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ATTORNEY GENERAL OPINION NO. 81- 128

Mr. William Malcolm  
Clay County Attorney  
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Re: Counties and County Offices -- County Treasurer --  
Term of Person Appointed to Fill Vacancy in Office

Synopsis: By reason of the death of the incumbent county treasurer of Clay County who was re-elected to a regular term commencing in October, 1981, the person who has been appointed to fill the vacancy holds office for the balance of the unexpired term and, as required by K.S.A. 19-504, "until a successor is elected and qualifies." Being a de jure officer, by virtue of these statutory provisions, the person so appointed will hold office until a successor is elected at the general election in November, 1984, and until such successor qualifies for office by taking the oath of office and filing a sufficient bond. Cited herein: K.S.A. 1980 Supp. 19-501, K.S.A. 19-504, K.S.A. 1980 Supp. 25-312, K.S.A. 25-314, K.S.A. 1980 Supp. 25-3902, 25-3903, K.S.A. 75-4308, Kan. Const., Art. 3, §12.

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Dear Mr. Malcolm:

You have requested our opinion regarding the following factual situation: Mrs. Alice Bender was, and had been for fifteen years, the incumbent Clay County Treasurer, and her current term of office was to end on October 15, 1981. In the November, 1980 general election, Mrs. Bender was reelected to an additional term of office as county treasurer for the period beginning October 15, 1981, and ending October 15, 1985. However, prior to re-qualifying for the new term of office and before the beginning of that term and, consequently,

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before the end of her prior term, Mrs. Bender passed away. Thereafter, Mrs. Jean Wooley was appointed by Governor Carlin to fill the remainder of Mrs. Bender's unexpired term.

In light of these facts, you have requested our opinion on two specific questions:

"(1) Based on the above facts, will the newly appointed Clay County Treasurer, Mrs. Jean Wooley, serve the remainder of the unexpired term of the prior deceased County Treasurer, Mrs. Alice Bender, and until the next General Election?

"(2) What is the length of the unexpired term that Mrs. Wooley shall serve, i.e. October 15, 1981, or October 15, 1985?"

In posing these questions, you have cited K.S.A. 19-504 and K.S.A. 1980 Supp. 25-312 as being controlling, and you state that, upon reviewing these statutes, it is your opinion "that Mrs. Wooley shall serve as the Clay County Treasurer for the remainder of the unexpired term [until October 15, 1981] and until the next General Election." We agree, in part, with your opinion.

As you have correctly noted, K.S.A. 19-504 provides for the filling of a vacancy in the office of county treasurer as follows:

"In case the office of county treasurer shall become vacant, there shall be appointed a qualified elector of the county to perform the duties of such treasurer, and the person so appointed, upon giving bond, with the like sureties and conditions as that required in county treasurer's bonds, and in such sum as the board of county commissioners shall direct, shall be invested with all the duties of such treasurer for the remainder of the unexpired term and until a successor shall be elected and qualifies. Appointments hereunder shall be made in the manner provided by law for filling vacancies in the office of member of the house of representatives." (Emphasis added.)

As the statute requires that appointments be made "in the manner provided by law for filling vacancies in the office of member of the house of representatives," K.S.A. 1980

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Supp. 25-3903 controls the procedure for filling such a vacancy. The latter statute provides in pertinent part:

"Whenever a vacancy occurs in the office of state representative or state senator such vacancy shall be filled by appointment by the governor of a person elected to be so appointed by a district convention held as provided in K.S.A. 1975 Supp. 25-3902."

Therefore, by virtue of this statute and its reference to K.S.A. 1975 [now 1980] Supp. 25-3702, a vacancy in the office of county treasurer is to be filled by appointment by the governor of a person selected by a party district convention. It is our understanding that this is the procedure that was followed in appointing Mrs. Wooley to succeed Mrs. Bender.

In support of your opinion, you also cited K.S.A. 1980 Supp. 25-312, which states in pertinent part:

"All vacancies in any elective state or county office, unless otherwise provided for by law, shall be filled by appointment by the governor, until the next general election after such vacancy occurs, when such vacancy shall be filled by election. When any elected office is provided by law to be filled by appointment by the governor of a person selected by a party district convention, and the immediately past incumbent of such office was an independent without political party affiliation, the vacancy shall be filled by appointment by the governor, until the next general election after such vacancy occurs, when such vacancy shall be filled by election."

