

Opinion 12-04

OPINION OF: GARY K. KING Attorney General

February 28, 2012

TO: The Honorable John M. Sapien, New Mexico State Senator, 1600 W. Ella Drive, Corrales, NM 87048

BY: Michael S. Williams, Assistant Attorney General

QUESTIONS:

1. Does a person appointed to replace a county probate judge who passed away during the first year of her four-year term finish the original office-holder's term in office?
2. If the appointee must run for the office prior to the expiration of the original office-holder's term in office, must he run in the primary and general election?
3. If the appointee must run for the office in the next election cycle and wins, must he run again two years later when the original office-holder's term would have expired?

CONCLUSIONS:

1. A judge appointed to replace a probate judge who was in the first year of a four-year term does not finish the original office-holder's term and must run in the first general election following appointment if the appointee wishes to continue to hold the position.
2. The appointed probate judge is subject to all of the normal legal requirements of any candidate running for that office and therefore must comply with the applicable provisions of the Election Code.
3. If the appointed probate judge is elected in the next election cycle, the appointee must run again two years later when the original term expires.

ANALYSIS:

Term of Probate Judge Vacancy Appointments

Probate judges are mandated for each New Mexico county. See N.M. Const. art. VI, § 23; NMSA 1978, § 34-7-1.[1] Probate judges are elected in each county at a general election. See NMSA 1978, § 34-7-2. A vacancy in the office of a probate judge occurs when any one of a number of circumstances arises such as: (1) the death of the party in office; (2) removal of the party in office (3) failure of the party in office to qualify as provided by law; and (4) resignation of the party in office. See NMSA 1978, §§ 10-3-1 and 10-4-1.

With respect to filling vacancies, NMSA 1978, Section 10-3-3 states that,

[w]henver any vacancy in any county ... office ... other than a vacancy in the office of county commissioner, shall occur by reason of death, resignation or otherwise it shall be the duty of the board of county commissioners of the county where such vacancy has occurred to fill said vacancy by appointment and said appointee shall be entitled to hold said office until his successor shall be duly elected and qualified according to law.

The question as to whether a probate judge who is appointed in the first year of the previous officer-holder's four year term serves out the original term of the previous office holder is strikingly similar to a question addressed to New Mexico Attorney General Milton J. Helmick in 1924. See Att'y Gen. Op. No. 3788 (1924).[2] Luna District Attorney Forrest Fielder asked Attorney General Helmick for an opinion regarding the term of office of a probate judge who was appointed to fill out the term of office of the previous probate judge who had passed away. Specifically, District Attorney Fielder asked Attorney General Helmick for an opinion as to "how long [the] appointment will hold" and "[i]s the appointment ... only good for the balance of the present term or is it good until the next General Election...."

The Attorney General's 1924 opinion interpreted Section 1219 of the 1915 New Mexico Code, which was the predecessor to and uses the same language as NMSA 1978, Section 10-3-3, quoted above. The opinion quoted Article XX, Section 4 of the state constitution, which then, as now, provided that a person appointed to fill a vacancy in the office of county commissioner held the office "until the next general election." Based in part on the similarity between the offices of county commissioner and probate judge, the opinion interpreted Section 1219's (now Section 10-3-3's) direction that an appointee serve "until his successor shall be duly elected" to refer to the next general election. The opinion also noted that no provision of law authorized a special election for the purposes of electing a successor. The opinion concludes, "therefore ... the appointee may serve as the Probate Judge until his successor is elected at the next General Election and has duly qualified."

Given that the provisions of Section 1219 of the 1915 Code and NMSA 1978, Section 10-3-3 are identical, Attorney General Helmick's 1924 opinion is instructive and persuasive. Like the 1924 opinion, we believe the term "duly elected" in Section 10-3-3 is most reasonably interpreted to refer to the next general election following an appointment to fill the vacancy. As in 1924, this view is consistent with constitutional provisions governing appointments to vacant state and local government offices. Article XX, Section 4, quoted in the 1924 opinion, provides that an appointee to fill a vacancy in the office of the district attorney or county commissioner holds such office until the next general election. Likewise, Article V, Section 5 provides that an appointee filling a vacancy in an elected state office holds office only until the next general election. See *also* Op. Att'y Gen. No. 5612 (1952) (appointee to a state office holds office only until the next general election). Also unchanged since 1924 is the absence of any statute providing for a special election to fill vacancies in the office of the probate judge.

