

Founded in 1852
by Sidney Davy Miller

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May 25, 2001

VIA FACSIMILE AND OVERNIGHT MAIL

Confidential-Subject To Attorney-Client Privilege

Martha P. Fitzhugh, Esq.
Bay County Corporation Counsel
515 Center Avenue
Bay City, MI 48708

Re: County Apportionment

Dear Ms. Fitzhugh:

You have asked for our legal opinion on two questions relating to Bay County's implementation of the apportionment process provided for in MCL 46.401 et seq.

Questions Presented

1. Can the Deputy Treasurer and Deputy Clerk serve in place of the Treasurer and Clerk on the Bay County Apportionment Commission and perform the duties required of the statutorily required members? If time permits, or in a follow up opinion, please comment about substitutions for the Prosecutor or the Party Chairs if they are absent. Please refer to MCL 46.403.

In addressing this question, it is our understanding that the County Clerk is incapacitated by illness and therefore unable to serve on the Apportionment Commission. It is further our understanding that the County Treasurer has been unavailable due to a trip taken outside of the country.

2. What facilities are considered "state institutions" as that term is used in MCL 46.404(g)? The Bay County Law Enforcement Center houses a variety of inmates. Must they be convicted or sentenced to be excluded? Are they to be excluded in accordance with their home addresses or as part of the Law Enforcement County

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Commission District? In addition, state wards are housed in group homes located throughout the County. 185 state wards were identified in the Bay County census.

Short Answer

1. There are no published judicial decisions or Attorney General opinions addressing this issue, directly or indirectly, in the context of county apportionment. However, it is more likely than not that a reviewing court would conclude that the Deputy County Clerk and the Deputy County Treasurer are authorized to serve in place of the County Clerk and County Treasurer on the Apportionment Commission.

Within the time allotted to respond to these questions, we have not been able to address your questions regarding the County Prosecutor and Party Chairs.

2. Prisoners convicted of a crime should be excluded. However, prisoners who have not yet been convicted, and wards of the State (or for that matter, anyone who is mentally incompetent) should be included.

Analysis

1. Can the Deputy Treasurer and Deputy Clerk substitute for the Treasurer and Clerk on the Bay County Apportionment Commission?

Section 3 of the statute for the apportionment of county boards of commissioners, found at MCL 46.403, provides for the composition of the County Apportionment Commission; it states, in relevant part:

(1) The county apportionment commission shall consist of the county clerk, county treasurer, the prosecuting attorney, and the statutory county chairperson of each of the two political parties receiving the greatest number of votes cast for the office of Secretary of State in the last preceding general election.

The authority of the county clerk and the county treasurer to appoint deputies, and the scope of their authority, is generally described at Section 1 of the Appointment of Deputies Act, 1911 PA 74, found at MCL 45.41, which states:

In all counties of this state having a population of more than 50,000 where it is provided by law that the county treasurer,

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county clerk and register of deeds shall receive salaries in lieu of fees, each of said officers may appoint a deputy or deputies who may perform all the official acts which the officer making such appointment might legally do, and who shall be paid therefor from the general fund of the county, such salaries as the board of supervisors of the county shall determine. (emphasis added)

Within the time allotted to respond to these questions we have been able to conduct reasonably extensive research on this issue. We have found no judicial decisions or Attorney General Opinions that directly or indirectly address this issue in the context of the county appointment process. Therefore, the focus of our analysis has been to identify judicial decisions addressing similar situations.

The Michigan Court of Appeals in Stewart v Lanier, 16 Mich App 434; 168 NW2d 304 (1969), concluded that a deputy township clerk is entitled to serve in the place of the township clerk, with no limitations on his power to represent the clerk. The Stewart court, quoting an earlier Michigan Supreme Court decision in Kennedy v VanBuren County Drain Commissioner, 189 Mich 676, 155 NW 733 (1916), stated:

The office of deputy clerk is one authorized by the statute [citation omitted], and unless his powers are limited by the statute, he may perform an act which his principal may perform. [citations omitted]. It was doubtless well understood by the Legislature that the township clerk could not always be at his office to serve the public in his official capacity, and by reason thereof, he was authorized to appoint a deputy clerk to act in his stead in order to expedite public business, with no limitations on his powers to represent his principal. In view of this we must hold that the deputy clerk was qualified to sit as a member of the township board. (emphasis added) 16 Mich App at 437.

We have compared the statute authorizing the appointment of deputy township clerks, found at MCL 41.69, to the statute authorizing the appointment of deputy county clerks and treasurers, MCL 45.41. While there are undoubtedly some differences in the language, they are sufficiently similar such that we believe a reviewing court would find the analysis in the Stewart case highly persuasive authority.

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As I am sure you are aware, a township clerk actually serves as a member of the township board, in addition to performing his or her duties as clerk. Therefore, the township clerk is vested with legislative powers, which in some respects might be viewed as exceeding those of a county clerk. The Court of Appeals in Stewart, concluded that a deputy township clerk's powers included the legislative powers of the township clerk, stating:

Clearly under statute and under the Kennedy case, the deputy clerk is vested with legislative powers and may sit as a voting member of a township board in the absence of the township clerk. 16 Mich App at 437.

