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Vacancies in Office

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Vacancies in Office

Reference Number: CTAS-580

Vacancies can occur in county offices for a variety of reasons. According to the state constitution, county officials "shall be removed from office for malfeasance or neglect of duty," as these terms are defined by the legislature. Tenn. Const., art. VII, § 1. Similarly, court clerks may be removed for "malfeasance, incompetency or neglect of duty." Tenn. Const., art. VI, § 13. According to statute, any of the following results in a vacancy in office:

1. Death of the incumbent;
2. Resignation, when permitted by law;
3. Ceasing to be a resident of the state, district, circuit, or county for which elected or appointed;
4. Decision of a competent tribunal declaring the election or appointment void or the office vacant;
5. An act of the General Assembly abridging the term of office, where it is not fixed by the Constitution;
6. Sentencing the incumbent, by any competent tribunal in this or any other state, to the penitentiary, subject to restoration if the judgment is reversed but not if the incumbent is pardoned;
7. Adjudicating the incumbent insane; or
8. Failure to satisfy bond requirement.

T.C.A. §§ 8-48-101, 8-19-117.

As stated above, moving out of the state, district, circuit, or county from which one was elected or appointed is a cause of vacancy under T.C.A. § 8-48-101. If disputed, the determination of residency is a question of fact. See *Bailey v. Greer*, 468 S.W.2d 327 (Tenn. Ct. App. 1971). A declaratory judgment may be necessary to determine residency. The following principles, outlined in T.C.A. § 2-2-122, are helpful but not binding in making the determination of residency:

1. The residence of a person is that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has a definite intention to return;
2. A change of residence is generally made only by the act of removal joined with the intent to remain in another place. There can be only one (1) residence;
3. A person does not become a resident of a place solely by intending to make it the person's residence. There must be appropriate action consistent with the intention;
4. A person does not lose residence if, with the definite intention of returning, the person leaves home and goes to another country, state or place within this state for temporary purposes, even if of one or more years duration;
5. The place where a married person's spouse and family have their habitation is presumed to be the person's place of residence, but a married person who takes up or continues abode with the intention of remaining at a place other than where the person's family resides is a resident where the person abides;
6. A person may be a resident of a place regardless of the nature of the person's habitation, whether house or apartment, mobile home or public institution, owned or rented; however, a commercial address may not be used for residential purposes, unless the applicant provides evidence of such applicant's residential use of such address;
7. A person does not gain or lose residence solely by reason of the person's presence or absence while employed in the service of the United States or of this state, or while a student at an institution of learning, or while kept in an institution at public expense, or while confined in a public prison or while living on a military reservation; and
8. No member of the armed forces of the United States, or such member's spouse or dependent, is a resident of this state solely by reason of being stationed in this state.

Information on Removal from Office-Ouster can be found under Ethics.

Temporary Vacancies

Reference Number: CTAS-581

Vacancies Due to Military Service

A temporary vacancy exists when a county official, except for a member of the county board of education, is inducted into military service such as the United States Army or any of its branches, the Navy, Air Force, Marine Corps, Coast Guard, Merchant Marine, or any other military activity. T.C.A. § 8-48-202. Upon the official's return from military service, he or she is entitled to resume the office for the remainder of the term, if it has not already expired. T.C.A. § 8-48-202. If the official does not return from military service prior to the expiration of the term, a successor is elected in the regular manner prescribed by law. T.C.A. § 8-48-203.

When a county official, except for a member of the county board of education, is inducted into the United States military service, the office duties are discharged temporarily during the official's absence by another person legally qualified, and the office is to be filled temporarily by the legislative body. T.C.A. §§ 8-48-204, 8-48-205. However, if a clerk and master is inducted into military service, the chancellor appoints a qualified person to fill the office temporarily. T.C.A. § 8-48-205. Any person temporarily appointed or elected to an office must execute a bond and subscribe to an oath to discharge the duties of the office. T.C.A. § 8-48-207. The temporary official receives the salary and has the same power, authority, and privileges as the regular official. T.C.A. § 8-48-208. The temporary official may not remove assistants appointed by the regular official; that power remains with the regular official. T.C.A. § 8-48-209. All persons chosen to fill offices temporarily must satisfy all qualifications required to hold the office. T.C.A. § 8-48-206.

