

JUDGES, ELECTIONS - vacancy before primary election, sections 23-3305 and 23-4504, Revised Codes of Montana, 1947.

HELD: Statutes prescribing time limitations, within which declarations for nomination and certification of nominees by the secretary of state must be made, do not apply to a case where a vacancy occurs in the office of a regularly elected district judge if there is sufficient time before the primary to allow declarations to be filed and the ballots printed.

May 18, 1970

Honorable Forrest H. Anderson
Governor of the State of Montana
State Capitol
Helena, Montana 59601

Dear Governor Anderson:

In your letter of May 14, 1970, you requested my opinion upon the proper manner of selecting nominees for the position of District Judge of the Fifth Judicial District for a special election to be held in connection with the general election November 3, 1970, to fill the vacancy created by the death of the Honorable Philip C. Duncan.

Article VIII, section 34, Montana Constitution, provides that vacancies in the office of the judge of the district court shall be filled by appointment by the governor. That section further provides:

“ . . . a person appointed to fill any such vacancy shall hold his office until the next general election and until his successor is elected and qualified.”

Based on the statements in your letter, statutory and case law, it is evident that there is a “vacancy” in the office of district judge and that consequently the provisions of Article VIII, section 34, Montana Constitution, are controlling.

Several provisions in our election laws provide for the nomination and election of district judges on a nonpartisan ballot. Section 23-4503, R.C.M., 1947, requires judicial candidates to file declarations for nomination. Furthermore, section 23-4508 (3), R.C.M., 1947, provides:

“(3) No candidate shall have his name on the judicial ballot for the general election unless he was a successful candidate at the primary election.”

The procedure for the nomination and election of district judges is quite clear; however, the death of the Honorable Judge Duncan occurred on May 9, 1970, several days after the closing date for the filing of declarations for nomination. Two of the relevant statutory provisions are set forth below:

“23-3305. Deadline for filing nominating declarations — persons with whom filed. Nominating declarations shall be filed not later than 5:00 p.m. forty (40) days before the date of the primary election. Declarations for nomination to an office filled by election throughout the state, as judge of a district court, to an office filled by election in more than one (1) county, or as a member of the legislative assembly shall be filed with the secretary of state. Declarations for nomination to an office filled by election in one (1) county, or district or city shall be filed with the registrar or city clerk.”

“23-4504 . . . (2) The secretary of state shall separately arrange, certify, and file the names of judicial candidates, and certify to each registrar the names to be placed on the primary ballot at the same time, and in the same way, that other candidates are certified. . . .”

Only one provision in chapter 45, Title 23, R.C.M., 1947, the nonpartisan nomination and election laws, deals with vacancies. Section 23-4510, R.C.M., 1947, provides:

“(1) If after the primary a candidate is not able to run for the office for any reason, the vacancy shall be filled by the candidate next in rank in number of votes received in the primary election.

“(2) If after the primary and before the general election there is no person able or entitled to the office or there are not enough candidates to fill the offices, the governor shall certify to the secretary of state the names of persons qualified for the office equal to twice the number to be elected. The names of those persons nominated by the governor shall be printed on the official ballot.

“(3) Nominations made by the governor are not filed too late if filed within ten (10) days after the vacancy occurs. If the ballots have already been printed, stickers may be used to place the names on the ballot.”

However, since this section deals specifically with vacancies occurring after the primary election, in my opinion it offers no

assistance or guidance for a resolution of the present problem. Section 23-4502, R.C.M., 1947, provides:

“Candidates for the supreme court or district court shall be nominated according to primary election laws so far as they are consistent with the provisions of this chapter.”

The only section of the primary nominating law which deals with the problem at hand is section 23-3321 (2), R.C.M., 1947, which provides:

“(2) If a vacancy occurs in the office of a candidate in case of death or removal from the state or district before the date of the primary, the vacancy shall be filled by the affected political party.”

However, since this section provides for action by a political party it is clearly inconsistent with the nonpartisan judicial nomination and election law, and therefore, in my opinion it is not applicable.

It is apparent that some of the provisions of the election laws contained in Title 23, R.C.M., 1947, are not only uncertain and conflicting, but also impossible of application without destroying the right of the people to select candidates for elective public offices.

A problem somewhat analogous to the type of emergency situation presently under consideration was presented to the Montana Supreme Court, in *State ex rel. Mitchell v. District Court*, 128 Mont. 325, 275 P.2d 642. In that case a railroad commissioner had resigned his office after the primary election and after the final date for certification of names of persons nominated by the secretary of state to the county clerks of candidates for the ensuing general election. At the time of the resignation, only 32 days remained before the date of the general election. The Montana Supreme Court was presented with the question whether the secretary of state was authorized to receive nominations of candidates for the vacant office made by the convention system of nominating and certify the names of persons so nominated to the county clerks and recorders for placement upon the general election ballot: The Supreme Court ruled in that case that the legal time limitations for the receipt of nominations and the deadline for certification of names of nominees had no application when the vacancy occurred after those dates had passed. In conformity with the general doctrine that elective offices should be filled by persons elected by the people rather than appointees, the court ruled that nominations should be made, received by the secretary of state, and certified to the clerks of the various counties even though all these steps had to be taken after the normal time limit for doing them was past.

Although to allow declarations for nomination to be filed at this late date would conflict with several of the statutory provisions set forth in the election laws, specifically sections 23-3305 and 23-4504 (2), R.C.M., 1947, which are set forth on pages 1 and 2 of this opinion, the right of the people to select judicial nominees is of primary and overruling importance.

Therefore, based on the authority contained in **State ex rel. Mitchell v. District Court**, supra, the time limitations set forth in sections 23-3305 and 23-4504 (2), R.C.M., 1947, do not apply to an election to fill a vacancy created by the death of a regularly elected district judge where, as here, the vacancy occurs before the primary election but after the normal closing date for filing declarations for nomination.

To hold otherwise would result in a conflict with the specific and fundamental law of Montana contained in our Constitution.

“All political power is vested in and derived from the people; all government of right originates with the people; is founded upon their will only, and is instituted solely for the good of the whole.” Montana Constitution, Article III, section 1.

“The people of the state have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state . . .” Montana Constitution, Article III, section 2.

“All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Montana Constitution, Article III, section 5.

To conclude that the time limitations for filing declarations for nomination are suspended in this situation, raises the procedural problem of how many days should be allowed for the filing of such declarations and at the same time permit the ballots to be printed. As of the 18th day of May, 1970, the date of this opinion, there were 15 days until the primary election. After consulting with the secretary of state and the county clerks and recorders of the affected counties, I have concluded that 5:00 p.m., May 22, 1970, is the final date that declarations for nomination can be accepted by the secretary of state and still allow time to have the ballots printed.

One possible objection to the procedure outlined in this opinion is that some of the ballots sent to absent voters will not contain the names of the judicial candidates. In **State ex rel. Mitchell v. District Court**, supra, the Montana Supreme Court in quoting from **Brown v. Georgetta**, 70 Nev. 500, 275 P.2d 376, stated that such an occurrence would not void an election.

THEREFORE, IT IS MY OPINION that the time limitations set forth in sections 23-3305 and 23-4504, R.C.M., 1947, do not apply to an election to fill a vacancy created by the death of a regularly elected district judge, where, as here, the death of the judge occurred before the primary election but after the normal closing date for filing declarations for nomination. Furthermore, that the secretary of state shall accept declarations for nomination until 5:00 p.m., May 22, 1970. The names of the judicial candidates received by the secretary of state shall be certified and forwarded to each registrar to be placed on the primary judicial ballot.

Very truly yours,

ROBERT L. WOODAHL
Attorney General