The fact that the Court of Appeals concluded that a deputy clerk could assume what are essentially legislative functions on behalf of the clerk, is significant in this situation. Generally speaking, public officials who hold legislative functions are accorded a broader range of discretion. The fact that a deputy could exercise this range of discretion is significant because apportionment commissioners are deemed to be essentially exercising a local legislative function. In re Apportionment of Allegan County Board of Supervisors - 1968., 13 Mich App 692, 695; 164 NW2d 665, 666 (1968); cf. O'Connor v Eckhardt, 23 Mich 150; 178 NW2d 150 (1970) [apportionment is an administrative function and should have the least possible interference from the judiciary.]

In analyzing this question, we considered other legal authority that would suggest that the Deputy Clerk and the Deputy Treasurer are not authorized to serve in place of the Clerk and Treasurer on the Apportionment Commission. The Michigan Supreme Court in the case Tower v Welker, 93 Mich 332, 53 NW 527 (1892), stated that, in general, a deputy city clerk (who like a county treasurer, does not have a legislative role) is entitled to exercise all ministerial duties which the clerk has a right to perform. An argument could be made that because county clerks do not inherently have legislative powers, it is not appropriate to expand the Deputy's powers to include substituting for the Clerk in exercising the statutorily prescribed legislative function of serving as a county apportionment commissioner.

Furthermore, we looked at numerous other state statutes that establish various boards and commissions. We found over 270 instances where state statutes specify that a "designee" may serve in place of the public official designated to serve on the particular board or commission. An argument could be made that, as a matter of statutory construction, since the county apportionment statute does not contain language

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specifically authorizing a designee or deputy to serve in place of the clerk or treasurer, only the named public official is eligible to serve.

We point out these competing arguments simply to highlight the fact that there is not a definite, clear-cut answer to the question you have asked. Nevertheless, we believe that it is more likely than not that a reviewing court would conclude the Deputy Clerk and Deputy Treasurer are allowed to serve in place of their principals on the County Apportionment. Therefore, we recommend that the Apportionment Commission allow the Deputy Clerk and Deputy Treasurer substitute for the Clerk and Treasurer, if the Clerk and Treasurer desire for them to do so.

2. What items are considered state institutions pursuant to MCL 46.404(g)?

This statute states, in relevant part:

Sec. 4. In apportioning the county into commissioner districts, the county apportionment commission shall be governed by the following guidelines in the stated order of importance:

* * * * *

(g) Residents of state institutions who cannot by law register in the county as electors shall be excluded from any consideration of representation.

Stated somewhat differently, we understand your question to be: who should be excluded as electors pursuant to MCL 46.44(g)? In this regard, reference must be made to State election law for an explanation of who cannot by law register as electors.

As you know, every U. S. citizen who is not less than 18 years of age and is a resident of the state for not less than 30 days is entitled to be registered as an elector in the township, city, or village in which he or she resides. MCL 168.492. Notably, however, the Michigan Constitution at Article 2, Section 2 provides that the legislature may exclude mentally incompetent persons and persons committed to a jail or penal institution from voting. Therefore, the question becomes, whether state lawmakers have promulgated laws prohibiting mentally incompetent and jailed persons from voting.

Our review of the state election law did not uncover any statutes prohibiting mentally incompetent persons from voting or registering to vote. Therefore, because all

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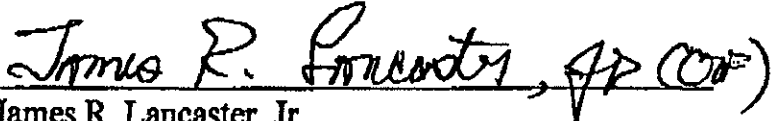
mentally incompetent persons may vote, they may not be excluded and as a consequence, should be included in the apportionment count. This is so even if the person has not actually changed his or her legal residency to the state institution. It appears that if the person could change residency if he or she desired, *see* 1979 OAG 5512, p 237, then the person should be counted as an elector at the location of the institution.

The same general rule applies to jailed persons not convicted and awaiting trial. They retain their right to vote and to register to vote. *Arlee v Lucas*, 55 Mich App 340 (1974). MCL 168.758(1)(f) defines an "absent voter" as a person who cannot attend the polls on election day because of being confined in jail awaiting arraignment or trial. Therefore, any inmate detained and awaiting arraignment or trial is eligible to vote or register to vote. However, for residency purposes, we believe it is appropriate to use the place where the detainee is registered to vote as the detainee's legal residence. Arguably, in the situation in which an inmate will be detained for more than six months and is from a county other than Bay, the inmate should be considered an elector in the location where the inmate is detained. However, because most inmates are either convicted or released within six months, this situation will seldom present itself.

I hope that this letter adequately answers the questions you have posed. If you need any further assistance, please do not hesitate to contact us.

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By:


James R. Lancaster, Jr.

JRL/vjm

cc: Michael J. Hodge, Esq.
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