

DISTRICT COURTS: JUDGES: VACANCY: Where vacancy occurs in office of district court judge after election of someone other than incumbent but before the time for the new judge to take office, the regularly elected judge should take office on the first Monday in January for a full six-year term. Minn. Const. Art. VI, §§ 7, 8.

June 20, 1986

The Honorable Rudy Perpich
Governor of Minnesota
130 State Capitol
St. Paul, MN 55155

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(c.r. 141a)

Dear Governor Perpich:

In your recent communications with our office you have presented substantially the following:

FACTS

Judge George Wetzel of the Seventh Judicial District is presently serving a term of office which expires on the first Monday in January, 1987.

On June 1, 1986, the Secretary of State, pursuant to Minn. Stat. § 204B.33 gave notice of offices to be voted for in the state general election on November 4, 1986, for which candidates file with the Secretary of State. That notice includes the judicial office of Judge Wetzel.

On June 9, 1986, the Governor's office received a letter from Judge Wetzel tendering his resignation, effective December 29, 1986.

You then ask substantially the following:

QUESTION

Is it the duty of the Governor, pursuant to the constitution, to appoint someone to the office to be vacated by Judge Wetzel to hold that office until a successor may be elected at the general election in 1988?

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OPINION

While the issue is not totally clear as a matter of law, it is our view that the spirit and purpose of the constitution would best be served in these circumstances if the successor to Judge Wetzel were duly chosen by the voters at the November 4, 1986, general election and permitted to take office for a normal six-year term on January 5, 1987. We, therefore, answer your question in the negative.

Minn. Const. Art. VI, §§ 7 and 8, provide:

Sec. 7. Term of office; election. The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.

Sec. 8. Vacancy. Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.

These provisions set forth the primary and subsidiary constitutional mechanisms for the selection of judges. As explained in Enger v. Holm, 213 Minn. 154, 6 N.W.2d 101 (1942):

The constitution provides for a judiciary selected as therein provided. Subsidiary thereto is the purpose of keeping judicial offices filled at all times. Accomplishment of the principal purpose -- that of providing a judiciary -- is provided for by the election of judges in the regular course for the terms fixed by the constitution. Accomplishment of the subsidiary purpose of

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keeping such offices filled, lest such purpose be defeated and inconvenience result from vacancies, is provided for by the provisions for filling vacancies.

Id. at 175.

The notion that the primary constitutional means of selection of judges is by election from among competing candidates is further underscored by the historical failure of recommendations for the so-called "Missouri Plan"^{1/} to be adopted in Minnesota.^{2/}

Inasmuch as the constitutionally preferred method of choosing judges is by free and open elections, it is our view that any ambiguity concerning the mechanism to be used in a given situation ought to be resolved in favor of permitting a candidate, duly elected at a regular general election, to take office for a regular term rather than unnecessarily undercutting the orderly flow of elected terms with a long-term appointment.

^{1/} Under this scheme, judges are initially selected through a merit selection and appointment process. Subsequent elections are only directed to whether or not the appointed judge should be retained.

^{2/} See, e.g., State ex rel. Hennepin County Bar Association v. Amdahl, 264 Minn. 350, 119 N.W.2d 169 (1962); Pirsig The Proposed Amendment to the Judiciary Article of the Minnesota Constitution, 40 Minn. L. Rev. 815, 838; Minnesota Study Commission, Judicial Branch Committee Report (November 1972) at 2, 22-28.

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In the situation you describe, no vacancy in the office will actually exist until December 29, 1986. By that time, the regular primary and general elections will have been held and a successor to Judge Wetzel will have been chosen by the voters.^{3/} This successor would normally be eligible to assume office on January 5, 1987.

