S T A T E O F T E N N E S S E E
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Opinion No. 06-018

Court Clerks in Gibson County

QUESTIONS

In Op. Tenn. Att'y Gen. 06-011 (January 13, 2006), this Office addressed a number of questions regarding courts in Gibson County. The following questions concern possible legislation to address issues raised in that opinion.

1. May the Gibson County General Sessions Court Clerk and Gibson County Circuit Court Clerk, who is popularly elected in the area for which her court serves, also serve as the General Sessions Court Clerk and Circuit Court Clerk for the Humboldt Court System if she is popularly elected by the citizens of the area comprising the Humboldt Court System?

2. Assuming that the answer to Question 1 is "yes," will the clerk be required to be paid two clerk salaries, or could the clerk perform these functions and receive only one clerk's salary?

3. If the clerk must receive two salaries for serving as the Gibson County General Sessions Court Clerk, the Gibson County Circuit Court Clerk, and the Clerk of the Humboldt Law Court:

a. Could legislation be drafted to provide that the clerk be paid only one salary?

b. Could the clerk appoint a deputy clerk to manage the Humboldt Law Court on the clerk's behalf?

4. Would any legislation drafted to remedy the issue of the salary of the Humboldt Law Court Clerk have to be ratified by the county commission by a two-thirds vote or a simple majority?

5. Would legislation to abolish the Humboldt Law Court or any part of it have to be ratified by a two-thirds vote of the county commission or a simple majority?

6. Since the Humboldt Chancery Court Clerk and Master has been appointed to a six-year term recently by the Chancellor, would the county be required to pay the salary to this official for the rest of the six-year term if the Humboldt Chancery Court is abolished?

7. What is the legal status of the warrants, arrests and convictions, and other actions that have been taken by the Humboldt Chancery Court Clerk acting as the clerk of the Humboldt Law Court and the Humboldt Division of the Gibson County General Sessions Court in light of this Office's conclusion that the clerk of these courts must be elected by the voters in the district?

OPINIONS

1. No. The Humboldt Law Court is a separate court with a different territorial jurisdiction from the Gibson County Circuit Court at Trenton. If the Humboldt Law Court is preserved as a separate court, therefore, the clerk of that court must be elected by the people within that court's jurisdiction. This Office is unaware of any authority that would permit the same elected clerk to serve two different inferior courts with different territorial jurisdictions.

2. Since we have concluded that the same elected clerk may not occupy both offices, this question is moot.

3. As discussed above, the same elected clerk may not occupy both offices as long as the Humboldt Law Court is preserved as a separate court with a different territorial jurisdiction. These questions, therefore, are moot.

4. We think a court would conclude that any act creating a new office of Humboldt Law Court Clerk, addressing the salary Gibson County must pay the individual carrying out those duties, or changing the duties of the Gibson County Circuit Court Clerk is a local act subject to Article XI, Section 9, of the Tennessee Constitution. Such an act by its terms, therefore, must require ratification by a two-thirds vote of the county commission or approval in an election by a majority of those voting in the county.

5. A definitive answer to this question would depend on the particular legislation. Legislation simply abolishing the Humboldt Law Court, which exercises the jurisdiction of a state circuit court, could arguably fall outside the ratification requirements of Article XI, Section 9. But, given the current arrangement under which counties pay the salary of circuit court clerks, it is difficult to imagine an act abolishing this court that would not affect Gibson County in its governmental or proprietary capacity. Thus, for example, if the act creates a new office of clerk or changes the duties of the Gibson County Circuit Court Clerk, the act should provide for ratification by a two-thirds vote of the county commission or approval in an election by a majority of those voting in the county.

6. We think a court would conclude that an act abolishing the office of Humboldt Chancery Court Clerk is a local act affecting the term of a county officer within the meaning of Article XI, Section 9, of the Tennessee Constitution. Any legislation abolishing the office of Humboldt Chancery Court Clerk, therefore, should not become effective until that office becomes vacant. Such an act by its terms must also require ratification by a two-thirds vote of the county commission or approval in an election by a majority of those voting in the county.

7. We think a court would conclude that the Humboldt Chancery Court Clerk is the *de facto* clerk of the Humboldt Law Court and the Humboldt Division of the Gibson County General Sessions Court. The actions of a *de facto* officer are valid and binding as against third persons. No further action is necessary to achieve this result.

