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October 17, 1990

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. Boomer:

You have requested an opinion from this office whether a person could serve as a county commissioner while his daughter was employed as a deputy clerk of the district court. The daughter is currently employed by Power County and her father is seeking a seat on the Power County Board of Commissioners. It is the conclusion of this office that since the daughter had established employment with the county prior to her father's run for office, and since the father, if elected, will not directly appoint, hire or supervise his daughter, the continued employment by the daughter would not violate Idaho's anti-nepotism statute, Idaho Code § 18-1359(e).

Idaho's long-standing nepotism statutes, Idaho Code §§ 59-701 and 59-702, were repealed during the last session of the legislature. The provisions relating to nepotism in public office are now found in Idaho Code § 18-1359, which states in part:

Using public position for personal gain.--

- (1) No public servant shall: . . .
- (e) Appoint or vote for the appointment of any person related to him by blood or marriage within the second degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation or

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such appointee is to be paid out of public funds or fees of office, or appoint or furnish employment to any person whose salary, wages, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the second degree to any other public servant when such appointment is made on the agreement or promise of such other public servant or any other public servant to appoint or furnish employment to anyone so related to the public servant making or voting for such appointment. Any public servant who pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment of any public fund of the salary, wages, pay, or compensation of any such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in this chapter.

This new section combines the provisions of former §§ 59-701 and 59-702. Idaho Code § 18-1359(e) does not substantively differ from these repealed statutes.

Parenthetically, we note the clerk of the district court is an elective office, art. 5, § 16, Idaho Constitution; Idaho Code § 34-619. The clerk has the authority, subject to limited commissioner control, to hire deputy clerks. Idaho Code §§ 31-2003, 31-3107. The commissioners of the county have no authority in the actual selection or appointment of individual deputies. Crooks v. Maynard, 112 Idaho 312 (1987); Dukes v Board of County Commissioners, 17 Idaho 736 (1910). If the clerk makes a showing that assistance is necessary, the county commissioners must authorize the appointment. Dukes v. Board of County Commissioners, *supra*. For the purposes of Idaho Code § 18-1359(e), the board of county commissioners has no role in the appointment of deputy clerks. Thus, having a father serving as county commissioner and his daughter employed as a deputy clerk of the court will not violate the "appointment" aspect of § 18-1359(e).

The measure of control exercised by the board of county commissioners in setting wages or salaries of county employees, Idaho Code § 31-3107, would ordinarily prohibit the hiring of a deputy county clerk who is related within the second degree to a sitting county commissioner. Policy considerations behind the anti-nepotism statutes in promoting efficiency in public employment and discouraging favoritism would be compromised by such a situation. However, this rule should not apply in instances where the subordinate appointed employee was hired

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prior to the election of a relative within the prohibited degree.

The critical factor in this particular instance is that the daughter was employed by Power County long before the question of nepotism arose. The daughter, as a public employee, has a protected property interest in her employment. Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986); Allen v. Lewis-Clark State College, 105 Idaho 447, 670 P.2d 854 (1983). In addition, the father as a county commissioner has no supervisory control over the clerk's deputies. The Idaho case law dealing with nepotism is scant. The only appellate case comprehensively construing Idaho's anti-nepotism statutes is Barton v. Alexander, 27 Idaho 286, 148 P.2d 471 (1915). For the purposes of this factual situation, Barton v. Alexander provides little guidance. Furthermore, concern over the constitutionally protected "property interest" in public employment was not an issue in 1915 when the Idaho Supreme Court decided Barton v. Alexander.

Other jurisdictions have had the opportunity to address the issue in more recent times. In Backman v. Bateman, 263 P.2d 561 (1953), the Utah Supreme Court endorsed the conclusions of the Idaho landmark decision in Barton v. Alexander. Nonetheless, the Utah court struck down an anti-nepotism statute which prohibited continued employment of persons when a relative within the prohibited degree was subsequently elected to an office which held some measure of control over the existing related employee. (The reach of the Utah statute would have directly encompassed the present situation and would have required the resignation of the commissioner's daughter.) In Backman, a high school principal was fired on advice from the attorney general and the state superintendent of public instruction after his brother became a member of the district's school board. In declaring this statute unconstitutional, the Utah Supreme Court stated:

We agree that statutes which prohibit public officials from choosing and hiring their relatives, serve the salutary purpose of preventing selection of employees on the basis of favoritism to relatives rather than on merit. Such laws tend to make for better efficiency in public office, and are therefore a valid exercise of the police power. The authorities referred to, however, are concerned with anti-nepotism laws prohibiting the hiring of relatives in the original instance. Thorough research by ourselves and capable counsel has failed to discover any nepotism law which goes as far as this new Utah statute in that it proposes to interrupt and destroy the employment of persons who had been lawfully hired and had continued to work under the identical conditions for years. This presents a greatly different problem.

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263 P.2d at 564. (Emphasis added.) The court further stated:

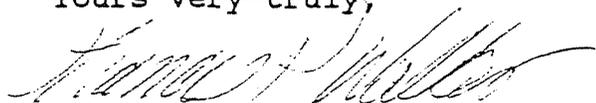
As compared with the relatively negligible harm which might come from the sole fact of relationship as above discussed, far-reaching and drastic are the effects of this statute upon the lives and careers of plaintiffs and other capable and faithful public employees who have given many years to a particular job. Persons who had obtained employment on merit in the first place, and who had virtually given their working lives to making a career of such pursuit, simply by continuing to work under the same conditions which had existed for years, following what was theretofore a career of honorable service, are by this statute declared to be guilty of crime on July 1st; their plans are upset and the economic basis of their lives, upon which all its other aspects--social, religious and family--must devolve, is destroyed because of a circumstance arising through no fault of theirs and wholly beyond their control, and bearing little or no relationship to their capacity to render efficient service.

Id. at 564-5. See also New Mexico State Board of Education v. Board of Education of Alamogordo Public School District, 624 P.2d 530 (N.M. 1981); State v. Fletchall, 412 S.W.2d 423 (Mo. 1967); Hinek v. Bowman Public School District No. 1, 232 N.W.2d 72 (N.D. 1975).

The conclusion reached by the Utah Supreme Court is sound. In light of the county employee's establishment of public employment in her own right and the employee's interest in continued public employment, it is difficult to argue that the harm potentially addressed by the nepotism statute will outweigh the actual harm visited upon the daughter if she is denied continued employment.

This opinion is limited to situations where the issue of nepotism arises subsequent to the establishment of employment by a person to an appointed, subordinate public office. This opinion is also limited to situations where the newly elected official does not exercise direct supervisory control over the established employee. In such situations both the appointment and fiscal aspects of the circumstances would have to be evaluated.

Yours very truly,



FRANCIS P. WALKER
Deputy Attorney General