

**Opinion No. 121**

**County Commissioners—Vacancies—Elections—Proclamations—  
Governor—District Judges—Appointments—Primary Elections.**

**Held: When a vacancy occurs in the Board of County Commissioners the judge or judges of the District Court in the District where the vacancy exists appoint a resident of the Commissioner district in which the vacancy has occurred to fill the vacancy**

**until the next general election. The Governor's proclamation of the general election need not contain a proclamation of an election to fill vacancies occurring in County offices, but the proclamation of a general election by the Board of County Commissioners should contain a provision proclaiming an election to fill vacancies in County offices. Candidates to be voted on at a general election to fill vacancies should be nominated by the direct primary method if that method is reasonably available.**

July 14th, 1950.

Mr. A. G. McNaught  
County Attorney  
Musselshell County  
Roundup, Montana

Dear Mr. McNaught:

In a recent letter to Governor Bonner you informed him that a vacancy had been created in the office of County Commissioner in Musselshell County by the death of the Honorable James Hunter. Your letter has brought about a request for my opinion on the following question:

What is the proper method of filling a vacancy in the office of County Commissioner created by the death of the incumbent?

Section 4 of Article XVI of the Constitution of the State of Montana provides:

" . . . When a vacancy occurs in the Board of County Commissioners the judge or judges of the judicial district in which the vacancy occurs, shall appoint someone residing in such Commissioner district where the vacancy occurs, to fill the office until the next general election when a Commissioner shall be elected to fill the unexpired term."

Pursuant to this Constitutional provision the Legislature has enacted laws to provide for the filling of a vacancy in the office of County Commissioner. Section 16-903, Revised Codes of Montana, 1947, provides:

"When ever a vacancy occurs in the Board of County Commissioners from a failure to elect or otherwise, the district judge or judges in whose district the vacancy occurs must fill the vacancy, and such appointee shall hold office until the next general election."

This Constitutional provision and Statute are plain and unambiguous. There has, however, arisen a question as to whether the appointment of a County Commissioner to fill a vacancy in that office is a judicial or ministerial act of the district judge. In State ex rel. Downen

v. District Court, 50 Mont. 249, 146 Pac. 467, it was held that the act of appointing a County Commissioner to fill a vacancy was a ministerial act on the part of the district judge and not judicial in character.

The proclamation of the Governor of a general election need not contain a provision proclaiming an election to fill vacancies in County offices.

Section 23-102, Revised Codes of Montana, 1947, provides:

"Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper officer or authority. The Board of County Commissioners shall be authorized to call a special election at any time for the purpose of submitting to the qualified electors of the County a proposition to raise money for any public improvement desired to be made in the County."

Section 23-103, Revised Codes of Montana, 1947, provides:

"At least sixty days before a general election, and whenever he orders a special election to fill a vacancy in the office of State Senator or member of the House of Representatives, at least ten days before such special election, the Governor must issue an election proclamation, under his hand and the great seal of the State, and transmit copies thereof to the Board of County Commissioners of the counties in which such elections are to be held."

Section 23-104, Revised Codes of Montana, 1947, provides:

"Such proclamation must contain:

1. A statement of the time of election, and the offices to be filled.
2. An offer of rewards in the following form: 'And I do hereby offer a reward of one hundred dollars for the arrest and conviction of any person violating any of the provisions of sections 94-1401 to 94-1426. Such rewards to be paid until the total amount hereafter expended for the purpose reaches the sum of five thousand dollars.'

Section 23-106, Revised Codes of Montana, 1947, provides:

"Whenever a special election is ordered by the Board of County Commissioners, they must issue an election proclamation, containing the statement provided for in subdivision one of Section 23-104, and must publish and post it in the same manner as proclamations issued by the Governor."

In considering whether or not the Governor's proclamation of a general election must contain a provision proclaiming the election of County officers to fill vacancies in such offices, the Supreme Court of Montana stated:

“When all these provisions (Sections 23-101 to 23-106, R.C.M., 1947) are read together, the conclusions seem necessary that the Legislature intended that special elections to fill vacancies in County offices should be proclaimed and notice thereof given by the Board of County Commissioners. Apparently, proclamation by the Governor is necessary only when the election is to be held to fill offices for the regular ensuing term, except to fill vacancies in the offices of State Senator and members of the House of Representatives. This is suggested by the fact that section 452 (Section 23-103, R.C.M., 1947,) does not impose upon the Governor the duty to call an election to fill any vacancy other than the two mentioned, as well as by the reflection that the Governor is not presumed to know what, if any, vacancy exists in any local County office.”

State ex rel. Rowe v. Kehoe, 49 Mont. 582, 144 Pac. 162.

Regardless of this statement by the Supreme Court of Montana, and the obvious provisions of the statutes, it has been the practice of the Governor of this State as an abundance of precaution, to include in his proclamation of general elections, a provision proclaiming an election to fill vacancies in County offices which have come to the attention of the Governor, and also a provision proclaiming an election to fill all vacancies in County offices which exist for some reason other than the expiration of the term of office, without specifically listing such vacancies.

