



KERR COUNTY ATTORNEY

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OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-44219-05

I.D. # 044219

Dear Attorney General Abbott:

Please see the enclosed request for Attorney General opinion with supporting brief and argument. It is my understanding that the individuals referenced in said document are engaged to be married. As such, we would appreciate an opinion at your earliest convenience.

Sincerely,



Rex Emerson

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: Request for Attorney General Opinion Regarding Whether a County Tax Assessor/Collector Married to an Employee of That County's Appraisal District Would Be In Violation of Texas Nepotism Law, and Related Issues

Dear General Abbott:

The Kerr County Tax Assessor/Collector (TAC), an elected official (see Texas Constitution, Article VIII, Section 14 and Texas Property Tax Code §6.21), is also by statute a nonvoting director of the Kerr Central Appraisal District (see Tax Code §6.03). The TAC intends to marry a person who is currently an employee of the Kerr Central Appraisal District (CAD). Tax Code §6.05(f) provides as follows:

"The chief appraiser may not employ any individual related to a member of the board of directors within the second degree by affinity or within the third degree by consanguinity, as determined under Chapter 573, Government Code. A person commits an offense if the person intentionally or knowingly violates this subsection. An offense under this subsection is a misdemeanor punishable by a fine of not less than \$100 or more than \$1,000."

Obviously, if the TAC marries the CAD employee, the employee will be related to a director within the first degree of affinity.

In addition, Tax Code §6.035(a) provides in pertinent part as follows:

- "(a) An individual is ineligible to serve on an appraisal district board of directors . . . if the individual:
- (1) is related within the second degree by consanguinity or affinity, as determined under Chapter 573, Government Code, to an individual who is engaged in the business of appraising property for compensation for use in proceedings under this title . . ."

In construing these statutes, you are asked to assume the following facts:

1. that the primary duty of the Kerr CAD employee in question is to appraise property;

2. that the employee is paid a salary to perform his appraisal duties;
3. that the employee has been appraising property for the CAD since on or about December 18, 2000;
4. that the TAC and the employee, hereafter referred to as the appraiser, were not acquainted at the time the employee became employed by the CAD; and
5. that the TAC has attempted to resign the position as a nonvoting director of the District, desires no further official relationship with the District as a nonvoting director, and is willing, if helpful or necessary, to appoint a replacement from the County tax office to serve as the nonvoting director.

This situation was not unforeseen. The most recent edition (dated February 2002) of the Appraisal District Director's Manual published by the Texas Comptroller of Public Accounts discusses nepotism under the heading "Family Relationships". The Manual states in pertinent part as follows (at page 3; copy attached):

"Appendix B [of the Manual] shows the family relationships that may make a person ineligible to serve as a director. Tax Code Section 6.035(a) does not address whether these prohibitions from serving as a director for family relationships apply to the county TAC who serves as a nonvoting director. No attorney general opinions or court decisions deal with the question of whether a statute that generally makes individuals ineligible to serve on a board applies to an ex officio member of that board. If a county TAC has a relative as described above, the county TAC should seek the advice of legal counsel.

"There are also no attorney general opinions or court decisions about whether a nepotism statute applies to the relative of a nonvoting director of a board. If Section 6.05 applies to a relative of the nonvoting county TAC, then the county assessor-collector should consult legal counsel."

In light of the facts and law presented, you are respectfully requested to resolve the following questions:

1. Do the statutes cited apply to the ex officio nonvoting TAC, who serves as a director by statute, rather than by appointment?
2. Would common law notions of nepotism or any other nepotism statute operate to prohibit a nonvoting TAC from continuing to serve as a director of a CAD while married to an employee who appraises property for the CAD?