ANALYSIS

This opinion addresses several questions based on our recent opinion concerning the court system in Gibson County. Op. Tenn. Att'y Gen. 06-011 (January 13, 2006). Under the law now in effect, the clerk for the Humboldt Chancery Court also serves as the clerk for the Humboldt Law Court. That same individual also serves as the clerk for the Gibson County General Sessions Court within the first, second, third, fourth, sixteenth, and twentieth civil districts of Gibson County. As Opinion 06-011 noted, the clerk of an inferior court must be elected by the voters of that court's district for a four-year term. Tenn. Const. Art. VI, § 13.

1. Combining the Offices of Gibson County Circuit Court Clerk and Humboldt Law Court Clerk

The first question is whether the Gibson County Circuit Court Clerk, who is popularly elected in the area for which her Court serves, may also serve as the Humboldt Law Court Clerk if she is popularly elected by the citizens of the area over which the Humboldt Law Court exercises jurisdiction. The Humboldt Law Court is a separate court with a different territorial jurisdiction from the Gibson County Circuit Court at Trenton. If the Humboldt Law Court is preserved as a separate court, therefore, the clerk of that court must be elected by the people within that court's jurisdiction. This Office is unaware of any authority that would permit the same elected clerk to serve two different inferior courts with different territorial jurisdictions. Op. Tenn. Att'y Gen. 89-103 (August 16, 1989).

2. Clerks' Salaries

The next question is, assuming that the answer to Question 1 is "yes," would the individual serving as Clerk of the Gibson County Circuit Court and the Humboldt Law Court be required to be paid two clerk salaries, or could the clerk perform these functions and receive only one clerk's salary. Since we have concluded that the same elected clerk may not occupy both offices, this question is moot.

3. Proposed Legislation

The next question concerns legislation that might address the office of Clerk of the Humboldt Law Court. The question assumes that the same elected clerk could serve both as Gibson County Circuit Court Clerk and Humboldt Law Court Clerk, and asks whether the individual serving in both offices could, under legislation, be paid one salary. The question also asks whether the individual serving in both offices could appoint a deputy clerk to manage the Humboldt Law Court on the clerk's behalf. As discussed above, the same elected clerk may not occupy both offices as long as

the Humboldt Law Court is preserved as a separate court with a separate territorial jurisdiction. This question, therefore, is moot.

4. Ratification of Legislation

The next question is whether legislation addressing the salary of the Humboldt Law Court Clerk would have to be ratified by a two-thirds or a majority vote of the Gibson County Commission. As discussed above, the same elected clerk may not serve both the Gibson County Circuit Court and the Humboldt Law Court Clerk as long as the Humboldt Law Court is preserved as a separate court with a separate territorial jurisdiction. Article XI, Section 9, of the Tennessee Constitution provides in relevant part:

> . . . any act of the General Assembly ***private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity*** shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

The purpose of Article XI, Section 9, is to "vest control of local affairs in local governments, or in the people, to the maximum possible extent." *Civil Service Merit Board of the City of Knoxville v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991); *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975). Thus, private acts affecting a county or a city must generally provide for local approval in order to be effective. The approval must be by a two-thirds vote of the local legislative body or by a majority of those voting in the city or county affected. This provision does not apply to an act dealing with state courts or the salaries to be paid by the State of Tennessee to the judges and chancellors of these courts. *State ex rel. Cheek v. Rollings*, 202 Tenn. 608, 308 S.W.2d 393 (1957). In *Rollings*, the Tennessee Supreme Court upheld an act discontinuing all meetings of the Chancery Court at Tracy City in Grundy County. The Court found that, under Article VI, Section 1, of the Tennessee Constitution, the General Assembly had the right to establish and abolish inferior state courts. The Court found that Article XI, Section 9, was not intended to limit the General Assembly's power under Article VI, Section 1. *See also, City of Knoxville ex rel. Roach v. Dossett*, 672 S.W.2d 193 (Tenn. 1984) (Article XI, Section 9, did not prevent the General Assembly from removing jurisdiction over state criminal offenses from the municipal courts of Knoxville, a home rule municipality, by an act applicable to counties falling within a specified population bracket). The Tennessee Supreme Court has found, however, that an act expanding the jurisdiction of a particular general sessions court must receive local approval under Article XI, Section 9. *Durham v. Dismukes*, 206 Tenn. 448, 333 S.W.2d 935 (1960) (Sumner County General Sessions Court); *Lawler v. McCanless*, 220 Tenn. 342, 417 S.W.2d 548 (1967) (Gibson County General Sessions Court).

