

**OPINION
69-260**

June 27, 1969 (OPINION)

Mr. Lowell O. Tjon

State's Attorney

RE: Officers - Vacancies - County Court of Increased Jurisdiction

This is in reply to your letter in which you state that a vacancy in the office of County Judge was created by the death of C. J. Mead on June 7, 1969. You also state as follows:

"We have been searching the Constitution and the statutes for authority which would permit the appointment of a successor but we find certain restrictions in Section 111 and 173 of the Constitution, as well as Section 11-10-04 of the N.D.C.C.

"Apparently there is no one currently available with residence and elector qualifications within the county who the county commissioners would be willing to appoint to this position. One individual who is interested in the position claims to have established his residence qualifications, but has not actually lived in this county; however, the commissioners are not willing to appoint him to this position because they feel such appointment would not be acceptable upon other grounds.

"We are therefore in a sense faced with a void in the law with respect to this situation. Under the circumstances we are wondering whether or not the provisions of Section 27-07-23 of the N.D.C.C. might not be applicable since this section seems to provide for situations where the judge may become incapacitated or incompetent due to illness to the extent that he may not be able to make a request in writing and further providing that the District Court may request the judge of an adjoining county to serve in such capacity.

"We are today attempting to get in touch with Judge Gefreh for this purpose and we would hope that Judge Sherman of LaMoure County would be available to so serve on a temporary basis.

"Your opinion regarding the applicability of this section of the law to our situation would be appreciated."

We have had a somewhat similar situation in Benson County and had occasion to issue an opinion to the Honorable Samuel D. Krause, Judge of the County Court of Increased Jurisdiction of Wells County, dated January 30, 1968. A copy of same is enclosed. We also wrote a letter to Mr. M. C. Hiaasen, State's Attorney of Benson County, dated February 19, 1968, in which some of the problems were discussed.

We agree with your observation that certain restrictions appear in Sections 111 and 173 of the North Dakota Constitution, as well as Section 11-10-04 of the North Dakota Century Code. These provisions, when construed together, provide that the person filling such office

must be an elector of the county.

In the aforementioned opinion and correspondence we were not concerned with the provisions of Section 27-02-23 but were primarily concerned with the qualifications for the office and whether or not the county commissioners may request and arrange with the county judge of a county with increased jurisdiction to fill the vacancy on a part-time basis. Our response to the question of permitting the county commissioners to fill the vacancy in such manner was in the negative.

In examining the provisions of Chapter 27-08 relating to county courts of increased jurisdiction, we find that there are provisions which permit the change of judges under certain circumstances. Section 27-08-27 permits the filing of an affidavit of prejudice in a civil action. Section 27-08-34 and 27-08-38 permit the filing of an affidavit of prejudice in criminal actions. These sections are primarily concerned with the filing of an affidavit of prejudice and securing another judge to hear and try the cases. These sections have no application to the present situation but are mentioned merely to illustrate that there is no legislation under Chapter 27-08 relating to county courts of increased jurisdiction which would apply to the current situation.

By increasing the jurisdiction of a county court, the basic office is not changed. It remains the same. It is still a county court. Its jurisdiction has been enlarged or increased and the qualifications for the office and some of the procedures have become more exacting and demanding but basically it is still a county court.

Section 27-07-23 of the North Dakota Century Code provides as follows:

"CHANGE OF JUDGE - WHEN PERMITTED - HOW OBTAINED - AUTHORITY AND DUTIES OF OTHER JUDGE. If the judge of the county court of any county is disqualified, is necessarily absent from this state, or is ill and unable to act, he shall request in writing the county judge of an adjoining county to act in his place and stead; provided, however, that should the county judge become incapacitated or incompetent because of illness to the extent that he is unable to make a request in writing, then the district court having jurisdiction of said county shall in writing request the county judge of an adjoining county to act in the place and stead of the incapacitated county judge. When acting pursuant to such request, the county judge of such adjoining county shall possess all the powers and shall have all the jurisdiction of the county judge for whom he acts, and the judge so requested shall attend for the purpose of acting for such judge at such time as may be necessary." (Emphasis supplied.)

We find no comparable provisions under Chapter 27-08 of the North Dakota Century Code. In the absence of a provision similar to Section 27-07-23 in Chapter 27-08, it suggests at least that the Legislature assumed that unless otherwise provided the provisions relating to county courts also apply to county courts of increased jurisdiction. We are extremely reluctant to conclude that the

Legislature assumed that the possibility of events happening as provided for under Section 27-07-23 would never occur to a county having a court of increased jurisdiction. The language, "* * *" provided, however, that should the county judge become incapacitated or incompetent because of illness to the extent that he is unable to make a request in writing, then the district court having jurisdiction of said county shall in writing request the county judge of an adjoining county to act in the place and stead of the incapacitated county judge. * * *", embraces every instance where the county judge is unable to act. The death of a judge certainly makes him unable to act.

We recognize that the language does not specifically state that when the office is vacant and no one is found to fill the vacancy that the district judge may request another judge to sit. At the same time we are aware that the Legislature cannot be omniscient in all things so as to anticipate every possible conceivable situation which might occur and to provide for its occurrence. It thus becomes necessary to construe the existing statutes and to apply them as nearly as possible to the intended purpose.

The law abhors vacancies in public office. (3. N.D. 389, 398, 56 N.W. 142.) The Courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions. (State v. Johnson, 237 Pac. 12). While these statements were made in connection with the question of holding over until a successor is qualified, etc., every effort should be made to reasonably construe existing statutes so as to permit the filling of a vacancy. The residents of Ransom County cannot be denied the right to have the services of a county court which are essential to them in their activities.

The provisions of Section 27-07-23, permitting the district judge to request in writing that the county judge of an adjoining county act in the place and stead of the incapacitated judge, necessarily implies that if such county court is one of increased jurisdiction, the request must be made to an adjoining county with increased jurisdiction. The qualifications to fill the office must be met in this respect, except for residence.

Even though reservations exist whether or not Section 27-07-23 applies under the given circumstances, we strongly feel, and it is our opinion, that under the usual circumstances there is justification in resorting to Section 27-07-23 and applying it in this instance. It is our further opinion that when the written request of the district court to a county judge of an adjoining county with increased jurisdiction is made, such written request constitutes a construction that Section 27-07-23 is applicable in this instance. We would recognize such request as a judicial construction by the court and would feel obligated to recognize it.

This procedure could be employed until such time as the county commissioners appoint a qualified person, which should be accomplished at the earliest possible date.

We would further like to remind those who may be involved, particularly the judge upon whom the request will be made, that it will be necessary in all proceedings to indicate in the record in some reliable manner that he is serving at the request of the district court. In this respect, see *Brave Bull v. Ordway*, 57 N.D. 344, 221 N.W. 780.

HELGI JOHANNESON

Attorney General