

VOLUME NO. 38

OPINION NO. 113

COURTS, CITY - Calling in another judge because of work load;

JUDGES - Calling in another city judge because of work load;

JUSTICES OF THE PEACE - Calling in a city judge for a town because of work load;

MUNICIPAL CORPORATIONS - Calling in a city judge for a town because of work load;

MONTANA CODE ANNOTATED - Section 3-11-203(1)(d).

HELD: Section 3-11-203(1)(d), MCA, authorizes a city judge for a town who has determined that he or she is unable to act for any reason to call in a justice of the peace or a qualified resident of the town to act in his or her place. However,

that provision does not authorize the city judge to appoint a regular deputy or substitute city judge.

14 November 1980

Wayne L. Vick, Esq.
Bridger City Attorney
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Dear Mr. Vick:

You have asked for my opinion on the following question:

May a justice of the peace who has been designated to act as a city judge for a town call another person in to act as judge under section 3-11-203(1)(d), MCA, because of the work load?

Section 3-11-203(1)(d), MCA, states:

The city judge or mayor may call in a justice of the peace or some qualified resident of the city or town to act in the judge's place whenever the judge is:...sick, absent, or unable to act.

(Emphasis added.) My research has revealed no Montana interpretations of this provision. Therefore, my opinion is based on cases from other jurisdictions interpreting similar laws.

In Titan Oil & Gas, Inc. v. Shipley, 257 Ark. 278, 517 S.W.2d 210, 217 (1974), the Supreme Court of Arkansas held that a judge need not be physically disabled in order to come under such a provision. If that were the case, the court reasoned, the other words--"sick" or "absent" in the Montana statute--would have sufficed. The court did not, however, provide any guidance as to what sorts of non-physical disabilities would constitute an inability to act. Rather, the court deferred to the judge's own determination of inability, stating:

The judge's determination of the necessity for his being absent from court on a day fixed for its being in session is conclusive and the record showing his absence and the election of a special judge in accordance with the requirements of the

constitution is impervious to attack, not only collaterally, but on appeal, unless the facts which would defeat the election are recited in the record. (Citation omitted.)

517 S.W.2d at 217. Thus, in the situation you have described, the determination whether the city judge is unable to act must be made by the city judge herself.

Another case revealed by my research does establish a limit on a judge's use of a statute such as section 3-11-203, MCA. In Cox v. Allen, 188 Ky. 598, 222 S.W. 932 (1920), the Kentucky Supreme Court held that a regular deputy or substitute judge appointed under the supposed authority of such a provision had no more judicial power "than would any loafer who might have been in the office of the...judge at the time." The court stated:

Manifestly no such authority was ever intended to be conferred by the Legislature in enacting the statute....To construe the section as the county judge did in this case would result in having two or more county judges in the same county at the same time, but only one of whom was chosen by the people as provided by law. They might perchance be making contradictory orders concerning the same matter at the same time, and thus not only obstruct the orderly administration of the office, but create endless confusion.

222 S.W. at 934. By analogy, section 3-11-203(1)(d), MCA, does not confer on a city judge the authority to appoint a regular deputy or substitute city judge, with power and authority to act in all matters the same as the regular city judge. The city judge may call in a substitute only when and for as long as the emergency situations listed in the statute exist.

THEREFORE, IT IS MY OPINION:

Section 3-11-203(1)(d), MCA, authorizes a city judge for a town who has determined that he or she is unable to act for any reason to call in a justice of the peace or a qualified resident of the town to act in his or her place. However, that provision does not authorize the city judge to appoint a regular deputy or substitute city judge.

Very truly yours,

MIKE GREELY
Attorney General