



Office of the Attorney General
State of Texas

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Letter Opinion No. 93-8

Re: Whether there would be any illegality involved in a married couple's concurrent service in office as county commissioner and county auditor in Austin County (ID# 17955)

You ask us to consider whether there would be any illegality involved in a married couple's concurrent service in office as county commissioner and county auditor in Austin County.

Your request cites several statutes that give the county auditor and the commissioners court functions and duties relating to each other's accountability in the handling of county funds. Specifically, the county auditor keeps accounts for county officers who handle money or property intended for county use, Local Gov't Code § 112.005, and has general oversight of the financial records of those county officers, *id.* § 112.006. In turn, the commissioners court has the duty to examine county financial records and correct errors therein, *id.* § 115.022, and has the authority to hire an independent auditor upon a determination that there has been malfeasance or nonfeasance relating to the accounting for and handling of public funds, *id.* § 115.031.

The legislature has separated the duty of selecting the county auditor from the commissioners court, the county's governing body. As you state in your letter, the county auditor of Austin County is appointed by the district judge pursuant to section 84.003 of the Local Government Code. In addition, section 84.009 vests in the district judge(s) the authority to remove the county auditor from office for official misconduct, incompetence, or a "clear[] show[ing] that the auditor is not necessary and the auditor's services are not commensurate with the auditor's salary." The district judge's powers of selection and removal of the county auditor are extrajudicial because the auditor does not work under the direction of the district judge, nor does he or she have duties that specifically relate to the district courts. Because the auditor and the commissioners court must be independent of each other as they fulfill their duties, we may infer that the legislative purpose in assigning to the district judge(s) the extrajudicial functions of selecting and removing the auditor was to maintain the auditor's independence from the commissioners court.

The facts you present raise an apparent conflict of interests between the presumed bond of loyalty inherent in the county auditor's and county commissioner's marital relationship and the independence of judgment required of them as they monitor each

other's actions as county officers. You do not, however, cite any particular laws for us to consider as possible prohibitions against a married couple's concurrent service in those positions. We will consider in this letter the laws relating to nepotism and conflict of interests.

The nepotism law, V.T.C.S. articles 5996a-5996h provides in part:

No . . . officer of any . . . county . . . or judge of any court . . . shall appoint, or vote for, or confirm the appointment to any office, position, clerkship, employment or duty, of any person related within the second degree by affinity . . . to the person so appointing or so voting, or to any other member of any such board, the Legislature, or court of which such person so appointing or voting may be a member, when the salary, fees, or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatsoever.

V.T.C.S. art. 5996a. The law not only prohibits the appointment of a person who is related as specified above but also makes it illegal for any officer to "approve any account or draw or authorize the drawing of any warrant or order to pay any salary, fee or compensation of such ineligible . . . person, knowing him to be so ineligible." *Id.* art. 5996d.

The subject county auditor and county commissioner are related in the first degree of affinity, *see id.* art. 5996h (so defining marital relationship), which degree is within the range proscribed by article 5996a. However, the relevant relationships under the above-quoted portions of the nepotism law do not include those between the appointee and the members of the body to which he or she is appointed but instead are limited to those between the appointee and the persons composing the body of which the appointing official is a member. *Id.* art. 5996a.

Your fact situation is somewhat similar to the more common one in which a governmental body authorizes an official to hire someone to serve under him or her and the official then appoints a person who is related to a member of the governmental body. In prior cases of that type we have applied a control principle:

[T]he nepotism statutes are not violated when a relative of a member of a governing body is hired for a position authorized by that body, where the governing body does not exercise control over the person to be selected. Attorney General Opinions No. O-5274 (1943); No. O-4895 (1942); No. O-875 (1939); No. O-480 (1939).

Letter Advisory No. 79 (1974) at 3. Your situation poses a novel and troubling difference from prior cases, however. Here, the appointment was not to a position of service under the appointing official (the district judge) but instead was to an position closely related to

the governing body (the commissioners court). The appointment of the spouse of one of the county commissioners to undertake the duties of overseeing the county's financial record-keeping creates at least the appearance of impropriety, even though the commissioner has no control over the appointment.

Nevertheless, the language of the nepotism law is plain; that law does not reach relationships between appointees and officials who have no control in selecting them. We therefore conclude that the nepotism law is not violated. This conclusion is consistent with the common meaning of the word *nepotism*: "Bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship *to appointing authority*." BLACK'S LAW DICTIONARY 1039 (6th ed. 1990) (emphasis added).¹

The laws relating to conflict of interests of local officials are codified in section 81.002 and chapter 171 of the Local Government Code. We will deal with those laws in turn.

