



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 32

The Honorable Paul Bud Burke
State Senator, 9th District
State Capitol, Room 359-E
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Conflict of Interest
-- County Sheriffs

Courts -- District Courts; Miscellaneous Provisions
-- District Court Rules for Administrative
Operation of Court; Clerks of District Courts;
Qualifications; Conflict of Interest

Synopsis: Generally, marital relationships between
governmental officers or employees are not
per se prohibited by Kansas law. Kansas
conflict of interest laws prohibit certain
interaction with or activities involving entities
in which a public officer or employee has a
substantial interest. These conflict of interest
laws do not preclude an individual from serving as
a public officer or employee. Because the
appointment in question is for a court personnel
position, statutes concerning that position and the
judicial rules and canons should also be considered
in making such an appointment. Cited herein:
K.S.A. 13-2903; 14-537; 20-342; 20-343; 46-215;
46-221; 46-231; 46-233; 46-239; K.S.A. 1990 Supp.
46-247; K.S.A. 74-605; K.S.A. 1990 Supp.
75-4301a; 75-4304.

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Dear Senator Burke:

As State Senator for the Ninth District of Kansas you request our opinion on whether a conflict exists if a district court clerk is married to the county sheriff for the county in which the district court is located. You state that each individual would work for different branches of the government, the state judicial system and the county enforcement system. You also provide information concerning the qualifications of the individual being considered for district court clerk.

We initially note that K.S.A. 20-342 and 20-343 discuss district court clerks and provide authority to the Supreme Court and the administrative judge with regard to procedures and requirements for hiring for such a position. These statutes do not address hiring an individual whose spouse holds a county office. Judicial canons and rules should be considered. However, we will limit our discussion solely to the issue you raise concerning a conflict.

The term "conflict of interest" is sometimes used to indicate what is also referred to as incompatibility of office. Incompatibility of office encompasses situations wherein an individual serves two masters. The general rule in Kansas is that one person may hold dual offices unless the offices are incompatible. Abry v. Gray, 58 Kan. 148 (1897). Determining whether there is an incompatibility of office requires examination of statutes which may directly prohibit dual office holding or considering the duties of the two offices to determine whether they are inconsistent or subordinate. See also Moore v. Wesley, 125 Kan. 22 (1928); Dyche v. Davis, 92 Kan. 971 (1914); and 3 McQuillan Municipal Corporations, § 12.67 (1990). Because we are not examining a situation wherein one person proposes to hold two offices, the principles of incompatibility of office do not apply. We will therefore focus on conflict of interest principles and nepotism rules.

Generally, marital relationships between governmental officers or employees are not per se prohibited by state law. However, there are some existing statutory prohibitions concerning certain governmental positions. K.S.A. 13-2903 limits hiring practices in cities of the first class: "The relatives by blood or marriage of the mayor or any commissioner are hereby disqualified from holding any city office during the term for which said mayor or commissioners are elected." See Attorney General Opinions No. 84-49 and 87-45. K.S.A. 14-537 states that second class city park

commission members may not be related to other city officials. K.S.A. 74-605 provides that members of the Kansas corporation commission may not be related to each other by blood or marriage. As discussed in Attorney General Opinions No. 81-140, 80-264, 77-109 and 77-58, it is within the authority of a county board of county commissioners to adopt and enforce anti-nepotism policies with regard to county employees. We have thus far not located a Kansas statute which prohibits a blood or marital relationship between a district court clerk and a county sheriff. Thus, unless the court has adopted such a rule, nepotism rules do not preclude such a situation. We must therefore consider conflict of interest laws.

Conflict of interest laws in Kansas are either statutory or common law. K.S.A. 1990 Supp. 75-4301a et seq. set forth the newly amended Kansas conflict of interest laws. K.S.A. 1990 Supp. 75-4304(a) provides:

"(a) No local governmental officer or employee shall, in the capacity of such an officer or employee, make or participate in the making of a contract with any person or business by which the officer or employee is employed or in whose business the officer or employee has a substantial interest."

K.S.A. 1990 Supp. 75-4301a defines local governmental employee and local governmental officer as those employed, appointed or elected to serve a governmental subdivision such as a county. This act does not apply to district court employees or officers. However, the county sheriff should be aware that substantial interest is defined at K.S.A. 1990 Supp. 75-4301a(a) to include a legal or equitable interest by an individual or that individual's spouse. K.S.A. 1990 Supp. 75-4301a et seq. do not prohibit spouses from serving or working for the same or different governmental entities. Rather, these conflict of interest laws may impact upon participation in certain matters by persons subject to the provisions of this act.

K.S.A. 46-215 et seq. set forth state governmental ethics laws. These statutes also require substantial interest statements (K.S.A. 1990 Supp. 46-247) and restrict and prohibit certain contractual or financial actions by state officers or employees (K.S.A. 46-231, 46-233, 46-239). K.S.A. 46-234 limits appointments of formally elected state officers

to state civil positions. However, K.S.A. 46-215 et seq. does not apply to employees or officers of the judicial branch. K.S.A. 46-221(a). Moreover, with the exception of K.S.A. 46-234, this act does not preclude hiring practices, but rather, generally regulates the actions of state employees or elected officials. Thus, it does not appear that statutory conflict of interest laws apply to the hiring of a district court clerk who is the spouse of a county sheriff.

Case law concerning conflict of interest also generally relates to one individual entering into some kind of financial or contractual arrangement which benefits that individual privately. There is a public policy against an agent using a fiduciary relationship to obtain a personal advantage from a contract made for that person's principal. See West v. Prairie State Bank, 200 Kan. 263 (1968); EVCO Distributing, Inc. v. Brandau, 6 Kan.App.2d 53 (1981); Moore v. Burroughs, 111 Kan. 28 (1922); Stephens v. Gall, 179 F.Supp. 938 (D.C. Kan. 1910). However, in LaHarpe Fuel Company v. City of Iola, 152 Kan. 445 (1940), the Kansas Supreme Court stated that a city could not void a contract by contending that it was contrary to public policy because the wife of a city commissioner owned one share of stock and served on the board of the private corporation with which the city was contracting. This line of authority does not prohibit spouses from both holding office or working for the same or different governmental entities. Rather, these conflict of interest principles generally preclude participation in certain matters by persons serving the interests of another. See also "The Voidability of Interested Director Contracts Under the Kansas Corporation Code" 24 K.L.R. 655, 659 (1976).

Conflict of interest laws are based upon the premise that individuals occupying public positions should not use that position to further personal gain. These principles do not preclude persons from holding the office or being employed by the government merely because their spouse is also employed by the same or a different branch of the government. Rather, conflict of interest laws generally limit or prohibit certain behaviors by persons who are already holding public positions. We have been unable to locate a Kansas statute or court rule which directly prohibits the hiring of a county sheriff's spouse as a district court clerk. It is our opinion that no conflict of interest law bars such employment. However, the appearance of impropriety referenced in the judicial canons should be considered and statutory conflict of

interest laws or ethical principles may impact upon the subsequent behavior of persons who spouses are employed with an entity with which that public employee or officer interacts.

Very truly yours,



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