



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 17, 1995

Ms. Carole Wayland
Midland County Auditor
200 West Wall
Midland, Texas 79701

Letter Opinion No. 95-070

Re: Whether the spouse of a county attorney may be employed by that official (ID# 33122)

Dear Ms. Wayland:

You have requested an opinion from this office concerning whether it is a violation of the state nepotism law for a county attorney to employ his or her spouse as a secretary in the county attorney's office. You advise us of the following:

The county attorney of Midland County was elected in November 1984 and has served [consecutive] terms since taking office in January 1985. The county attorney's future spouse began employment in the county attorney's office in May 1993 and was married to the county attorney in March 1995. The salary for the county attorney's spouse is paid with public funds of Midland County.

The prohibition against nepotism is governed by chapter 573 of the Government Code (former articles 5996a to 5997, V.T.C.S.¹). Except in limited circumstances, the prohibition applies to relationships within the third degree by consanguinity or within the second degree by affinity. Gov't Code § 573.002.² Section 573.041 is the operative provision, and provides the following:

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an

¹We note that V.T.C.S. articles 5996a to 5997 were repealed by the Seventy-third Legislature. Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 46, 1993 Tex. Gen. Laws 583, 986. Although this codification is a nonsubstantive revision, *id.* § 47, the text of the provisions was reorganized to some extent.

²Consanguinity is relationship by a common ancestor. BLACK'S LAW DICTIONARY 275 (5th ed. 1979). Affinity is relationship by marriage; it is the type of relationship that exists between the husband and the blood relations of his wife, and between the wife and the blood relations of her husband. *Id.* at 54; see *Texas Employers' Ins. Ass'n v. McMullin*, 279 S.W.2d 699, 702 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.) (explaining concept of affinity).

individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

(1) the individual is related to the public official within [the third degree by consanguinity or the second degree by affinity];
or

(2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within [the third degree by consanguinity or the second degree by affinity].

The spouse and the county attorney are related in the first degree by affinity and are therefore related within the prohibited degree of relation. We note that the county attorney has the appointment power of all persons who work in his office. *See id.* § 151.001; *Commissioners Court v. Ross*, 809 S.W.2d 754, 756 (Tex. App.--Tyler 1991, no writ) (holding that although county commissioners court possesses authority to determine number of sheriff's deputies to be appointed and their compensation, sheriff possesses absolute right to determine persons to be appointed). Further, if such persons are paid on a monthly basis, it is presumed for purposes of the nepotism law that the county attorney makes a new decision each month to retain such employees. *See Attorney General Opinion MW-286 (1980); Letter Opinion No. 93-114 (1993).*

However, there are exceptions to the prohibition against nepotism. For example, the prohibition does not apply to an employee who has a sufficient period of prior continuous employment with the governmental body before his or her relative assumes office. The prior continuous employment required may range from thirty days to one year depending upon the type of position held by the public official. This exception is set forth in section 573.062 of the Government Code which provides as follows:

A nepotism prohibition prescribed by Section 573.041 or by a municipal charter or ordinance does not apply . . . if:

(1) the individual is employed in the position immediately before the election or appointment of the public official to whom the individual is related in a prohibited degree; *and*

(2) that prior employment of the individual is continuous for at least:

(A) 30 days if the public official is appointed;

(B) six months, if the public official is elected at an election other than the general election for state and county officers; or

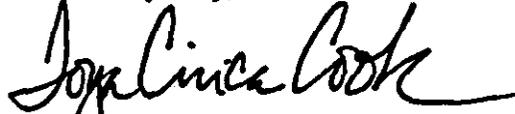
(C) one year, if the public official is elected at the general election for state and county officers.

Gov't Code § 573.062 (emphasis added). Thus section 573.062 provides a two-pronged standard for exclusion from the prohibition: (1) the individual must be employed immediately prior to the election or appointment of the public official at issue, and (2) that employment must be continuous for a specified amount of time. With regard to the first aspect, we conclude that, because the spouse was not employed by the county attorney's office immediately prior to her spouse's election to such office, the exception provided by section 573.062 is inapplicable to the present situation. The prior continuous employment exception is only available if the employee has completed the applicable period of prior continuous service during a time when the relative was not an employer with the power to hire or to fire the employee. Attorney General Opinion DM-132 (1992); Letter Opinion No. 92-43 (1992); see Attorney General Opinion JM-636 (1987) at 3-4 (concluding that if school trustee leaves office for two months and then resumes office, and trustee's relative's first anniversary date falls during two-month interim, trustee's relative has not completed one year of continuous service).³ Although a violation of the prohibition against nepotism had not occurred at the time that the spouse began work in May 1993, any continued employment subsequent to the date of marriage to the county attorney was prohibited by section 573.041 of the Government Code.

S U M M A R Y

Although a violation of the prohibition against nepotism had not occurred at the time that the spouse began employment in May, 1993, any continued employment subsequent to March, 1995, the date of marriage to the county attorney, was prohibited by section 573.041 of the Government Code. Further, the prior continuous employment exception is only available if the employee has completed the applicable period of prior continuous service during a time when the relative was not an employer with the power to hire or to fire the employee. See Attorney General Opinion DM-132 (1992).

Yours very truly,



Toya Cirica Cook
Assistant Attorney General
Opinion Committee

³Other exceptions to the prohibition against nepotism include appointments of notaries public and certain legislative employees as well as substitute teachers and bus drivers in certain school districts. Gov't Code § 573.061.