. John T. Corrigan, Prosecuting Attorney  
County of Cuyahoga, Cleveland, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“Our local Board of Elections has requested me to ask you for an opinion as to the following situations arising in connection with R.C. Section 3505.05:

“(1) What happens if an incumbent judge holding an unexpired term dies *after* 40 days prior to an election at which, had he died earlier, his successor could have been chosen from two party-nominated candidates? In such case, does the governor appoint the successor who would hold office until the next election at which the office could be voted on?”

“(2) What happens if an incumbent judge holding an unexpired term dies before 80 days prior to an election (at which his successor could ordinarily be elected) but not leaving enough time to process petitions? Does the governor appoint a successor, or is there some other result?”

In answer to your first question, reference is made to Section 13,

Article IV, Ohio Constitution. This Section 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.”

You are concerned with the vacancy created by the death of an incumbent judge, which death occurred after forty days prior to a general election and presumably before that election. The constitutional provision expressly provides for an appointment by the governor to fill the unexpired term until a successor is elected. The constitution further provides that the successor shall be elected at the first general election for the office occurring more than forty days after the vacancy was created. As your question relates to a vacancy occurring after such forty-day period, the successor would be elected at the next ensuing general election for the office following the one mentioned in your question. This will be true provided, of course, that the unexpired term would not end within one year immediately following the date of the general election at which the successor would be elected. If it did so expire, the appointment would be for the entire unexpired term.

In answer to your second question, two statutes appear to be pertinent. Section 3505.05, Revised Code, provides in part as follows:

“If a person holding a judicial office for a term for which no election would otherwise be held at the next general election dies prior to the fortieth day and on or after the eightieth day before the day of the general election, the appropriate committee of each political party, acting as in the case of a vacancy in a party nomination as provided for in section 3513.31 of the Revised Code, may select a person as the candidate of its party for election to the unexpired term of such office. Such committee shall certify the name of such candidate, and thereupon such name shall be printed under the title of said office on a separate nonpartisan ballot to be used at such general election.

“\* \* \*”

Section 3513.31, Revised Code, was amended in 1955, effective January 1, 1956, and reads as follows:

“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.”

Section 3505.05, Revised Code, provides for elections to fill judicial vacancies occurring prior to the fortieth and on or after the eightieth day before the general election.

Section 3513.31, Revised Code, provides for elections to fill vacancies occurring subsequent to the one-hundredth day before the primary election and prior to the fortieth day before the next general election.

These two sections in no way affect the provisions of Section 13, Article IV of the Ohio Constitution. The governor would still appoint a successor to fill the judicial office until the time of the next general election for the office occurring more than forty days after the vacancy was created.

Section 3513.31, Revised Code, provides that under the facts of your second question and presuming that the death of the incumbent occurred subsequently to the one-hundredth day before the primary election, that the appropriate committee of each political party may select a person as the candidate of its party for election for such unexpired term at the next general election.

In Opinion No. 2276, Opinions of the Attorney General for 1958, it was held that where a vacancy in any elective office, including 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.

It appears that the provisions of Section 3513.31, Revised Code, would clearly provide for the nomination by the political parties of candidates under the facts which you present. Even though there is an inference in Section 3505.05, Revised Code, that candidates for judicial office in which a vacancy has occurred more than eighty days prior to the general election would be supplied by some other means, it is my opinion that there is no basic conflict between the two statutes. Section 3505.05, Revised Code, applies to judicial vacancies occurring between the fortieth and eightieth day before an election while the provisions of Section 3513.31, Revised Code, apply to all vacancies in elective offices including judicial, which occur before the fortieth day before the general election and after the one-hundredth day prior to the primary election. This latter section supplies the answer to your second question.

It is my opinion, therefore, and you are accordingly advised as follows:

1. If an incumbent judge holding an unexpired term dies after forty days prior to an election, at which his successor could have been chosen had he died earlier, Section 13, Article IV, Ohio Constitution, applies and the governor fills the vacancy by appointment until a successor can be elected at the first general election for such position held more than forty days after such vacancy shall have occurred, provided that if the unexpired term ends within one year immediately following the date of

such general election, no election shall be held and the appointment shall be for the entire unexpired term.

2. If an incumbent judge holding an unexpired term dies subsequent to the one-hundredth day prior to the primary election and prior to the fortieth day before the election at which his successor could be elected, election must be held to fill such vacancy and the appropriate committee of each political party may select such party's candidate in the next general election pursuant to Section 3513.31, Revised Code.

Respectfully,  
MARK McELROY  
Attorney General