From a close examination of this statute, it is apparent that it applies only to two particular situations, neither of which is present here. The first sentence of the statute provides for the filling of vacancies in elective state or county offices by appointment of the governor, "unless otherwise provided by law." However, as we explained above, there is another method provided by law for filling a vacancy in the office of county treasurer, which is set forth in K.S.A. 19-504 quoted above. Therefore, by its express terms, the first part of K.S.A. 1980 Supp. 25-312 is clearly not applicable to vacancies in the office of county treasurer. (In accordance with this view, see Attorney General Opinion No. 80-265.)

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The second sentence of K.S.A. 1980 Supp. 25-312, providing that a person selected by a party district convention and appointed by the governor holds only to the next general election also is not applicable here. That limitation applies only where "the immediately past incumbent of such office was an independent without political party affiliation." As it is our understanding that Mrs. Bender, the incumbent, was affiliated with a political party, the second part of K.S.A. 1980 Supp. 25-312 also is not pertinent here. Therefore, reliance upon that statute is inappropriate in this instance.

One other statute which must be considered in analyzing the problem you have presented is K.S.A. 25-314, a general provision prescribing the terms of office of persons filling vacancies. That statute provides in pertinent part:

"Any of said officers [state, district, county and township officers (see K.S.A. 25-313)] that may be elected or appointed to fill vacancies may qualify and enter upon the duties of their office immediately thereafter, and when elected they may hold the same during the unexpired term for which they were elected, and until their successors are elected and qualified; but if appointed, unless otherwise provided by law, they shall hold the same only until their successors are elected and qualified." (Emphasis added.)

While this statute provides that a person appointed to fill a vacancy shall only hold the office until a successor is elected and qualified, that is only so when not "otherwise provided by law." As noted above, K.S.A. 19-504 does provide otherwise, directing that a person appointed to fill a vacancy in the office of county treasurer shall hold that office "for the remainder of the unexpired term and until a successor shall be elected and qualifies." Thus, K.S.A. 25-314 also is not applicable to the filling of vacancies in the office of county treasurer. (See Attorney General Opinion No. 80-265, cited above.)

Therefore, in our judgment, the only applicable statute for the filling of vacancies in the office of county treasurer, and the determination of the term of office of an appointee thereunder, is K.S.A. 19-504, which accomplishes this purpose, in part, by virtue of K.S.A. 1980 Supp. 25-3902 and 25-3903. Accordingly, pursuant to K.S.A. 19-504, a person appointed to fill a vacancy in the office of county treasurer holds

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that office for the remainder of the unexpired term for which he or she was appointed and until a successor is elected and qualifies. In applying this rule to the facts at hand, it is clear that Mrs. Wooley will hold the office of county treasurer for the remainder of Mrs. Bender's unexpired term, that being until October 15, 1981, and until a successor is elected and qualifies.

Since there is not a successor who has been elected and will qualify at the expiration of the current unexpired term on October 15, 1981, Mrs. Wooley will "hold over" in office until such time as her successor is elected and qualifies. Furthermore, since she holds over under authority of a specific statute, she does so as a de jure officer, and no vacancy is created in the second term whereby a new appointment could be made. This statement finds support in the Kansas Supreme Court's definition of a vacancy in Leek v. Theis, 217 Kan. 784 (1975), wherein the Court quoted from Barrett v. Duff, 114 Kan. 220 (1923), in part, as follows:

"'An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it. It is vacant when it has no incumbent authorized to perform its functions. . . .'" (p. 232.)"  
(Emphasis added.) 217 Kan. at 790.

We also have based our conclusion on State of Connecticut, ex. rel., v. Watson, 132 Conn. 518, 45 A.2d 716, 164 A.L.R. 1238 (1946), wherein the court recanted the general rule, as follows:

"If by constitutional provisions or valid statute a definite term is established for an office without provisions that the incumbent shall continue in office after its expiration, he will, in holding over, be a de facto and not a de jure officer, and a vacancy will result which may be filled by the appointment, under proper authority, of a successor; if, however, the term of office is not only for a definite time but until a successor is appointed and qualified, an incumbent holding over is a de jure officer and unless, from the particular language of the statute or the particular circumstances of the case, a different legislative intent appears, there is no vacancy in the office within a provision authorizing an appointment in such a contingency."  
(Emphasis added.) 45 A.2d at 720, 721.

