4050 - Bill

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

March 23, 1990

The Honorable Paul E. Short, Jr.
Majority Leader
House of Representatives
Post Office Box 547
Chester, South Carolina 29706

Dear Representative Short:

By your letter of March 21, 1990, you have requested the opinion of this Office as to the constitutionality of a statute which requires that probate judges have a college education or have worked in the probate court office for a specified period of time. Section 14-23-1040 of the South Carolina Code of Laws (1989 Cum. Supp.) requires the following:

> No person is eligible to hold the office of judge of probate who is not at the time of his election a citizen of the United States and of this State, has not attained the age of twenty-one years upon his election, has not become a qualified elector of the county in which he is to be a judge, and has not received a four-year bachelor's degree from an accredited post-secondary institution or if he has received no degree he must have four years' experience as an employee in a probate judge's office in this State. 1/

1/ Act No. 678 of 1988, of which Section 14-23-1040 was a part, contains a "grandfather clause" for probate judges holding office on the effective date of the act. See Section 4 of the act.

Presumption of Constitutionality

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional. However, we do not identify a constitutional problem with this statute.

Discussion

Article V, Section 1 of the Constitution of the State of South Carolina vests the judicial power of the state in a unified judicial system, mentioning various courts by name but not including probate courts. Further, Article V, Section 12 authorizes the General Assembly to provide for the jurisdiction "in matters testamentary and of administration, [and] in matters appertaining to ...persons mentally incompetent... ." Thus, the probate court system was created by the General Assembly. The office of probate judge is not created by the terms of the State Constitution but is instead a creation of the General Assembly. As noted in the first paragraph, the General Assembly has imposed certain requirements for eligibility to hold the office of probate judge, the constitutionality of which have been questioned.

Article I, Section 5 of the State Constitution provides that "[a]ll elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office." This constitutional provision does not prohibit the General Assembly from imposing requirements on persons wishing to hold an office created by the General Assembly, however.

An argument that Article I, Section 5 would be contravened if the legislature were to add qualifications not contemplated by this provision was made in McLure v. McElroy, 211 S.C. 106, 44 S.E.2d 101 (1947), in the context of requiring that certain trustees of the Union Hospital District be physicians practicing within the District. The Supreme Court distinguished between offices created by the State Constitution and those created by legislative act, deciding that the requirements of Article I, Section 5 applied only to the former. As to the latter, the Court stated:

> The distinction between offices of constitutional origin and those created by statute as to their control by the Legislature has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the Legislature which can declare the manner of filling it, how, when, and by whom the incumbent shall be elected... . [I]t is held that; 'Constitutional provisions prescribing the qualifications of electors do not apply to any election for municipal offices, not provided for by the Constitution, but created by legislative enactment.'

Id., 211 S.C. at 117. The Court discussed much relevant material, including treatises by Throop and Mechem on public officers, as support for the foregoing. The Court concluded that

> all officers, constitutional and statutory, and whether elected or appointed, must be qualified electors, and the legislature may not add other conditions for eligibility to those specified in the constitution for election or appointment to constitutional offices, that is, those offices created by the constitution; but as to offices established only by legislative acts, the General Assembly may prescribe other and additional qualifications which are reasonable in their requirements.

Id., 211 S.C. at 120.

Based on the foregoing, it appears that the General Assembly may permissibly impose qualifications for the office of probate judge if such requirements be reasonable. Being a citizen of the United States and a qualified elector of the county in which one is to be a judge are requirements which would be imposed, by implication at least, on every office holder. See Section 7-5-120 of the Code and Article I, Section 5 of the Constitution. The remaining requirements of Section 14-23-1040 appear to be reasonable, in that the subject matter jurisdiction of a probate court is complex and extremely technical in many respects and substantial rights of a class of persons who, in many instances, cannot protect themselves, are affected by the decisions of a probate judge. Perhaps the General Assembly recognized these factors and wished to ensure the abilities of those who would be probate judges by requiring those interested in being probate judges to demonstrate their abilities to handle technical and complex matters such as these, by education or previous experience in the probate court.

For the foregoing reasons, it is the opinion of this Office that Section 14-23-1040 of the Code (1989 Cum. Supp., supra) would be free from constitutional infirmity.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions