

The State of South Carolina



Opinion No 87-3
P. 20

Office of the Attorney General

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January 12, 1987

Larry W. Propes
Deputy Director
South Carolina Court Administration
Post Office Box 50447
Columbia, South Carolina 29250

Dear Mr. Propes:

You have advised that, in the November 1986 general election, the incumbent sheriff was elected to fill the office of probate judge. Because the sheriff cannot assume the office of probate judge until after his successor for the office of sheriff has been elected in March 1987, the outgoing probate judge has agreed to continue in office until the sheriff's successor has been elected and the sheriff qualifies as probate judge. You have asked whether the outgoing probate judge has authority to continue in office until the sheriff, as his successor, has qualified.

Section 14-23-1020, Code of Laws of South Carolina (1986 Cum. Supp.), provides in part that

[t]he probate judge of each county holding office on June 30, 1976, shall continue to be such judge of probate until the expiration of his term of office at which time his successor shall be selected as provided by law for a term of four years and until his successor is elected and qualifies. ...
[Emphasis added.]

As you have stated, the outgoing probate judge's successor cannot qualify until the successor to the sheriff has been elected. Even though the outgoing probate judge has fulfilled a four-year term, the statute requires him to continue in office until his successor qualifies.

Similar language has been interpreted by the South Carolina Supreme Court in Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415 (1964). Therein, in the context of election commissioners appointed under a virtually identical provision, the court stated:

Larry W. Propes
January 12, 1987
Page Two

The legislative intent to make provisions against a situation where there would be no qualified commissioners to conduct and hold elections is clear. A proper interpretation of the statute makes it mandatory on the part of election commissioners to serve until their successors are appointed and qualify. Therefore the attempted resignation of these respondents was of no effect and their tenure in office, together with the duties and responsibilities thereof, must be held to continue, since no successors have qualified. This is in accord with the general rule that a public officer does not cease to be such even when his resignation is accepted, but continues in office until a successor is qualified where the statute or Constitution so provides. ...

245 S.C. at 34. The same reasoning would apply in this instance, compelling the conclusion that the outgoing probate judge must continue in office until his successor, the incumbent sheriff, qualifies.

Because the term of office of the outgoing probate judge has expired, he is deemed to be holding over. Thus, at the very least, he would be deemed to be a de facto officer. Cf., Heyward v. Long, 178 S.C. 351, 183 S.E. 145 (1935). As we have advised in the past, acts of a de facto officer "in relation to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court would declare such acts void" or remove the officer from office. Op. Atty. Gen. dated February 10, 1984 and cases cited therein (copy of opinion enclosed).

We trust that we have responded satisfactorily to your inquiry. Please advise if clarification or additional assistance should be needed.

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/rhm
Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

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