

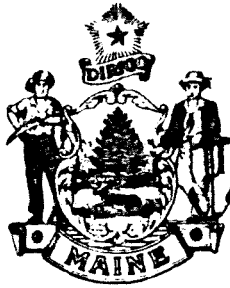
# MAINE STATE LEGISLATURE

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AUGUSTA, MAINE 04333

October 3, 1979

Honorable Dana C. Devoe  
Senate Chambers  
State House  
Augusta, Maine 04333

Dear Senator Devoe:

We take this opportunity to respond to your opinion request dated August 15, 1979 regarding various contingencies which may occur as a result of the resignation of the Penobscot County Register of Probate.

Your first question is whether the Deputy Register of Probate succeeds the Register of Probate when the latter resigns. We answer this question in the affirmative. As you know, the election and appointment of Registers of Probate are controlled by constitutional provision. Me. Const., art. VI, § 6. The general duties of the office, however, are controlled by statute. 18 M.R.S.A. § 251, et seq. 18 M.R.S.A. § 256 provides specifically that "deputy registers shall act as register in the event of a vacancy or absence of the register, until the register resumes his duties or another is qualified as register." In the absence of a constitutional provision regarding this matter, the statutory provision would control, and the deputy register of probate would succeed the register upon her resignation.

Your second question is whether art. VI, § 6 of the Maine Constitution imposes a time limit on the Governor for appointing a new register. Since we have determined from the constitutional language that the Governor need not appoint a new register, we answer this question in the negative. The relevant constitutional provision reads as follows:

Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in the manner aforesaid at the November election, next after their occurrence; and in

the meantime; [sic] the Governor may fill said vacancies by appointment, and the person so appointed shall hold their offices until the first day of January next after the election aforesaid.

Me. Const., art. VI, § 6  
(emphasis added)

The use of the word "may" in defining an official power in most cases indicates that the exercise of that power is discretionary with the exerciser. E.g., Boynton v. Adams, 331 A.2d 370 (Me. 1975). In other cases, it has been held to be equivalent to "shall," establishing a mandatory duty. E.g., Anthony A. Bianco v. Hess, 339 P.2d 1038 (1959). This rule applies where there is a definite public interest in the doing of an act by a public officer and rights of third parties are at issue. See Collins v. State, 161 Me. 445 (1965). Here, no specific individual rights appear to be implicated by the Governor's exercise vel non of the power to fill the vacancy in the office of Register of Probate. Further, there is no possibility that the office will be unable to function if the Governor fails to make an appointment because 18 M.R.S.A. § 256 specifically provides that the Deputy Register will take over the duties of the Register in the event of vacancy in the office. Under these circumstances, and in the absence of any legislative history indicating otherwise, it is our view that the Governor's power to appoint an interim Register of Probate is not mandatory,<sup>1/</sup> and there can therefore be no time limit imposed upon him to make an appointment.

Your third question appears to seek an opinion on the terms of the successor who may be appointed to take the Register's place and of the person who is elected to take the successor's place. If the Governor appoints a successor to the Register, that successor, by the specific terms of § 6, will serve until the first day of January next after the election at which an elected successor is chosen. Based on the date of October 19, 1979 for the resignation of your present Register, should Governor Brennan appoint a new Register, that appointive Register would serve until January 1, 1981. The new Register elected at the 1980 election, pursuant to § 6, would then serve a full four-year term, starting on January 1, 1981, and expiring January 1, 1985. This is the interpretation which was arrived at by the Justices of the Maine Supreme Judicial Court when they addressed the same question in 1872. Opinion of the Justices, 61 Me. 601 (1872).

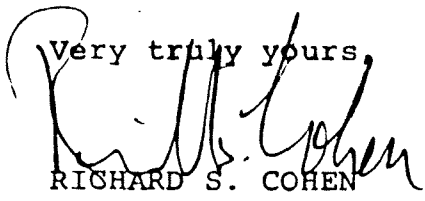
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<sup>1/</sup> The juxtaposition within § 6 itself of the words "shall" and "may" to distinguish the election replacement procedure and the interim appointive replacement procedure offers added evidence that the latter is discretionary while the former is mandatory.

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I hope that this information answers the questions posed in your letter. If you have any further questions, please feel free to contact us.

Very truly yours,

  
RICHARD S. COHEN  
Attorney General

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