It appears, however, that the constitution simply does not squarely address this eventuality. As noted above, Article VI, § 8, provides for appointment "until a successor is elected and qualified." The section also states that the successor should be elected at the "next general election occurring more than one year after the appointment is made." However, the latter phrase contains the unstated assumption that a future election will be needed to choose a successor to the vacating incumbent. Nothing is said about a situation like this one in which a successor has already been selected by the normal election process before the vacancy occurs. Given this ambiguity, it is our view that it should be resolved by reading the last sentence of Article VI, § 8, as having no application in circumstances where an elected successor is already in existence. Thus, under the first sentence of the section, an appointee, if

^{3/} In light of Judge Wetzel's stated desire to resign, we must assume that he has no intention to be a candidate for re-election.

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any, may be selected to serve until the successor is both "elected and qualified." Since the requirement of election will have already been fulfilled when the vacancy occurs, there will be no need to refer to the last sentence of the section. With the qualification of the elected successor on or after January 5, 1987, the vacancy and the term of service of an appointee, if any will be ended as contemplated by the first sentence.

Prior to the 1956 constitutional amendment extending appointee-service period from 30 days to a year, Minnesota cases took the view that the provision for election following vacancy appointments should not be applied to prevent the completion of the normal election process. For example, in Babcock v. Black, 22 Minn. 336 (1875), a judicial vacancy occurred less than 30 days before the regularly scheduled election for the office. In holding that the person elected at the November election was entitled to a certificate of election, the court said:

Sec. 10 was put in the constitution to provide for the exceptional case of a vacancy--for a case where the regular order of terms, and of elections for such terms, is broken in upon by a vacancy before the end of a regular term for which the judge was elected, and by the necessity to elect before the election would come under the general rule. The election mentioned by the section is not one which comes in the regular course of such elections, as provided for by § 7, but an election which becomes necessary by the happening of the vacancy; and in order that such an election, thus coming on at a time different from that at which a judge would, in the regular

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and natural course of things, be elected, shall not be had without adequate notice to the people, it is provided that a successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened. This means the successor whose election is made necessary by the vacancy.

Id. at 338-30.

See also Enger v. Holm, 213 Minn. 154, 6 N.W.2d 101 (1942) (appointees to fill supreme court vacancies occurring prior to 1942 general election to serve only until successors regularly elected at the general election, took office in January, 1943).

Since the 1956 amendment, however, two cases have taken the view that where a vacancy occurs and is filled by appointment shortly before the regularly scheduled election, the scheduled election should not be given effect and the appointee should hold office until after the next general election occurring more than one year hence.

In State ex rel. Hennepin County Bar Assn. v. Amdahl, 264 Minn. 350, 119 N.W.2d 169 (1962), an incumbent judge, who was an unopposed candidate for re-election, died one week before the 1962 general election. The court held that the Governor's appointee was entitled to hold office until the 1964 general election. This holding was based in part upon the proposition that extension of the appointment period from 30 days to one year was aimed in substantial

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part at the following consideration noted in the 1948 report of the Constitutional Commission:

"This section increases the spread between appointment and the appointee's subsequent candidacy for election from 30 days to one year. The 30-day period, as provided in the present Section 10, has proved too short. Complications arise when a vacancy occurs after the primary election but more than 30 days prior to the final election. In addition, the short period does not give sufficient time to enable observation of the competence developed by the appointee prior to the election."

Id. at 358, 119 N.W.2d at 175 (emphasis added), quoting the Commission Report. As noted above, these considerations have no application to a situation in which the vacancy occurs after the full normal election process has taken place. Indeed, the Amdahl court itself recognized this. In addressing a number of hypothetical difficulties, the court said:

One of the possibilities mentioned is where a vacancy occurs after a general election in which a candidate other than the incumbent is elected. If the primary and general elections are regularly held, and the people have had a chance to exercise their free choice, undoubtedly the election should be upheld. The main purposes of our constitution and election laws have in that case been accomplished.

Id. at 361, 119 N.W.2d at 176.