Accordingly, we conclude that the conclusion set forth in the 1924 opinion should not be disturbed and that an appointed probate judge may serve until a successor is elected in the first general election after the appointment and is duly qualified. See *also State ex rel. Rives v. Herring*, 57 N.M. 600, 261 P.2d 442 (1953) (appointed county clerk entitled to serve until her successor was duly elected and qualified according to law); *accord Walker v. Dilley*, 86 N.M. 796, 528 P.2d 209 (1974).

A guiding principle supporting our decision is that our laws vest the right to select probate judges in the people of the state through suffrage. Probate judges in New Mexico are elected officials and when an elected position is filled by appointment rather than the vote, the right of suffrage has not been fully realized. While the degradation of suffrage through the appointment of elected officials is sometimes necessary to handle temporary vacancies, we believe laws providing for vacancy appointments should be interpreted to minimize harm to the right to vote. Government officials may sometimes desire the convenience and consistency that comes with keeping an appointed official in their position but the supreme right of suffrage should trump such concerns. In this regard, this office has previously quoted a decision from the Arizona Supreme Court and we do so again here:

In a democracy suffrage is the most basic civil right, since its existence is the chief means whereby other rights may be safeguarded. To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality.

Harrison v. Laveen, 67 Ariz. 337, 198 P.2d 456, 459 (1948), quoted in Att’y Gen. Op. No. 73-44 (1973).

Applying this principle to the issue at hand, if a judge appointed in the first year of an elected four year term is allowed to finish the original four year term, the voting electorate would effectively be denied their right to select their probate judge for three years. On the other hand, if the appointed judge must stand for election in the first general election after the appointment, suffrage is denied for only one year. We believe the latter is the better approach and most in line with the laws and constitution of the state.

Need to Run in Primary Election

Our determination of the first question inevitably answers the second in that an appointed probate judge seeking to continue in the position must be duly qualified and meet all the requirements of the position. This necessarily includes participation in primary elections if necessary for placement on the general election ballot and otherwise complying with the applicable provisions of the Election Code. See NMSA 1978, Chapter 1.

Term of Office if an Appointed Probate Judge is Elected at the Next General Election and Duly Qualified

The third question goes to the length of the term of office in the event that an appointed probate judge is elected in the first general election after appointment and is duly qualified.[3] Although NMSA 1978, Section 10-3-3 provides for the appointment of a person to fill a vacancy in the office of probate judge until a successor is elected and qualified, it does not specify whether the elected successor serves for a full term or only for the remainder of the original term.

As cited above, probate judges are elected in each county at a general election. See NMSA 1978, § 34-7-2. Since 1992, Article X, Section 2 of the New Mexico Constitution has provided that elected county officers, including probate judges, serve four-year terms. See N.M. Const. art. X, § 2(A). Section 2(B) “establish[ed] staggered terms” for elected county officers by creating an initial four-year term for the assessor, sheriff and probate judge and an initial two-year term for the treasurer and clerk. See *Block v. Vigil-Giron*, 135 N.M. 24, 28, 84 P.3d 72, 76 (2004). Section 2(D) renders ineligible for election any county officer who has already served two consecutive four-year terms.

The “term” of office is the fixed period of time that an elected official is authorized to serve in office following election and due qualification. See *Block v. Vigil-Giron*, 135 N.M. at 27. Generally, when a term is fixed by statute or the constitution, it is not affected by the number of people who hold the office during the term. See *Denish v. Johnson*, 121 N.M. 280, 289, 910 P.2d 914, 923 (1996). When the state constitution creates a “formal” system of staggered terms, the New Mexico Supreme Court has held that a person selected to fill a vacancy does not serve a new full term but, to preserve the formal scheme of staggering, serves only the remainder of the vacated term. See *id.* (addressing terms of appointees to vacated positions on New Mexico Tech board of regents).