Section 81.002 provides, in pertinent part, as follows:

(a) Before undertaking the duties of the county judge or county commissioner, a person must take the official oath and swear in writing that the person will not be interested, directly or indirectly, in a contract with or claim against the county except:

- (1) a contract or claim expressly authorized by law; or
- (2) a warrant issued to the judge or commissioner as a fee of office.

In Attorney General Opinion MW-437 (1982), we decided that a county commissioner would not violate his oath of office by virtue of having a community-property interest in a salary claim against the county held by his wife as a county employee. The holding and reasoning of that opinion apply here with equal force.

Chapter 171, which deals generally with local governmental officers, preempts the common law of conflict of interests. Local Gov't Code § 171.007(a). The common law

¹We note, however, that article 5996c, V.T.C.S., goes beyond the dictionary definition of nepotism in prohibiting one official from engaging with another in the practice of "trading," or the hiring of each other's relatives to provide services that will be paid for out of public funds or fees of office. Under the unusual facts presented here, the only way the commissioners court could "trade" with the district judge would be by hiring a relative of the district judge to serve under the judge. Such action is unlikely because it would be an obvious violation of chapter 151 of the Local Government Code. See Local Gov't Code §§ 151.003 ("the officer applying for the employees may appoint them"), 151.004 ("the commissioners court or a member of the court may not attempt to influence the appointment of any person to an employee position authorized by the court under this subchapter").

prohibited a public officer from having any personal financial interest in a contract entered into by the governmental body of which he was a member. *See, e.g., Meyers v. Walker*, 276 S.W. 305, 307 (Tex. Civ. App.--Eastland 1925, no writ) (noting that prohibition applied to indirect as well as direct pecuniary interests). A contract that violated the common-law rule was void and could not be ratified even by newly elected officials who had no personal interest in it. *Id.*

Chapter 171 prohibits participation by a "local public official"² in an action taken on any matter involving any "substantial interest in a business entity"³ or in real property" held by that official if the action would have a "special economic effect"⁴ on the business entity or on the value of the real property that would be distinct from its effect on the public. Local Gov't Code § 171.004. Thus, that chapter alleviates the harsh common-law rule that would make such actions void. Now a local governmental body may take action on a matter in which a member has a substantial interest so long as that member discloses the interest and abstains from participation in the action. Even if the interested member violates the chapter by participating, the action is voidable (not void) only if it "would not have passed the governing body without the vote of the person who violated the chapter." *Id.* § 171.006; Attorney General Opinion JM-1090 (1989).

²"Local public official" means a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature." Local Gov't Code § 171.001(1).

³Section 171.001 defines *business entity* as "a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law."

Section 171.002 defines *substantial interest in a business entity* as follows:

(a) For purposes of . . . chapter [171], a person has a substantial interest in a business entity if:

(1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$5,000 or more of the fair market value of the business entity; or

(2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.

....

(c) A local public official is considered to have a substantial interest under this section if a person related to the official within the first degree by consanguinity or affinity, as determined by Article 5996h, Revised Statutes, has a substantial interest under this section.

⁴This phrase is not defined in chapter 171.

Chapter 171 would not prohibit the district judge's appointment of a county auditor who is married to a county commissioner. That law would proscribe only the county commissioner's participation in the appointment, assuming the other elements of section 171.004 were present. The county commissioner would not participate in the appointment anyway because section 84.002 of the Local Government Code vests the power of appointment solely in the district judge(s).

Your request presents two subsidiary questions that illustrate the conflict of interests present here. The first is as follows:

If the commissioners discovered improprieties in the county auditor's report, then this is grounds for employing an independent accountant to audit her books. But should the husband of the county auditor participate in this decision?

In our opinion, the decision to hire or not to hire an independent accountant in the above situation is not an "action . . . [that] will have a special economic effect on" the county auditor.⁵ Local Gov't Code § 171.004. Therefore, without deciding whether the auditor is a "business entity" vis-à-vis the commissioner, or whether the commissioner has a "substantial interest," we conclude that the commissioner's participation in such a decision would not violate that chapter.⁶

The second illustrative question is as follows:

[T]he general oversight authority of the county auditor requires that the commissioners court obtain the auditor's approval before spending county funds. Should the wife of a county commissioner be responsible for insuring that expenditures approved by her husband and the rest of the commissioners court are proper?