More recently, in Nelson v. Quie, 299 N.W.2d 119 (Minn. 1980), a judge, in July, applied for mandatory retirement effective October 31, 1980, only days before the election for the office on November 4, 1980. There the court held:

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It is the unanimous opinion and judgment of this court that the retirement of Judge Wolner creates a "vacancy in the office of judge" within the meaning of Minn. Const. Art. VI, § 8, as of October 31, 1980; that the appointment of a qualified person to fill the vacancy has become the constitutional duty of the Governor; and that the person so appointed will serve until a successor is elected and qualified following the general election in 1982.

It follows that there is no occasion to vote for candidates for this office at the general election to be held on November 4, 1980.

To the extent that phrases appearing in State ex rel. Hennepin County Bar Assn. v. Amdahl, 264 Minn. 350, 119 N.W.2d 169 (1962), have caused confusion as to what would otherwise be the clear application of Minn. Const. Art. VI, § 8, to the case before us, the dictum is rejected.

Id. at 120.

It is not totally clear what particular dictum from Amdahl, supra, the court intended to reject. However, since the vacancy in Nelson, like that in Amdahl, occurred before the general election, it is not likely that the court was addressing the Amdahl statement about vacancies occurring after the general election. Rather, the briefs submitted in the Nelson case suggest that the dictum at issue was the Amdahl language that suggested that vacancies occurring before an election might be filled by that election if "there has been a fair opportunity for the voters to make an intelligent choice."

There is no case to our knowledge which contains a direct holding upon a judicial vacancy occurring after the

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choosing of a successor by the normal, process of regularly scheduled election. However, for the reasons stated above, we, like the supreme court in Amdahl, supra, believe that, in such circumstances, the election process should be upheld and the appointee, if any, should serve only until the lawful successor, previously chosen, is entitled to qualify for office.

To decide otherwise would, in our mind, not only be contrary to the history and spirit of the general constitutional framework for judge selection, but would create the potential for intolerable abuses and absurd results which could not have been contemplated by the people who drafted and voted for the present constitutional language. For example, an incumbent judge who is defeated for re-election might resign immediately before the end of this term in an effort to defeat the right of his or her lawfully elected opponent from taking a full term of office. Even absent such attempted manipulation, there could occur a situation in which a judge, having chosen not to run for re-election may die on the final hours of his or her term. We would perceive no conceivable public or constitutional purpose to be served in either of these situations by preventing the properly elected candidate from taking office. Likewise here, it is our view that the regularly scheduled election for Judge Wetzel's seat should go forward

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and the person elected should be entitled to take office for the full six-year term commencing January 5, 1987.^{4/}

It could be argued nonetheless that since a "vacancy" will exist for at least one week from December 29, 1986, to January 5, 1987, the Governor has the absolute technical duty to appoint someone to serve for that week at least. While the constitutional mechanism is designed to avoid curtailment of judicial services due to vacancy in judicial office, it seems clear that precise moment-to-moment succession is neither mandated nor possible in all circumstances. Where a judge dies or resigns without notice, the selection of a successor, even by appointment, would normally be expected to consume time equal or greater than a week. Indeed, Minn. Stat. § 2.722, subd. 4 (Supp. 1985), contemplates that a vacancy may continue for 90 days or more while the Supreme Court considers disposition of the seat.

A one-week vacancy occurring between December 29 and January 5 should have no greater adverse impact on judicial

^{4/} We do not address here the potential ramifications of Minn. Stat. § 2.722, subd. 4 (Supp. 1985), which authorizes the Minnesota Supreme Court, in the event of judicial vacancy, to continue or abolish the position or transfer it to another district. Our opinions are not intended to, and cannot, encroach upon the authority of the judiciary. Thus, it is clear that the views expressed here are, of course, subject to any action which might be taken by the Minnesota Supreme Court pursuant to that statute.

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services than a judge's modest holiday vacation. Indeed, the confusion which could follow from a one-week interim appointment would seem more of a potential interference with smooth judicial function than a week's hiatus in office.

Thus, in our opinion, while the constitutional language technically provides for appointments to fill vacancies without regard to length, the Governor would not, absent extraordinary circumstances, be remiss in his constitutional duty in permitting a one-week vacancy to exist.

Very truly yours,

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Attorney General

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