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June 19, 2003

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OPINION COMMITTEE

Honorable Greg Abbot, Attorney General  
& Nancy Fuller  
Opinion Committee  
P. O. Box 12548  
Austin, TX 78711-2548

FILE # ML-43153-03  
I.D. # 43153

RE: Nepotism question

Please give your opinion as to whether or not there is a violation of the nepotism laws of the State of Texas under the facts and circumstances set out below.

QUESTION

Whether the nepotism statutes require the termination of an employee of the sheriff's office who had been employed by the elected sheriff for at least seven years before the sheriff's marriage to the employee?

THE FACTS

The sheriff of Stonewall County first took office on January 1, 1989; his subsequent terms began on January 1, 1993, January 1, 1997, and January 1, 2001.

The sheriff's future spouse began employment in the sheriff's office in November 1992, and they were married in May of 2000. She had been continuously employed in the sheriff's office for about four years before the sheriff's election to the term of office beginning January 1, 1997, and for over seven years before the sheriff's election to the term of office beginning January 1, 2001.

The salary for the sheriff's spouse is paid with public funds of Stonewall County.

DISCUSSION

The prohibition against nepotism is governed by Chapter 573 of the Government Code. Except in limited circumstances, the prohibi-

tion applies to relationships within the third degree by consanguinity or within the second degree by affinity. Gov't Code, Section 573.002. 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 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 second degree by affinity)

The spouse and the sheriff are related in the first degree by affinity and are related within the prohibited degree of relation.

The sheriff has the appointment power of all persons who work in his office. *Commissioners Court v. Ross*, 809 S.W.2d 754,756 (Tex. App.-Tyler, 1991, no writ, holding that although the county commissioners court possesses authority to determine the number of sheriff's deputies to be appointed and their compensation, sheriff possesses absolute right to determine persons to be appointed).

At the time the sheriff's present spouse began employment in November, 1992, a violation of the prohibition against nepotism had not occurred. Nor was there a violation of the prohibition against nepotism when the sheriff was again elected to office in November, 1992, and again in November, 1996.

Section 573.062 provides for a two-pronged standard for exclusion from the prohibition: (1) the individual must be employed immediately prior to the election of the public official, and (2) that employment must be continuous for a specified amount of time.

Letter Opinion No. 95-070 indicates that 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. This opinion appears to be in conflict with the provisions of Section 573.062 regarding the exclusions from prohibition.

The facts set out in Letter Opinion No. 93-114 show that the sheriff in that case first took office on January 1, 1985, appointed the brother of his future wife as deputy sheriff on April 12, 1988, and married his deputy sheriff's sister on July 1, 1993.

The opinion states, among other things, that "the deputy had served more than four years prior to the sheriff's election to the term of office beginning January 1, 1993." The opinion concludes that the nepotism provisions do not require the termination of the deputy sheriff following the sheriff's marriage to the deputy's sister.

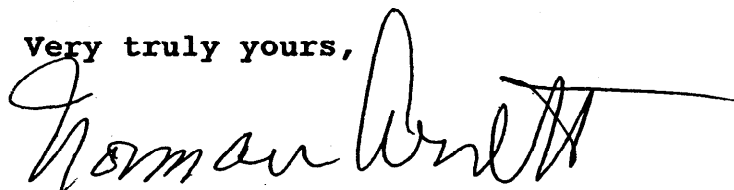
The opinion (No. 93-114) further states that while the deputy sheriff continues in his position, the sheriff "may not participate in any deliberation or voting on the appointment, reappointment . . . . change in status, compensation or dismissal of the individual if that action applies only to the individual and is not taken regarding a bona fide class or category of employees."

CONCLUSION

At the time of their marriage in May, 2000, the sheriff's spouse had continuously served as an employee of the sheriff's office for more than three years immediately prior to his election to the term beginning January 1, 1997, and over seven years immediately prior to the sheriff's election to his present term which began January 1, 2001. It appears that the two-pronged standard, as set out above, for exclusion from the prohibition against nepotism has been satisfied.

The provisions of Section 573.062 (b) would be applicable.

Very truly yours,



Norman Arnett,  
Stonewall County Attorney