



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 5, 2021

The Honorable Gary D. Trammel
Stephens County Attorney
100 East Walker
Breckenridge, Texas 76424

Opinion No. KP-0360

Re: Application of Government Code chapter 573, regarding nepotism, to the candidacy for sheriff of a person who is a brother of the current county judge, and associated questions regarding the county judge's role as a member of the county commissioners court with respect to budget and election matters involving the sheriff (RQ-0378-KP)

Dear Mr. Trammel:

On behalf of a citizen, you ask numerous questions related to a situation in your county where the county judge's brother ran for the office of sheriff.¹ As background, you tell us the sitting county judge won the election in 2018 and assumed office on January 1, 2019. *See* Request Letter at 1. You also tell us that the judge's biological brother, previously working as the sheriff's chief deputy, filed to run for the office of sheriff in the November 2020 election.² *See id.* (stating that the incumbent sheriff chose not to run for reelection).

The primary question in your letter is whether the chief deputy can "run for sheriff if his biological brother is the current sitting county judge[.]" *Id.* at 1. The subsequent questions concern aspects of county government where the office of county judge and the office of sheriff may intersect, such as the preparation of the county budget and the election. *See id.* at 1–2. However, some of the questions in your letter conflate different provisions in the nepotism and conflict-of-interest statutes. *See id.* We consider the questions that implicate chapter 573 of the Government Code prohibiting nepotism first, and then we consider the questions that implicate chapter 171 of the Local Government Code relating to conflicts of interest.

¹*See* Letter from the Honorable Gary D. Trammel, Stephens Cnty. Att'y, to the Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (rec'd Sept. 9, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0378KP.pdf> ("Request Letter").

²We understand the county judge's brother, Kevin Roach, has won the office of sheriff. *See* <http://www.co.stephens.tx.us/upload/page/2592/docs/Total%20Unofficial%20Election%20Results%20November%202020.pdf>.

Pertinent to the first question, Government Code section 573.041 provides that

[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 a degree described by Section 573.002;³ or

....

TEX. GOV'T CODE § 573.041(1). A county judge is a public official. TEX. CONST. art. V, § 15 (establishing office of county judge); TEX. GOV'T CODE § 573.001(3)(A) (defining a “public official” for purposes of nepotism to include a county official). Brothers are related to each other in the third degree by consanguinity. *See* TEX. GOV'T CODE §§ 573.022(a)(2) (providing that individuals are related by consanguinity if they share a common ancestor), 573.023(c)(2) (providing that brothers are within the third degree of consanguinity), 573.002 (applying chapter to relationships within the third degree of consanguinity). Thus, a county judge may not appoint or confirm the appointment of his brother to a position paid with public funds. *Id.* § 573.041(1). If the public official is prohibited from hiring a relative by section 573.041, so too is any member of the multi-member body on which the public official sits. *See id.* § 573.041(2). But subsection 573.041 applies only to a public official with hiring authority over the position in question. *See* Tex. Att’y Gen. Op. Nos. KP-0045 (2015) at 1; DM-0002 (1991) at 1; *see also Pena v. Rio Grande City Consol. Indep. Sch. Dist.*, 616 S.W.2d 658, 659–60 (Tex. App.—Eastland 1981, no writ) (describing that hiring authority as the “exclusive right and sole legal authority to appoint or employ” personnel).

While the office of sheriff is a “position” under chapter 573, it is an independently elected office, not subject to the appointment or confirmation by the county judge, or even by the county commissioners court.⁴ *See* TEX. GOV'T CODE § 573.001(2) (defining “position” to include an office); TEX. CONST. art. V, § 23 (providing for the election of a sheriff in each county). Because the county judge has no authority to appoint or confirm the appointment of the sheriff to office, section 573.041 does not apply. *See* Tex. Att’y Gen. Op. No. KP-0045 (2015) at 1. And because section 573.041 does not apply to the county judge, it also does not apply to the other members of the commissioners court. Therefore section 573.041 does not prohibit the county judge’s brother from running for sheriff.

³Section 573.002 provides that the chapter applies to “relationships within the third degree of consanguinity or within the second degree by affinity.” TEX. GOV'T CODE § 573.002.

⁴We recognize that Local Government Code section 87.041 authorizes a county commissioners court to fill a vacancy in certain offices including that of the sheriff. TEX. LOC. GOV'T CODE § 87.041. However, that provision is not applicable to the circumstances you describe.