None of these cases addresses whether an act that affects the salary a county must pay a court clerk or that court clerk's duties is subject to Article XI, Section 9. We think a court would conclude

that any act creating a new office of Humboldt Law Court Clerk, addressing the salary the county must pay the individual carrying out that duties, or changing the duties of the Gibson County Circuit Court Clerk is a local act subject to Article XI, Section 9, of the Tennessee Constitution. Such an act by its terms, therefore, must require ratification by a two-thirds vote of the county commission or approval in an election by a majority of those voting in the county.

5. Act Abolishing the Humboldt Law Court

The next question is whether an act abolishing the Humboldt Law Court must be locally ratified under Article XI, Section 9. A definitive answer to this question would depend on the particular legislation. As discussed above, legislation simply abolishing the Humboldt Law Court, which exercises the jurisdiction of a state circuit court, could arguably fall outside the ratification requirements of Article XI, Section 9. Given the current arrangement under which counties pay the salary of circuit court clerks, however, it is difficult to imagine an act abolishing this court that would not affect Gibson County in its governmental or proprietary capacity. Thus, for example, if the act creates a new office of clerk or changes the duties of the Gibson County Circuit Court Clerk, the act should provide for ratification by a two-thirds vote of the county commission or approval in an election by a majority of those voting in the county.

6. Act Abolishing the Humboldt Chancery Court

The next question is whether, if the county wishes to request an act abolishing the Humboldt Chancery Court, it must pay the current clerk for the rest of his or her term. With regard to state and county officers, Article XI, Section 9, provides:

> The General Assembly shall have no power to pass a special, local or private act *having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, . . .*"

(Emphasis added). A chancery court is a state court. But the Humboldt Chancery Court Clerk is paid by the county and acts with respect to districts within the county over which the court has jurisdiction. *Webster v. LaBonte*, 597 S.W.2d 893 (Tenn. 1980) (office of clerk of the circuit and general sessions court is a county office within the meaning of Article VII, Section 2, of the Tennessee Constitution). For these reasons, a court is likely to find that the office of Humboldt Chancery Court Clerk is a "county office" within the meaning of Article XI, Section 9, of the Tennessee Constitution. Further, while no definitive conclusion is possible, a court could conclude that an act abolishing the Humboldt Chancery Court and the office of Humboldt Chancery Court Clerk is a local act within the meaning of Article XI, Section 9. For these reasons, any legislation abolishing the office of Humboldt Chancery Court Clerk should not become effective until that office becomes vacant. Such an act by its terms must also require ratification by a two-thirds vote of the county commission or approval in an election by a majority of those voting in the county.

7. Legal Status of Actions Taken Under Current Clerk Arrangement

The last question is the legal status of actions taken by the Humboldt Chancery Court Clerk acting as the clerk of the Humboldt Law Court and the Humboldt Division of the Gibson County General Sessions Court in light of this Office's conclusion that the clerk of these courts must be elected by the voters in the district. We think a court would conclude that the Humboldt Chancery Court Clerk is the *de facto* clerk of these two courts. Generally, the acts of *de facto* officers are valid as to third persons and the public. *State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 718 (Tenn. 1995). In that case, an individual sentenced by a city judge challenged the validity of the sentence in a *habeas corpus* proceeding. The individual argued that his sentence was invalid because, under Article VI, Section 4, of the Tennessee Constitution, the judge was required to be elected for an eight-year term. The city judge had not been elected to an eight-year term. The Court found that the judge had *de facto* authority and that the sentence could not be challenged in a collateral proceeding. Relying on 48A C.J.S. *Judges* § 2 (1981) the Court noted, "An unconstitutional statute is sufficient to give color of right or authority to elect or appoint a judicial officer, and a person elected or appointed by authority of such statute is a *de facto* judge." 911 S.W.2d at 718. Under the same reasoning, a court would probably conclude that the Humboldt Chancery Court Clerk is the *de facto* clerk of the Humboldt Law Court and the Humboldt Division of the Gibson County General Sessions Court. As such, his or her actions are valid and binding as against third persons. *See also Ferrell v. Cigna Property and Casualty Insurance*, 33 S.W.3d 731 (Tenn. 2000) (although the proper procedure was not followed in appointing the Clerk and Master as a special judge, his actions were those of a *de facto* officer, where the parties consented to the appointment and did not object on appeal). *See also Kelley v. Story*, 53 Tenn. 202 (Tenn. 1871) (*de facto* clerk of a court).

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