In determining whether a formal system of staggering is created, the opinion in *Denish* focused on whether the governing law expressly provided for a vacancy to be filled for the remainder of the vacated term. See 121 N.M. at 290. Specifically, the opinion focused on Article XX, Section 5, which provides, in pertinent part, that a person appointed to fill a vacancy in an appointed office serves “for the period of the unexpired term.”[4] Unlike Article XX, Section 5, NMSA 1978, Section 10-3-3 does not expressly specify the length of a successor’s term. Nevertheless, we believe the provisions of Article X, Section 2 fixing the terms of county offices, establishing staggered terms and imposing term limits are sufficient to create a “formal” staggering scheme. See 121 N.M. at 291 (observing that “in practice” the formal staggering scheme “may be the only system used in New Mexico”). See also *State ex rel. Swope v. Mechem*, 58 N.M. 1, 13-14, 265 P.2d 336, 340 (1954) (provision in predecessor to N.M. Const. art. XX, § 4 directing that a successor elected to fill a vacancy in the office of supreme court justice, district court judge, district attorney or county commissioner “shall hold the office until the expiration of the original term” was superfluous in the case of the office of supreme court justice because the constitution made “clear the intent that staggered terms of office be maintained”).

Because Article X, Section 2 establishes a system of staggered terms for county offices, it follows that a person elected to fill a vacancy in a county office serves only for the remainder of the original office-holder's term. We believe this is the only interpretation that preserves the integrity of the staggering scheme intended by the constitution.

A fundamental principle of constitutional and statutory construction is to interpret provisions in laws to give maximum effect to each, and to read provisions together as harmoniously as possible. See *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 126 N.M. 413, 415, 970 P.2d 599, 601 (1998). Our interpretation regarding the term of an elected successor to a vacated county office is supported by Article XX, Section 3, which states that, "[t]he term of office of every ... county ... officer, *except ... those elected to fill vacancies*, shall commence on the first day of January next after ... his election." (Emphasis added.) Under this provision and NMSA 1978, Section 10-3-3, the "term" of an appointee's successor to a vacated county office begins on the date the successor is "duly elected and qualified." Interpreting Section 10-3-3 to permit a successor to serve a full four-year term beginning on that date would likely lead to confusion over when the successor's four-year term ended, how to handle the gap between the end of the term and January 1, when the new elected officer's term would begin and whether the gap rendered the term non-consecutive under Article X, Section 2(D). This interpretation and resulting confusion would not preserve the constitutional scheme for staggered terms, contrary to the rule established in *Denish*.

There is a clear intent in the provisions of the New Mexico Constitution and statutes to establish fixed, staggered terms of county offices and also to provide for the prompt election of a replacement for an incumbent who vacates the office before the end of the term. We therefore conclude that if an appointee or other person who replaces a probate judge in the first year of a four-year term, wins the first general election after appointment, that person must run again two years later.

The core issues raised here are, admittedly, difficult ones that require thoughtful contemplation. We note, again, that the basic advice of the Attorney General has not changed regarding these issues since 1924 and that the legislature has not changed the applicable law during that time. Perhaps the best course to eliminate future debate is for the legislature to address the issues and amend relevant statutes in order to clearly reflect legislative intent.

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[1] The jurisdiction and venue of probate courts is set forth in N.M. Const. art. IV, § 23 and in the Probate Code, NMSA 1978, §§ 45-1-301 to 311.

[2] The opinion was issued during Attorney General Helmick's administration by Assistant Attorney General John W. Armstrong. Assistant Attorney General Armstrong succeeded Attorney General Helmick as the Attorney General in 1925. Attorney General Armstrong had previously served as a probate judge in Eddy County (Carlsbad). See H. Stratton and P. Farley, **Office of the Attorney General - History, Powers & Responsibilities** (1990), pp. 42-43.

[3] N.M. Const. art. XX, § 6 states that general elections shall be held in the state on the Tuesday after the first Monday in November in each even-numbered year. The term "general election" refers to the statewide biennial election when all state and county officials as well as congressional representatives are elected. See *Benson v. Williams*, 56 N.M. 560, 246 P.2d 1046 (1952); Att'y Gen. Op. No. 81-09 (1981); Att'y Gen. Op. No. 74-9 (1974).

[4] Similarly, N.M. Const. art. XX, § 4 provides that the successor elected to fill a vacancy in the office of district attorney or county commissioner "shall hold ... office until the expiration of the original term" and N.M. Const. art. V, § 5 provides that a person appointed by the governor to fill a vacated state office "shall hold office until the next general election, when his successor shall be chosen for the unexpired term."