

1976 S.C. Op. Atty. Gen. 410 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4542, 1976 WL 23159

Office of the Attorney General

State of South Carolina

Opinion No. 4542

December 13, 1976

\*1 The Governor may make an appointment to fill the vacancy in the Office of the Probate Judge during a legislative recess. Such appointment, however, is subject to approval by the Senate at its next session.

TO: Honorable Charles Anthony Harris  
Senator  
District No. 9

QUESTION PRESENTED:

What is the procedure for the filling of a vacancy in the Office of the Probate Judge during a Senate recess?

AUTHORITIES CITED:

Article V, Constitution of South Carolina, 1895, as amended;

Act 690 of 1976 Acts and Joint Resolutions of the General Assembly of South Carolina;

Sections 15-407, 15-408, 14-302, 1-121, 1-122, 50-1, Code of Laws of South Carolina, 1962, as amended;

[State ex rel McLeod v. Probate Court of Colleton County, et al](#), 266 S.C. 279, 223 S.E.2d 166 (1976);

[Spartanburg County v. Mitchell](#), 214 S.C. 283, 52 S.E.2d 266 (1949);

[State v. Sanders](#), 118 S.C. 498, 110 S.E. 808 (1927);

[State v. Bowden](#), 92 S.C. 393 (1912);

[South Carolina Electric & Gas v. S.C. Public Service Commission](#), 215 S.C. 193, 54 S.E.2d 777 (1949);

[Bell v. S. C. Highway Department](#), 204 S.C. 402, 30 S.E.2d 65 (1944);

[Wade V. Cobb](#), 204 S.C. 275, 28 S.E.2d 850 (1943).

DISCUSSION:

The Probate Courts of South Carolina are creatures of statute, Article 5, § 1 of Act 690 of 1976, and are components within the statewide court system created pursuant to Article V of the Constitution of 1895, as amended in 1973. Cf. [State ex rel McLeod v. Probate Court of Collection County, et al](#), 266 S.C. 279, 223 S.E.2d 166.

Article V, § 14 of the amended Constitution provides for the filling of vacancies in certain designated courts; excluded therefrom, however, is the Probate Court. With regard to the filling of a vacancy in the office of Probate Judge in this State, the statutes pertaining to this matter will control the process.

Section 15–407, Code of Laws of South Carolina, 1962, as amended in 1969, prescribes the procedures for the filling of vacancies in the offices of the Judge of Probate.

Vacancies for unexpired terms in the offices of judge of probate may be filled by the Governor with the advice and consent of the Senate, even though the unexpired term exceeds one year. Such appointments shall be for the unexpired term, however, if the unexpired term from the date of vacancy occurs exceeds three years the appointment shall be until the next general election, at which time a successor shall be elected to fill the unexpired term.

The above statute provides that the Governor may appoint an individual to fill the vacancy; such appointment is conditioned upon the advice and consent of the Senate. Said section does not provide for an appointment by the Governor to fill the vacancy during a recess of the Senate. Section 15–408, or the 1962 Code provides, *inter alia*, that in the event a vacancy occurs in the office of the Probate Court, the Clerk of Court of the County wherein the vacancy occurs shall perform the functions and duties of the Probate Judge until such time as the vacancy is filled. Sections 15–407 and 15–408 jointly insure that there will not be an interruption in the services performed by the Probate Court.'

\*2 There are, however, in addition to the applicable statutes discussed heretofore, certain statutes that generally pertain to the filling of vacancies in the offices of any county. Section 14–302, Code of Laws of South Carolina, 1962, empowers the Governor with the authority to fill vacancies in any county office. Such appointment is not conditioned upon receiving the advice and consent of the Senate and therefore, presumably, could effectively occur without regard to whether or not the Senate is in session. In addition, § 1–122(2) of the 1962 Code generally authorizes the Governor to make interim appointments to fill any vacancy in a county office without the necessity of obtaining Senate approval. It is the established law in this State that all statutes relating to the same subject matter must be construed together and harmonized if possible, and each one given effect if this can be done by any reasonable construction. [Spartanburg County v. Mitchell](#), 214 S.C. 283, 52 S.E.2d 266. In [State v. Sanders](#), 118 S.C. 498, 110 S.E. 808, the Court was confronted with a similar issue of statutory construction. The Court decisions that a vacancy in the office of Sheriff should be filled pursuant to the procedures outlined in the special statute dealing with filling a vacancy in the particular office and in accord with the general statute pertaining to county offices. The Court determined that the two statutes must be construed together. In [State v. Bowden](#), 92 S.C. 393, the Court jointly applied the special provision dealing with the filling of a vacancy in a Magistrate's Court and the general provision dealing with the filling of a vacancy in a county office to the appointment of a Magistrate. The Court further found that the special provision should be considered as an exception to the general provision and should control on all points to which it speaks. Cf. [South Carolina Electric and Gas v. S. C. Public Service Authority](#), 215 S.C. 193, 54 S.E.2d 777.

Undoubtedly Probate Judges are county officials in that they are commissioned officials, elected by the voters within a particular county, and are compensated by the particular county that they serve. See, § 50–1, Code of Laws of South Carolina, 1962, as amended; Article V, § 2 of Act 690 of 1976. Applying the general rule of construction that statutes in *pari materia* should be construed jointly, [Bell v. S.C. Highway Department](#), 204 S.C. 402, 30 S.E.2d 65, together with the premise of statutory construction that repeal by implication is not favored, [Wade v. Cobb](#), 204 S.C. 275, 28 S.E.2d 850, lends itself to the conclusion that §§ 15–407, 14–302, and 1–22 must all be examined to determine the process of filling a vacancy in the Office of Probate Judge. [State v. Sanders](#), *supra*; [State v. Bowden](#), *supra*. § 15–407 would control the process and duration of the appointment, however, §§ 14–302 and 1–122 would authorize the Governor to make such an appointment during a Senate recess.

CONCLUSION:

\*3 It would, therefore, appear that the Governor has authority to fill a vacancy in the Office of Probate Judge during a recess of the Senate, and that the appointment should be submitted to the Senate for its approval at its next session. The appointment, if approved, would continue for the unexpired term provided that the unexpired term from the date the vacancy occurs does not exceed three years. Prior to the Governor making an appointment to fill the vacancy in the office, the Clerk of Court shall be responsible for conducting the duties of the office.

Edwin E. Evans

Assistant Attorney General

1976 S.C. Op. Atty. Gen. 410 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4542, 1976 WL 23159

---

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.