Candidates to be voted on at the general election to fill a vacancy in the office of County Commissioner should be nominated by the direct primary election method if that method is reasonably available. The problem of nominations to select candidates to fill a vacancy was recently considered by the Supreme Court of Montana in the case of LaBorde v. McGrath, 116 Mont. 283, 149 Pac. (2d) 913. In the course of that opinion the Court stated:

“The death of the first incumbent and the appointment of the present incumbent came long prior to the time fixed by the law for holding of the primary election and we see no good reason why the primary election law should not apply. It would seem that Section 639 (Section 23-909, Revised Codes of Montana, 1947), Revised Codes, specifically prohibits the nomination by political parties of candidates in the manner provided by Section 612 (Section 23-801, Revised Codes of Montana, 1947) where, as here, the methods prescribed by the primary law are available. . . .”

“Should a vacancy be filled by an appointment made subsequent to the holding of the primary election but prior to the general election or should the appointment be made at such other time as would make it impossible or unreasonable for candidates to file and otherwise comply with the Primary Nominating Election Law, then the prohibition of Section 639 (Section 23-909, Re-

vised Codes of Montana, 1947) would not apply and the nomination of a candidate could then be made pursuant to the provisions of Section 612, Revised Codes, (Section 23-801, Revised Codes of Montana, 1947) or of Section 615 (Section 23-804, Revised Codes of Montana, 1947). . . ."

Section 23-909, Revised Codes of Montana, 1947, provides:

"Every political party which has cast three per centum (3%) or more of the total vote cast for Representative in Congress at the next preceding general election in the County, District or State for which nominations are proposed to be made, shall nominate its candidates for public office in such County, District or State, under the provisions of this law, and not in any other manner; and it shall not be allowed to nominate any candidate in the manner provided by Section 23-801. Every political party and its regularly nominated candidates, members, and officers, shall have the sole and exclusive right to the use of the party name and the whole thereof, and no candidate for office shall be permitted to use any word of the name of any other political party or organization than that of and by which he is nominated. No independent or non-partisan candidate shall be permitted to use any word of the name of any existing political party or organization in his candidacy. The names of candidates for public office nominated under the provisions of this law shall be printed on the official ballots for the ensuing election as the only candidates of the respective political parties for such public office in like manner as the names of the candidates nominated by other methods are required to be printed on such official ballots.

"Any political party that did not cast three per centum (3%) or more of the total vote cast for Representative in Congress, as above, and any new political party about to be formed or organized, may make nominations for public office as provided in Section 23-801."

Section 23-801, Revised Codes of Montana, 1947, provides:

"Any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office to be filled by election in the State. A convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle, and in the event a vacancy shall happen by death or resignation in the representation from any Congressional district of the State of Montana in the House of Representatives of the Congress of the United States, only the electors residing within such Congressional district shall vote at any such convention or primary meeting held for the purpose of making nominations to fill such vacancy."

Section 23-804, Revised Codes of Montana, 1947, provides:

"Candidates for public office may be nominated otherwise than by convention or primary meeting in the manner following:

"A certificate of nomination, containing the name of a candidate for the office to be filled, with such information as is required to be given in certificates provided for in section 23-802, must be signed by electors residing within the State and District, or political division in and for which the officer or officers are to be elected, in the following required numbers:

"The number of signatures must not be less in number than five per cent of the number of votes cast for the successful candidate for the same office at the next preceding election, whether the said candidate be State, County, Township, Municipal, or any other political division or subdivision of State or County; but the signatures need not all be appended to one paper. Each elector signing a certificate shall add to his signature his place of residence, his business, and his business address. Any such certificate may be filed as provided for in the next preceding section of this chapter, in the manner and with the same effect as a certificate of nomination made by a party convention or primary meeting."

Under the provisions of these statutes and the decision of the Supreme Court of Montana in *LaBorde v. McGrath*, 116 Mont. 283, 149 Pac. (2d) 913, the correct procedure for the nomination of candidates to fill vacancies to be voted on at a general election would be by the Direct Primary Law, Sections 23-901 to 23-936, Revised Codes of Montana, 1947, if that method is reasonably available. If the provisions of the Direct Primary Laws cannot be reasonably used, the nominations may be made under the provisions of Section 23-801 or Section 23-804, Revised Codes of Montana, 1947.

Therefore, it is my opinion that when a vacancy occurs in the Board of County Commissioners it is to be filled by appointment by the District Judge or Judges of the District in which the vacancy has occurred. The appointee to this office must reside in the Commissioner District in which the vacancy has occurred and such appointee will hold office until the next general election when an election will be held to elect an officer to fill the unexpired term. The general election proclamation of the Governor need not include a provision proclaiming an election to fill vacancies in County offices, but the election proclamation of the Board of County Commissioners should contain a provision proclaiming an election to fill any vacancies which exist in County offices. Nominations for candidates to vote on at the general election to fill a vacancy in the office of County Commissioner, caused by the death of the incumbent, should be made by the direct primary method if that method is reasonably available.

If for some reason it is not practical to nominate such candidates by the direct primary method then they may nominate by the methods prescribed in Sections 23-801 and 23-804, Revised Codes of Montana, 1947.

Very truly yours,  
ARNOLD H. OLSEN,  
Attorney General.