

PROBATE JUDGE: Lawyer must reside in county sixty days  
MAGISTRATE: to qualify for the office of probate  
judge and ex officio magistrate.

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June 1, 1948

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Honorable John H. Keith  
Judge of the Probate Court  
Iron County  
Ironton, Missouri

Dear Judge Keith:

This is in reply to your letter of recent date requesting the opinion of this department on the following set of facts: In case a vacancy is created in the office of probate judge and ex officio magistrate, and no lawyer in the county will accept said office, is a lawyer who is a resident of another county qualified to hold said office by appointment of the Governor?

The consideration of this question must, of course, be directed to the office of probate judge as that is the fundamental office since the probate judge derives his authority as magistrate from his official capacity as probate judge. (See opinion to Honorable Walter A. Eggers, Judge of the Probate Court of Perry County, dated October 1, 1947.)

We believe that Section 3 of the Magistrate Law, Laws of Missouri, 1945, page 763, which requires each judge of the magistrate court to have been a resident of the county for at least nine months next preceding his election, is not applicable to the office of probate judge and ex officio magistrate.

Section 1988, R. S. Mo. 1939, setting up the requirement that a probate judge must have been a resident of the county in which he may be elected for one year next preceding his election, was repealed outright by an act of the 63rd General Assembly, found in the Laws of Missouri, 1945, page 815.

There being no statute directly pertaining to the qualifications of probate judges with regard to residence, we must look to the constitutional provision relating to the qualifications for that office. Article V, Section 25, provides, in part, that "Judges of probate and magistrate courts shall be

qualified voters of this state, and residents of the county." Clearly, then, said judges must be residents of the county in which they will serve. However, the question arises as to what length of residence in the county is sufficient to comply with said constitutional provision. The determination of this question must necessarily depend upon the clause requiring such judges to be qualified voters of this state. According to Section 11469, R. S. Mo. 1939, as amended, Laws of Missouri, 1943, page 555, implementing Article VIII, Section 2 of the Constitution, a citizen to be entitled to vote in all elections by the people must have resided in this state one year and the county, city or town sixty days immediately preceding the election at which he offers to vote. Thus, it appears that a sixty day residence in the county which will entitle a citizen to vote in that county is required to qualify him for said office with regard to residence.

As a practical matter, we will direct your attention to Article V, Section 6 of the Constitution, which authorizes the Supreme Court to make temporary transfers of judicial personnel from one court to another as the administration of justice requires. In view of this authority, it may be possible under these circumstances to effect a temporary transfer of a judge of an adjoining county to Iron County in order to handle the duties of the court in Iron County. In such a case where a probate judge and ex officio magistrate is temporarily transferred or assigned by the Supreme Court to serve as a judge of the probate court and magistrate of a county other than the one to which he is appointed or elected, said judge shall be reimbursed for his expenses in the amount of five cents a mile for each mile traveled in going from the place of his residence to and returning from the place where such probate or magistrate court is held and for his subsistence in the amount of ten dollars per day for each day so engaged. Such expenses shall be paid monthly from the Magistrate Fund upon the certification of the probate judge or magistrate so transferred or assigned (Senate Bill No. 294 of the 64th General Assembly, approved May 6, 1948).

#### Conclusion.

In view of the foregoing, it is the opinion of this department that where a vacancy is created in the office of probate

Honorable John H. Keith

-3-

judge and ex officio magistrate, and where no lawyer in the county will accept said office, a lawyer of another county is not qualified to accept said office by appointment of the Governor unless he has changed his residence and resided for sixty days in the county where the vacancy exists.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General *J.B.*

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