

Opinion No. 103.**Nepotism — Public Policy — Husband
and Wife—Statutes**

HELD: A sheriff may not employ his wife, or anyone related to him by consanguinity within the fourth degree or by affinity within the second degree, as a matron under his supervision; or for any position of trust or emolument within any department of this state or any of its political subdivisions, even though the authorization for such employment has been given by his board of county commissioners.

December 2, 1954.

Mr. R. E. Towle
State Examiner
State Capitol Building
Helena, Montana

Dear Mr. Towle:

You have submitted for my consideration the following question:

“Is it lawful under our Montana laws pertaining to Nepotism for a County Sheriff to employ his wife as a matron under his supervision?”

Section 59-519, R.C.M., 1947, provides in part that:

“It shall be unlawful for any person or any member of any board, bureau or commission, or employee at the head of any department of this state or any political subdivision thereof to appoint to any position of trust or emolument any person or persons related to him or them or connected with him or them by consanguinity within the fourth degree, or by affinity within the second degree”

The following section, Section 59-520, R.C.M., 1947, makes it a misdemeanor, punishable by a fine of from fifty dollars (\$50.00) to one thousand dollars (\$1,000.00) and imprisonment up to six months, to violate the provisions of Section 59-519, supra.

Montana laws prohibiting Nepotism were considered by the Montana State Supreme Court in 1944 in the case en-

titled *State v. School District No. 13*, 116 Mont. 294, 151 Pac. (2d) 168. In that case, the court said:

"The final question is whether Florence Amundson was re-employed in 1941 as a teacher by the inaction of the two trustees, her husband and brother-in-law. They could not legally have acted to employ her, since Section 456.2, Revised Codes, (now Section 59-519, *supra*) makes it unlawful for members of any board to employ any person related to them 'by consanguinity within the fourth degree, or by affinity within the second degree.' Affinity means relationship by marriage . . ."

The application of Section 59-519, *supra*, and the other sections relating to Nepotism, has, since its enactment in 1933, been considered in thirty-three (33) Official Opinions of the Attorney General. These opinions are uniformly consistent in holding that public officers and members of official boards may not appoint their relatives, related to them by consanguinity within the fourth degree or by affinity within the second degree, to hold any position of trust or emolument within any department or political subdivision of this state. For opinions concerning the relationship of husband and wife, read 15 Opinions of the Attorney General 214, No. 319; 18 Opinions of the Attorney General 140, No. 124; and 19 Opinions of the Attorney General 258, No. 160.

In the case entitled *State ex rel. Kurth v. Grinde*, 96 Mont. 608, 32 Pac. (2d) 15, the Montana Supreme Court considered our state Nepotism Act. In that case a city council voted to confirm the appointment of the son of one of the council members to the position of city water registrar. The power of appointment in that case rested in the mayor, subject to confirmation by the city council. It was argued that the father of the appointee could not vote with the other council members because of the Nepotism Act. In answering this argument and affirming the appointment, the Supreme Court of Montana said:

". . . The statute by its term restrains only the appointing power. Its provisions are not sufficiently

broad to affect the power or right of one voting for confirmation . . ."

In the instant case, the power of appointment of a matron rests in the sheriff subject to authorization granted by the Board of County Commissioners. In this respect, the holding stated in 24 Opinions of the Attorney General, No. 10 is most appropriate:

"The Board of County Commissioners, while having the power to authorize the appointment of a stenographer in the office of the County Attorney when such stenographic service is necessary to properly discharge the duties of that officer, does not have the power to make the appointment."

The appointive power here rests in the sheriff and thus the appointment must conform to the provisions of the state Nepotism Act.

It is therefore my opinion that even though authorization for the employment of a matron has been granted by the Board of County Commissioners, a sheriff still may not, since he is the appointive officer, employ his wife or anyone related to him by consanguinity within the fourth degree or by affinity within the second degree to hold such employment as matron or any position of trust or emolument within any department of this state or any political subdivision thereof.