

OFFICIAL OPINION NO. 1

January 3, 1948.

Hon. C. E. Ruston,
State Examiner,
State Board of Accounts,
304 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of December 8th received requesting an official opinion on the following question:

"1. Is the office of Judge of the Marion Circuit Court a state office or department, board or commission as contemplated under Section 49-1117, Burns' 1933 and Section 49-302, Burns' 1945 Supp. which would prohibit said judge from appointing his son to the position of Secretary to the Jury Commissioners?"

Section 49-1117, Burns' 1933, same being Section 12, Chapter 70, Acts of 1932 (Spec. Sess.), provides as follows:

"It shall be unlawful for any department or institution of the state government to employ any two (2) or more persons who are members of the same family and who are domiciled in the same home."

Section 10 of the above act, as amended by Section 1, Chapter 122, Acts 1933, same being Section 49-1114, Burns' 1933, provides as follows:

"This act shall expire by limitation on the first day of January, 1936, and upon the expiration of this act, all laws and parts of laws which may be in any way affected by this act shall be in as full force and effect as they would have been if this act had not been passed."

Since under the express provisions of said act it expired by limitation on January 1, 1936, it is no longer effective and need not be further considered.

Section 49-302, Burns' 1945 Supplement, same being Chapter 16, Section 1, Acts of 1941, reads as follows:

"No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office or department or institution, as the case may be, nor shall any such relative be entitled to receive any compensation for his or her services out of any appropriation now or hereafter provided by law."

It has been held that an anti-nepotism statute, being highly penal, must be strictly construed. State, *ex rel.* Robinson v. Keefe (1933), 111 Fla. 701, 149 So. 638.

The above statute has not been construed by either the Appellate or Supreme Court of Indiana. For construction of like statutes by the courts of other states, see Annotations, 88 A. L. R. 1103.

The title of Chapter 165, Acts 1921 (Section 49-302, Burns' 1945 Supplement, *supra*) reads as follows:

"An act prohibiting *state officials* and members of *state boards and commissions* from employing certain relatives in the offices and departments over which they have control." (Our emphasis.)

The language and context of the quoted act and its title would indicate a legislative intent to prevent nepotism in the administrative and executive branches of the state government itself. It requires a liberal and broad construction of the act to make it applicable to legislative or judicial branches and a considerable extension of the language employed to make it applicable to a circuit court. It must be conceded that a circuit court is exercising one of the sovereign state functions and for some purposes, depending upon the language of the particular statutes or the constitutional provisions, a circuit court judge may be a state officer. But it does not follow that we can generalize from those other situa-

tions and read into the act in question the office of circuit court judge when the language of the act itself is "state board or commission, or to the head of any state office or department or institution." Generally speaking, a judge of the circuit court is not a state officer.

It has been held by the Supreme Court of Indiana that "the judges and prosecuting attorneys are not state, county, or township officers; they are constitutional officers." *State, ex rel. Gibson v. Friedley* (1893), 135 Ind. 119; *State, ex rel. Pitman v. Tucker* (1874), 46 Ind. 355, 359.

The case of *State, ex rel. Gibson v. Friedley, supra*, was approved without comment in the case of *Spencer v. Criminal Court of Marion County* (1938), 214 Ind. 551, 557.

In the light of the cases above cited and the language of Section 48-302, Burns' 1933 R. S., I am of the opinion that the Judge of the Marion Circuit Court would not be prohibited by law from appointing his son to the position of secretary to the Jury Commissioners.

Further, my examination of the cases reveals that there is no common law prohibition of such an appointment. Apparently it has always been considered that if appointment of relatives is against public policy, that policy must be enunciated by specific language of the Legislature.

OFFICIAL OPINION NO. 2

January 6, 1948.

Mr. Kenneth A. Weddle,
Indiana Securities Commissioner,
* State House,
Indianapolis, Indiana.

Dear Mr. Weddle:

I have your letter requesting an opinion in reference to The Indiana Securities Act in which you state your question as follows:

"Is registration as a Securities Dealer with the Indiana Securities Commission necessary to engage in the transactions specified in subsections a, b, c, e, f, g, h, i, j and k of Section 5 of the Indiana Securities