3. Would the fact that the appraiser has been employed by the CAD since approximately December 18, 2000 become a consideration? Specifically, would the appraiser's history of employment render the nepotism provisions inapplicable in this case under a "grandfather" or "continuous employment" analysis?
4. Are there any possible circumstances pursuant to which the Kerr CAD appraiser may remain employed by the CAD while being married to the Kerr County TAC who serves as a nonvoting director of the CAD?
5. Assuming your office finds that a CAD appraiser may not continue employment with the CAD because of a nepotism prohibition arising from the statutory requirement that the TAC serve as a nonvoting director of the CAD, is the only resolution to the nepotism condition that either the TAC must resign that elected office, or the CAD appraiser resign or be discharged from employment with the CAD?
6. Is an appraisal district's appraiser "an individual who is engaged in the business of appraising property for compensation for use in proceedings under" the Texas Property Tax Code, as envisioned by Tax Code §6.035(a)?
7. Under the circumstances of this case, upon learning that the appraiser has married the board member, does the chief appraiser commit an offense if he does not terminate the appraiser immediately, or at the conclusion of the pay period? See Tax Code §6.05(f).
8. Is it possible for a County TAC to (a) "decline" or resign from the statutory position as nonvoting director or to (b) appoint an "agent" from the tax office to serve as the nonvoting director? Would either of these actions avoid the nepotism prohibition and allow the CAD appraiser to continue employment with the CAD?

ARGUMENT AND AUTHORITIES

It is respectfully submitted that this unfortunate situation is an unintended consequence of a well-meaning statute, and it is urged that the nepotism laws should not be applied in this case. Nepotism laws are designed to prevent a public officer from serving his or her personal interest in full employment for relatives instead of the public interest in hiring the best qualified employees. In this case the TAC did not seek the office of nonvoting director; rather, it was statutorily conferred. In addition, the TAC lacks a voice in employment matters because (a) such matters are statutorily within the authority of the chief appraiser [see Tax Code §6.05(c)-(f)] and (b) because the nonvoting position has no vote. Thus, the nonvoting director simply has no say, and certainly no power of appointment, with respect to employment matters. In addition, in this case, the CAD appraiser was employed by the CAD well before there was any acquaintance with the TAC.

Only an official who *may* exercise control over hiring decisions is subject to the anti-nepotism statute. Tex. Att'y Gen. Op. No. DM-2 (1991) at 1. (The anti-nepotism statute does not apply to employees). It is respectfully submitted that your office has previously opined that a tax assessor-collector is an employee and not an officer. See Tex. Att'y Gen. Op. No. JM-499 (1986) at 6. While this opinion specifically considered school tax assessor-collectors, there appears to be no reason for a distinction with respect to the county tax assessor-collector; the duties, as described in the Property Tax Code, are essentially the same. The county tax assessor-collector therefore should not be considered an "officer" for the purposes of the nepotism laws, especially in the capacity as a nonvoting director. Analysis similar to that stated in JM-499 was also employed in the case of *Pena v. Rio Grande City CISD*, 616 S.W.2d 658, 659-660 (Tex.Civ.App. -- Eastland 1981, no writ), which found that a superintendent of schools was not an officer for purposes of the nepotism statutes.

A nonvoting TAC is not an officer for the purposes of the nepotism statutes because, as previously stated, the authority and control for hiring employees is vested by statute in the chief appraiser and, indirectly, in the voting directors of Kerr CAD. The nonvoting TAC is neither.

Perhaps more to the point, your office has previously considered the application of Tax Code §6.03(a) in the context of incompatibility. Your office correctly determined that a county tax assessor-collector would not be prohibited from serving as an appraisal district board member because §6.03(a) constituted a general law exception to the common law rule of incompatibility and thereby overrode it. Tex. Att'y Gen. Op. No. JM-1157 (1990) at 2-3. By analogy, it should also be noted that Tax Code §6.03(a), in statutorily providing for the TAC's automatic appointment to the board of directors of the Kerr CAD, also overrides the nepotism rule. It would seem only just that to give effect to the legislative intent of §6.03(a), the statute should also be construed to overcome any nepotism prohibition, particularly under the facts of this case.

Your opinion regarding these difficult issues is respectfully requested. It is the understanding of the Kerr CAD that the parties are planning to be married. For that reason, any assistance you might be able to provide on an expedited basis would be greatly appreciated.