

PROBATE JUDGE:

A person not eligible to hold office on the day of the commencement of the term of the office cannot qualify for the office four months after the beginning of the term.

March 29, 1950



Mr. Duncan R. Jennings  
Prosecuting Attorney  
of Montgomery County  
Montgomery City, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion. You thus state your opinion request:

"Will you please give me an opinion based on the following facts, to-wit:

"A person files as a candidate for office of Probate Judge, is nominated, elected and receives his commission. He lacks four months of being 25 years of age on January 1, 1951.

"Can this party wait four months before he qualifies?"

Article V, Section 25, of the 1945 Missouri State Constitution, states, in part:

"\* \* \* Probate judges shall be at least twenty five and magistrates at least twenty two years of age. \* \* \*"

(Underscoring ours.)

Section 2438, Mo. R. S. A. 1939, states:

"At the general election in the year 1878, and every four years thereafter, except as hereinafter provided, a judge of probate shall be elected by the qualified voters

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in every county. Said judge shall be commissioned by the governor and shall take the oath prescribed by the Constitution for all officers and shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified: Provided, that in all cases where the death of the judge-elect shall take place after his election and before he qualifies, the same shall constitute a vacancy in such office from and after the date which said judge-elect is required to qualify."

(Underscoring ours.)

We would call your further attention to the case of State v. Heath, 132 S. W. (2d) 1001, in which the court stated:

"It was contended that 'the word "eligible", as used in Constitutions and statutes, concerning elections of office, means the capacity to hold the office at the time of the election, so that the subsequent removal of the disability will not remove the incompetency.' While there are two conflicting lines of authorities on this question in this country, this court held against this contention and decided that the Constitution and statute did not mean eligible at the time of election, but, instead meant eligible at the time of commencement of the term and of taking possession of the office. See C.J. 949, Sec. 58; 22 R.C.L. 403, Sec. 43; 88 A.L.R. 812 note; 24 R.C.L. 571, Sec. 16.\* \* \*"

The court in the Heath case, from which the above excerpt is taken, went on to hold that "eligibility" meant "eligible at the time of commencement of the term and taking possession of the office." Under this holding, which was made November 3, 1939, a person who could not qualify for the office to which he had been elected, on the date of the commencement of the term of that office, was not "eligible" to hold the office.

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In answer to your first question, therefore, it is the opinion of this office that the party in the instant case cannot wait four months after the date of the commencement of the term of office to qualify for the office.

The answer to your first question makes it unnecessary to answer the other two questions. Since a person lacking the necessary qualifications at the beginning of the term cannot thereafter qualify, it may be assumed safely that he will not seek to be nominated or elected.

CONCLUSION

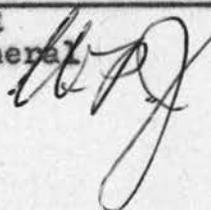
It is the opinion of this office that a person not eligible to hold an office on the day of the commencement of the term of the office, could not qualify for the office four months after the beginning of the term.

Respectfully submitted,

HUGH P. WILLIAMSON  
Assistant Attorney General

APPROVED:

J. E. TAYLOR  
Attorney General



HPW:hr