Temporary Absence of County Mayor

If the county mayor is absent or intends to be absent for more than 21 days, or is incapacitated or otherwise unable to perform the duties of the mayor's office, the legislative body appoints the chairperson to serve until the absence or disability is removed. Any contest of disability or its removal shall be adjudicated in chancery court. While the chairperson is serving as mayor, the chairperson pro tempore presides over legislative body sessions. T.C.A. § 5-5-103(g). Note that subsection (g) applies to a temporary absence, not a vacancy.

Interim Successors

Reference Number: CTAS-585

The law provides for a temporary successor to fill vacancies in the offices of trustee, register, county clerk, sheriff, highway chief administrative officer, and assessor of property, in addition to the provisions for an interim county mayor. T.C.A. §§ 8-11-111, 8-13-105, 18-6-115, 8-8-107, 54-7-107, 67-1-504. The duties of the office are to be temporarily discharged either by the chief deputy or by a deputy designated as temporary successor by the official in writing. It is important to note that this law applies only to the duties of the office and not to the office itself. In case of death of a clerk of court, the deputy holds office until the vacancy is filled. T.C.A. § 18-1-401. There is a statute (T.C.A. § 18-1-402) that says judges fill the vacancy in the office of court clerk but that statute (from 1858) has been superseded by the 1978 amendment to the state constitution (Art. VII, Sec. 2) requiring vacancies in county offices to be filled by the county legislative body. See AG Op. No. 88-131. If there is a vacancy in the office of clerk and master, a new clerk is appointed by the chancellor for another six-year term, beginning with the date of the appointment. T.C.A. § 18-5-101.

Procedure for Filling Vacancies

Reference Number: CTAS-586

Vacancies in elected county offices are filled temporarily by the county legislative body. The appointee serves until a successor is elected at the next countywide general election for which the candidate has sufficient time to qualify. T.C.A. § 5-1-104; *see also* Tenn. Const., art. VII, § 2. The county clerk, or if there is no county clerk the county clerk's deputy, or if there is no county clerk or deputy, the acting chair of the county legislative body, shall provide notice to every member of the county legislative body of the need to fill the office or vacancy. This notice may be waived by the members of the county legislative body if all members have constructive notice of the vacancy through other sources of information. Additionally, the presiding officer of the county legislative body shall cause public notice to be given in a newspaper of general circulation in the county at least seven (7) days prior to the meeting at which the office is to be filled, notifying the public of the vacancy or opening and specifying the office or offices to be filled at the meeting. T.C.A. § 5-5-111.

Except in Davidson and Shelby counties, the county commission must fill a vacancy within 120 days of receiving notice from the county clerk unless during that time there is a general election scheduled in the

county and there is sufficient time for the vacancy to be placed on the ballot. T.C.A. § 5-1-104.

Registered voters of the county may submit names to the commission for consideration; however, to be nominated, a member of the commission must subsequently nominate such person. Nominations do not require a second. If a person nominated is not present, the person making the nomination must submit a signed statement from the nominee that the nominee is willing to serve. The commission is required to adopt rules of procedure for eliminating nominees in cases where there are multiple nominees for an appointment and no nominee receives the majority of votes. No secret balloting is permitted and each member's vote regarding the appointment process must be recorded by the clerk and entered in the minutes. Any challenge to the legality of an appointment must be filed with the chancery court within 10 days of the appointment. T.C.A. § 5-5-111.

A commissioner who has accepted a nomination cannot vote on the appointment and for purposes of determining a majority the membership is reduced for each member accepting a nomination. County commissioners must resign their office only if they are actually appointed by the commission to fill the vacancy. T.C.A. § 5-5-111.

Election of Successor by the People

Reference Number: CTAS-587

Any person appointed by the county legislative body to fill a vacancy serves in that capacity until a successor is elected by the county voters at the next general election. If the vacancy occurs after the time for filing nominating petitions for the party primary election and more than 60 days before the party primary election, the political party nominees should be selected in the primary election, and a successor should be elected in the August general election. If the vacancy occurs less than 60 days before the party primary election, but 60 days or more before the August election, the political party nominees should be selected by party convention and a successor elected in the August election. If the vacancy occurs less than 60 days before the August election, but 60 days or more before the November election, the political party nominees should be selected by party convention and a successor elected in the November election. T.C.A. § 5-1-104. All candidates for vacancies should qualify by filing nominating petitions no later than 12 noon on the 55th day before the election. T.C.A. § 5-1-104.

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