Your letter also asks about section 573.042. *See* Request Letter at 2. Section 573.042 prohibits candidates for public office from seeking to influence the employment status of relatives, including their compensation. *See id.*; *see also* TEX. GOV'T CODE § 573.042. Here, the county judge is not a candidate and the activities of the chief deputy as the candidate are not at issue, so section 573.042 does not apply. The list of prohibited activities in section 573.042 is broader than those of section 573.041. Section 573.042 proscribes the “appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal” of another,⁵ whereas section 573.041 proscribes only the appointment or confirmation of an appointment, or a vote to confirm or appoint. *Compare* TEX. GOV'T CODE § 573.042, *with id.* § 573.041; *see supra* note 5. Yet, the reference to “change in compensation” in section 573.042 appears to prompt many of your letter’s questions. In giving effect to the difference in language between the two sections, section 573.041 applies only if the public official appoints, confirms the appointment of, or votes to appoint or confirm a prohibited relative. *Id.* § 573.041; *see also* *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 884–85 (Tex. 2000) (relying on the principle of statutory construction that the Legislature knows how to enact law effectuating its intent).

This clarification is important as we consider section 573.041’s impact on the county judge’s role in the county budgeting process. *See* Request Letter at 1–2. Again, section 573.041 could apply only if the judge appoints, confirms, or votes to appoint or confirm the candidate as sheriff. *See id.* (asking questions about the county judge’s role in the county budget process); *see also* TEX. GOV'T CODE § 573.041. He does not. While the county judge in a county with the population of Stephens County⁶ has a role in proposing the county budget, the commissioners court is responsible for adopting the county budget. *See* TEX. LOC. GOV'T CODE §§ 111.006, .007, .0075, .008. Thus, the adoption of the county budget is an act of the commissioners court, not of the county judge. *See id.* § 111.008; *see also* *Canales v. Laughlin*, 214 S.W.2d 451, 455 (Tex. 1948) (recognizing that individual members of the commissioners court have no authority to bind the county by their action).

Moreover, chapter 152 of the Local Government Code expressly provides that the commissioners court sets the salaries for county officers such as the sheriff. *See* TEX. LOC. GOV'T CODE § 152.011; *see also id.* § 152.013 (setting out procedure by which commissioners court sets amounts for elected officers). Prior opinions of this office conclude that a governmental body lacking authority to appoint a position does not violate the nepotism prohibition by setting the salary for the position. *See* Tex. Att’y Gen. Op. Nos. JM-0254 (1984) at 1–2; H-1210 (1978) at 2 (determining that commissioners court’s setting of a salary does not constitute an appointment or confirmation of an appointment); *see also* Tex. Att’y Gen. LO-94-055, at 4. As setting the salary does not constitute an appointment or confirmation of the position under section 573.041, the county judge and the commissioners court may perform their respective duties related to the county’s budget without violating the nepotism statute.

⁵This language is identical to the language in section 573.062(b) regarding the continuous employment exception. *See* TEX. GOV'T CODE § 573.062(b). That exception is also not applicable here.

⁶The population of Stephens County is 9,366 as of 2019. *See* <https://www.census.gov/quickfacts/stephenscountytexas>.

