

JUDGES - Residency requirements for justice of the peace called to act pursuant to section 3-10-231(2) or (3);
RESIDENCE - Residency requirements for justice of the peace called to act pursuant to section 3-10-231(2) or (3);
MONTANA CODE ANNOTATED - Sections 3-10-202, 3-10-204, 3-10-231;
MONTANA CONSTITUTION - Article VII, section 9(4);
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 49 (1989), 42 Op. Att'y Gen. No. 4 (1987).

HELD: An acting justice of the peace who is called to act pursuant to section 3-10-231(2) or (3), MCA, and who is otherwise qualified to serve under section 3-10-202, MCA, need not be a resident of the county where the court sits.

January 23, 1990

Robert L. Deschamps
Missoula County Attorney
Missoula County Courthouse
Missoula MT 59802

Dear Mr. Deschamps:

You have requested my opinion on the following question:

Does an acting justice of the peace, called to act pursuant to section 3-10-231(2) or (3), MCA, have to be a resident of the county in which the court sits?

The statute in question, § 3-10-231, MCA, addresses circumstances in which an acting justice may be called in and by whom:

(1) Whenever a justice of the peace is disqualified from acting in any action because of the application of the supreme court's rules on disqualification and substitution of judges, subdivision 1, 2, or 3, he shall either transfer the action to another justice's court in the same county or call a justice from a neighboring county to preside in his behalf.

(2) Within 30 days of taking office, a justice of the peace shall provide a list of persons who are qualified to hold court in his place during a temporary absence when no other justice or city judge is available. The county commissioners shall administer the oath of office to each person on this list within the ensuing 30 days or as soon thereafter as possible.

(3) Whenever a justice is sick, disabled, or absent, the justice may call in another justice, if there is one readily available, or a city judge or a person from the list provided for in subsection (2) to hold court for the absent judge until his return. If the justice is unable to call in a substitute, the county commissioners shall call in another justice, a city judge, or a person from the list provided for in subsection (2).

(4) During the time when a justice of the peace is on vacation or attending a training session, another justice of the peace of the same county shall be authorized to handle matters that otherwise would be handled by the absent justice. When there is no other justice of the peace in the county, the justice of the peace may designate another person in the same manner as if the justice were sick or absent.

(5) A justice of the peace of any county may hold the court of any other justice of the peace at his request.

Under this statute, the following people are expressly authorized to substitute as acting justices during temporary absences of the resident justice of the peace:

- (1) Other justices of the peace from the same county;
- (2) Justices of the peace from outside the county;
- (3) City judges;
- (4) Qualified persons on the list compiled by the incumbent justice of the peace.

See 43 Op. Att'y Gen. No. 49 (1989). The subject of this opinion is whether acting justices must be residents of the county in which the court sits in order to qualify to serve in that regard.

A general residency requirement for all judges is found in Article VII, section 9(4) of the Montana Constitution. That section requires a justice of the peace to reside during a term of office in the county in which he is elected or appointed. This requirement arguably does not apply to persons listed as acting justices since those persons are not "elected or appointed" and do not hold a "term of office." A statutory residency requirement is also found at section 3-10-204(1), MCA, which states that every justice of the peace must reside in the county in which the court is held. This statutory residency requirement is not qualified by the terms "elected or appointed" or "during a term of office," and could therefore arguably be said to apply to acting justices.

However, subsection (1) of section 3-10-204, MCA, must be read in conjunction with subsection (2), which imposes a one-year residency requirement "preceding ... election or appointment." I conclude that this provision is directed at ensuring that elected or appointed justices not only have been county residents for at least one year before assuming the bench, but also maintain such residency during their terms of office. When so construed, section 3-10-204, MCA, has no application to acting justices. I reach this conclusion in spite of the suggestion found in 42 Op. Att'y Gen. No. 4 (1987) that the residency requirements of section 3-10-204(2), MCA, apply to acting justices.

Section 3-10-231(2), MCA, itself requires only that acting justices be "qualified to hold court" during a temporary absence when no other justice or city judge is available. Qualifications for justices of the peace are set forth in section 3-10-202, MCA. A residency requirement is not included. The legislative history attendant to the adoption of the 1985 amendments to section 3-10-231, MCA (1985 Mont. Laws, ch. 482), authorizing a justice to designate acting justices, suggests that the designating justice is to be invested with substantive discretion in making this selection--discretion which would necessarily be diminished if a residency requirement were inferred. See House Judiciary Committee Minutes of Feb. 5, 1985, at 2-3. In the absence of a constitutional or statutory requirement that an acting justice be a county resident, I conclude that no such requirement applies.

THEREFORE, IT IS MY OPINION:

An acting justice of the peace who is called to act pursuant to section 3-10-231(2) or (3), MCA, and who is otherwise qualified to serve under section 3-10-202, MCA, need not be a resident of the county where the court sits.

Sincerely,

MARC RACICOT
Attorney General