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Particularly on point is the case of Smith v. Snell, 154 Kan. 187 (1941). In that case the Kansas Supreme Court held that the death of a probate judge-elect before qualifying for office, and before the beginning of the term for which he was elected, did not create a vacancy which could be filled by appointment by the Governor, and that the incumbent was entitled to hold the office during such succeeding term until his successor shall have qualified.

Therefore, in our judgment, upon the expiration of the current unexpired term to which Mrs. Wooley was appointed, there is no vacancy, because she will hold over as a de jure officer until such time as her successor is elected and qualified. However, this raises the further questions of when there is to be an election of Mrs. Wooley's successor and when the person so elected may qualify and assume the duties of the office.

The determination of when the election of a successor is to be held was at issue in State, ex rel., v. Mechem, 31 Kan. 435 (1884). There, the Court discussed the question of whether the election of a successor to the office of county attorney was to be at the next general election or only at the time when such officer was to be elected for the ensuing regular term. The Court held that the election was to be at the next general election, basing their decision primarily on two statutes, Comp. Law 1879, Ch. 36, Sec. 57 and Sec. 59. These statutes are the predecessors of, and substantially the same as, K.S.A. 1980 Supp. 25-312 and K.S.A. 25-314, respectively, with the exception that K.S.A. 25-314 now contains the "unless otherwise provided by law" language previously mentioned. However, in light of our conclusion as to the inapplicability of these statutes to the present situation, the Mechem decision cannot be deemed controlling here. In fact, the Court's heavy reliance on the wording of those statutes, particularly the specific reference to "the next general election" contained therein, supports a conclusion that in the absence of such language there is no authority to hold an election for a successor until the time when an officer is to be elected for the ensuing regular term.

Therefore, it is our opinion that, in the absence of statutory provisions requiring an earlier election, the election of a successor to a person holding office by virtue of a statutory requirement to hold office "until a successor is elected and qualifies," shall be at the next regular election when an officer is to be elected for the ensuing regular term of office. In this instance, then, Mrs. Wooley's successor will be elected at the general election in November of 1984, which is the next election at which a person will be elected to serve a regular term of office as county treasurer of Clay County.

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As noted previously, Mrs. Wooley holds over in office as a de jure officer. Thus, the person elected for the ensuing regular term of office must be regarded as Mrs. Wooley's successor, thereby obviating the necessity of holding two separate elections at the November, 1984 general election, i.e., in our judgment it is unnecessary to hold an election to fill Mrs. Wooley's unexpired term, as well as an election for the succeeding regular term of office.

The last issue to be addressed is the time when Mrs. Wooley's successor will take office. Although the person elected at the general election in November of 1984 will be Mrs. Wooley's successor, the question arises whether such person must wait until the commencement of such person's regular term of office in October, 1985, or whether such person may assume the duties of county treasurer prior to that time. Because Mrs. Wooley will hold office only "until a successor is elected and qualifies," it is our opinion that the person elected for the regular term of office as county treasurer in November, 1984, will assume the duties of such office as soon as he or she has received a certificate of election and has qualified to take office.

The term "qualify" was discussed and interpreted by the Kansas Supreme Court in State, ex rel., v. Albert, 55 Kan. 154 (1895). In that case the court was interpreting the term "qualify" as used in Article 3, Section 12 of the Kansas Constitution, which states in pertinent part: "All judicial officers shall hold their offices until their successors shall have qualified." In interpreting that phrase, the Court stated:

"The term 'qualify,' used in this connection, has a well-defined meaning. It means to take such steps as the statute requires before a person elected or appointed to an office is allowed to enter on the discharge of its duties. In this case, it means to file a sufficient bond to be approved by the county clerk, and take and subscribe the official oath, these being the only prerequisites required of the person elected or appointed." Id. at 159, 160.

In light of this decision, we believe that the person elected as Mrs. Wooley's successor will assume the duties of county treasurer as soon as such person has received the certificate of election, taken the oath of office and filed a sufficient bond, since taking the oath and filing the bond also are the statutory prerequisites for assuming the office of county treasurer. See K.S.A. 75-4308 and K.S.A. 1980 Supp. 19-501, respectively.

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In summary, it is our opinion that, even though Mrs. Wooley was appointed to fill an unexpired term ending October 15, 1981, she will continue to hold such office, by virtue of the provisions of K.S.A. 19-504, until a successor is elected in November, 1984, and until such successor has qualified for office by taking the oath of office and filing a sufficient bond.

Very truly yours,



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