Next, we consider the questions about the potential impact of section 573.041 on the county judge's performance of his election-related tasks. *See* Request Letter at 1 (inquiring about the county judge's duties with respect to the primaries and the general election). Your letter questions the county judge's ability, along with that of the commissioners court, to "canvass the votes and confirm the election." *Id.* at 1–2; *see also* TEX. ELEC. CODE § 67.002 (providing for the commissioners court's canvass of election precinct returns of elections ordered by the county authority). Given the language in your letter about these parties' ability to canvass the election and "confirm the election," we understand these questions to suggest that an election canvass conducted by the county judge and the commissioners court as the county's canvassing body constitutes confirming the appointment of or voting for the appointment of or confirmation of the appointment prohibited by section 573.041. Request Letter at 2; *see* TEX. GOV'T CODE § 573.041. An election canvass is not a confirmation of an election. *See Dean v. State*, 30 S.W. 1047, 1048 (Tex. 1895) ("The action of the canvassing board is a part of the election machinery, and is practically necessary But it is not part of the election itself. The election is complete without it"); *Shelor v. Comm'rs Ct. of Harris Cnty.*, 304 S.W.2d 153, 155 (Tex. App.—Fort Worth 1957, no writ) (same). Instead, it is a ministerial, procedural task to ascertain the election's outcome. *See Grant v. Ammerman*, 437 S.W.2d 547, 549 (Tex. 1969). The title to an elected office is determined by the election, not the canvass. *Dean*, 30 S.W. at 1048 ("The title to an elective office depends on the vote cast at the election, and not upon the action of the canvassing board."); *see also Frankenstein v. Rushmore & Gowdy*, 217 S.W. 189, 191 (Tex. App.—San Antonio 1919, writ ref'd) ("The election was complete without the canvass of the votes"). The judge and the commissioners court do not, by canvassing the election, act to "appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment" of the chief deputy within the scope the nepotism statute. Accordingly, the county judge and the county commissioners court may canvass the votes even though the county judge and candidate for sheriff are brothers.

The additional election-related questions concern the potential impact of section 573.041 on the judge's role on the county election board.⁷ *See* Request Letter at 2; *see also* TEX. ELEC. CODE § 51.002(a) (providing for a county election board in each county). Under the Election Code, the county election board has a limited role in the election. It may recommend the consolidation of election precincts. *See* TEX. ELEC. CODE § 42.008. And it appoints members of the early voting ballot board and its presiding officer, and the members of the signature verification committee. *See id.* §§ 87.002, .027. These statutorily imposed duties give the county election board no role in determining the outcome of the election, and thus the county election board does not appoint or confirm the appointment of a candidate within the scope of the nepotism statute. Thus, section 573.041 is no impediment to the county judge serving in this capacity in an election in which his brother is a candidate for county office.

Having considered all the questions that implicate the nepotism statute, we turn to the remaining questions asking whether the judge may abstain from voting on the sheriff's salary and

⁷Your letter also asks about the other county commissioners' ability to serve on the county election board but they do not so serve, so we consider only the judge's service. *See* Request Letter at 2; *see also* TEX. ELEC. CODE § 51.002(b) (providing that the county election board in the general election for county officers "consists of the county judge, county clerk, voter registrar, sheriff, and county chair of each political party").

the sheriff's office's budget. *See* Request Letter at 1. Chapter 573 does not provide for curing any prohibited nepotism problem by abstention. *See generally* TEX. GOV'T CODE §§ 573.001–.084. Local Government Code chapter 171 provides for abstentions in certain circumstances. *See* TEX. LOC. GOV'T CODE §§ 171.001–.010. We therefore consider these questions about abstention under chapter 171.

Chapter 171 of the Local Government Code governs conflicts of interest and prohibits a local public official from voting on any matter involving a property or business entity in which he or she has a substantial interest. *See id.* § 171.004; *see also id.* § 171.001(1) (defining “local public official” to include a member of the governing body). Chapter 171 defines a substantial interest by the amount of ownership in or funds received from a business entity or by ownership of interest in real property. *Id.* § 171.002(a), (b); *see also id.* § 171.002(c) (including the substantial interest of a relative within the first degree of consanguinity or affinity). Section 171.004 requires a public official to file an affidavit stating the extent of the interest and then to abstain from further participating in the matter if certain circumstances are present. *Id.* § 171.004(a)(1)–(2). However, a relationship in the third degree of consanguinity is not a familial substantial interest under chapter 171. *See id.* § 171.002(c) (providing that “[a] local public official is considered to have a substantial interest under this section if a person related to the official in the first degree by consanguinity or affinity . . . has a substantial interest”). Thus, chapter 171 does not apply and does not require the county judge to abstain from voting on the sheriff's salary or the sheriff's office's budget. While chapter 171 does not require the county judge here to abstain, he could choose to do so or otherwise recuse himself.

In sum, neither the nepotism statute in chapter 573 of the Government Code nor the conflict-of-interest statute in chapter 171 of the Local Government Code prohibit the county judge's brother from running for sheriff in the circumstances you describe.

S U M M A R Y

Neither the nepotism statute in chapter 573 of the Government Code nor the conflict-of-interest statute in chapter 171 of the Local Government Code prohibit the county judge's brother from running for sheriff in the described circumstances.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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