Again, without deciding whether the commissioner is a "business entity" vis-à-vis the auditor, we are of the opinion that chapter 171 would not require the auditor to file, before approving *any* commissioners court expenditures, an affidavit of interest based on her marital relationship with the commissioner. The marital relationship alone does not

⁵Of course, the *consequences* of hiring an independent accountant could have a special economic effect on the auditor – for example, her removal from office and loss of salary – if the accountant finds that the auditor has been engaging in improper conduct or has neglected her duties.

⁶We assume that the commissioner would not participate in such a vote, and especially would not vote against a resolution to hire an outside accountant, with knowledge that the auditor has committed any kind of official misconduct, abuse of office, or neglect of duties. Even if the commissioner had the purest of hearts, however, we would question his prudence in determining to participate in a decision on hiring an outside accountant if the basis for the commissioners court's resolution involved some kind of improper conduct or omission by his wife.

create a "substantial interest" under chapter 171; in addition, the contemplated action must have a "special economic effect." *Id.* Your question does not present facts that would show a "special economic effect."⁷

We are not deciding that chapter 171 never would apply to any action taken by the commissioner or the auditor; we are saying merely that it would not apply to the situations you present in the last two questions above because neither question presents the element of "special economic effect," which is necessary to the existence of a "substantial interest in a business entity or in real property." *Id.* § 171.004(a). Chapter 171 does not prohibit the commissioner's and auditor's concurrent service for the county for the mere reason that they are married to each other.

We interpret the two preceding questions, as well as your main question, to be limited to a consideration of the conflict of interest arising from the presumed emotional bond of loyalty inherent in the marital relationship itself. We have assumed that the concern you raise does not include any financial aspects that would amount to a question of self-dealing, so we reserve decision of whether such additional facts might invoke the application of chapter 171.

It is easy to see that the emotional bond between husband and wife could make it impossible for the auditor and the commissioner to exercise the appropriate independence of judgment that is implicit in their roles as checks on each other's official functions. Your questions have serious ethical ramifications, because even the appearance of a conflict of interest can undermine the public's confidence in its elected and appointed officials. We do not think any of the laws discussed heretofore in this opinion addresses your concern, however. Nor are we aware of any case-law rule that would prohibit a married couple from serving concurrently as county auditor and county commissioner in the same county.

We finally note that V.T.C.S. article 41a-1, section 6(a), and title 22, chapter 526, of the Texas Administrative Code empower the Texas State Board of Public Accountancy to issue opinions upon written request. Section 501.11 of title 22 requires a certified or registered public accountant to "be independent with respect to the client in fact and in appearance" if the accountant "is performing an engagement in which [he or she] will issue a report on financial statements of any client (other than a report in which lack of independence is disclosed)." If your county auditor is certified or registered as provided in the Texas Administrative Code, you may wish to submit a request to the Texas State Board of Public Accountancy for an opinion on the applicability *vel non* of the public accountancy regulations to the situation you have presented to us.

⁷Although the marital relationship is not in itself sufficient to create a substantial interest, if a local public official's spouse has a substantial interest based on additional facts showing a "special economic effect," then that person also has a *vicarious* substantial interest by virtue of the relationship. See Local Gov't Code § 171.002(c) (defining "substantial interest" as arising from officer's close relation to another person who has "substantial interest").

S U M M A R Y

A district judge's appointment of the spouse of one of the county commissioners to serve as county auditor does not violate the nepotism law, V.T.C.S. articles 5996a - 5996h. A county commissioner does not violate his oath of office under section 81.002 of the Local Government Code by virtue of having a community-property interest in a salary claim against the county held by his wife as county auditor. Chapter 171 of the Local Government Code does not prohibit a district judge's appointment of a county commissioner's spouse to serve as county auditor, nor does it prohibit the commissioner's and auditor's concurrent service merely because they are married to each other. Such concurrent service has serious ethical ramifications, however, because even the appearance of a conflict of interest can undermine the public's confidence in its elected and appointed officials. This situation may violate the requirement of title 22, section 501.11, of the Texas Administrative Code, that a certified or registered public accountant "be independent with respect to the client in fact and in appearance." If the county auditor is certified or registered as provided in the Texas Administrative Code, the Texas State Board of Public Accountancy is empowered to issue an opinion upon written request concerning whether the public accountancy regulations of title 22, chapter 526, of the Texas Administrative Code apply to this situation.

Yours very truly,



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