

OPINION NO. 69-131

Syllabus:

A judge of a county court may not be a referee in the probate division nor a referee in a division of domestic relations of a court of common pleas.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: Paul W. Brown, Attorney General, October 2, 1969

I have before me your request for my opinion on the compatibility of a judge of the county court also holding the position of a referee in either the probate division or in the division of domestic relations of the court of common pleas.

Section 6, Article IV of the Ohio Constitution, became effective May 7, 1968. Euclid v. Heaton, 15 Ohio St. 2d 65 (1968). It provides in pertinent part as follows:

"* * * Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. * * *"

A similar prohibition was contained in former Section 14, Article IV of the Ohio Constitution. It reads in pertinent part as follows:

"The judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or the United States. * * *"

The present prohibition is much broader. The provisions of former Section 14, Article IV, supra, are limited to judges of the supreme court and of the court of common pleas. See Opinion No. 269, Opinions of the Attorney General for 1928. The prohibition in the present Section 6, Article IV, supra, covers all judges without limitation. Under the provisions of the new amendment no judge may hold another office of profit or trust under the authority of the State of Ohio or of the United States. A judge of the county court is therefore prohibited from holding such an office.

Webster's Third International Dictionary defines "office" as "a special duty, charge or position conferred by an exercise of governmental authority and for a public purpose."

The Supreme Court of Ohio in State, ex rel., v. Brennan, 49 Ohio St. 34 (1892) has defined an office as follows:

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"It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, and the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. * * *"

The functions of a referee are set forth by statute. Section 2315.26, Revised Code, provides that any issue in an action may be referred to a referee by the court upon the written consent of the parties. Section 2315.27, Revised Code, provides for referral of cases to referees where the parties do not consent. This section provides as follows:

"When the parties do not consent to the reference mentioned in section 2315.26 of the Revised Code, the court, or a judge thereof in vacation, upon the application of a party, or on its own motion, may direct a reference in any case in which the parties are not entitled by the constitution to a trial by jury, including any of the issues in an action for divorce, alimony, or annulment of marriage, other than a trial upon the merits

of such action, notwithstanding any provision of Chapter 3105. of the Revised Code.

"The court may appoint such number of referees as it deems necessary. Such referees shall be attorneys at law, admitted to practice in this state, and shall not engage in the practice of law in the division of the court in which they are employed."

A referee has broad powers. When a case is referred to him, he conducts the trial as if it were tried by the court. He may summon witnesses and compel their attendance. He makes findings of facts and conclusions of law. Judgment may be entered upon the decision of the referee as if the court had tried the action. See Sections 2315.28 through 2315.36, Revised Code. The probate division has the same authority to refer matters to referees and the probate referees have the same authority as other referees 2315.37, Revised Code.

A referee, in either the division of domestic relations or the probate division of the court of common pleas, holds a position involving broad powers and serious responsibilities. A referee holds a position conferred by an exercise of governmental authority for a public purpose. He also has a title and exercises public functions. He, therefore, holds an "office" both in the popular sense of the term and within the definition of the Supreme Court. A person holding the position of a referee in either the probate division or the division of domestic relations of the court of common pleas holds an "office" within the meaning of Section 6, Article IV of the Ohio Constitution. A judge of the county court would, therefore, be prohibited from holding either position.

It is, therefore, my opinion and you are hereby advised that a judge of a county court may not be a referee in the probate division nor a referee in a division of domestic relations of a court of common pleas.