

Governor has many options for appeals seat

Perdue can choose Blackburn's replacement or wait for election in November.

A day after Georgia Court of Appeals Presiding Judge G. Alan Blackburn announced his intention to retire on June 30, the three candidates who had announced their intention to seek his seat in November are circumspect as they wait to see whether Gov. Sonny Perdue will move to appoint a successor or let the matter be decided by the voters.

"I've worked in the governor's office before," said Enotah Circuit District Attorney N. Stanley Gunter, who served as an assistant executive counsel under Gov. Joe Frank Harris. "I know the governor has a lot of factors to consider, and he needs to do what he feels is best."

While Gunter would prefer to run for the seat, "the governor is certainly within his rights to make an appointment," he said. "If he does, I just hope he selects someone who's fair-minded and respects the rule of law."

"Given how much this impacts me personally, I don't think it's appropriate for me to comment on what the governor should do," said Troutman Sanders associate S. Leighton Moore III, whose reticence closely reflected that of the third potential contender, Fulton County Superior Court Judge Melvin K. Westmoreland.

"I don't think I'm really in a position to comment," said Westmoreland.

On Monday, the governor's executive counsel, Nels S. D. Peterson, said that under the Georgia Constitution, the governor has the authority to fill the vacancy rather than wait for an election. On Tuesday, Perdue's press secretary Bert Brantley said that no decision has been made as to whether the governor would fill the slot on the court—or even when he would tackle the issue.

"None of those decisions have been made," said Brantley, "and I don't expect a quick decision on such an important position."

Atlanta attorney Marc B. Hershovitz, whose practice includes representing politicians in election issues, said he hoped the governor would allow the election to go forward.

"Since everyone has long expected that Judge Blackburn would not run for re-election and were making plans accordingly," said Hershovitz, "I would hope that Gov. Perdue would exercise restraint and not deprive the citizens of Georgia of their right to choose Judge Blackburn's successor."

In his seven years in office, Perdue has had the opportunity to pick only two members of the state appeals courts—Justices Harold D. Melton and David E. Nahmias of the state Supreme Court. He has picked no

members of the Court of Appeals.

Blackburn last year announced his intention to resign sometime before the end of 2010, but he resisted revealing any date for his departure until Monday. His colleague, Presiding Judge Edward H. Johnson, has also announced that he will leave the court at year's end, and three other candidates are seeking that seat.

Of the three candidates for Blackburn's seat, two have already begun raising money: Gunter reported raising more than \$30,000 through March 31, and Moore collected almost \$10,000 for the same period.

Westmoreland has not solicited any donations yet.

Tom Plank, staff attorney with the State Ethics Commission, said that if Perdue appoints a new judge, the three candidates should be able to shift to the race for Johnson's seat and spend their contributions on that contest.

"Generally, the rules are geared toward a candidate running for the same office—in this case, a seat on the Court of Appeals—so I think they could keep it," said Plank.

Elections law specialist Douglas Chalmers Jr. of FSB FisherBroyles noted the importance of the timing of Blackburn's resignation as it relates to Perdue's role in picking a replacement.

The state Constitution states that judges appointed by the governor "shall serve until a successor is duly selected and qualified and until January 1 of the year following the next general election which is more than six months after such person's appointment."

That section means that if Perdue taps a successor to Blackburn on the first day the seat is open, July 1, the appointee would serve until at least Jan. 1, 2013, with this year's election canceled.

Chalmers, who was the chief lawyer in John McCain's Georgia campaign, noted that the state Constitution not only grants Perdue the right to appoint Blackburn's successor, but it also may require such a move. He cautioned that he had not reviewed enough case law on the matter to be certain.

Chalmers pointed to the Georgia Supreme Court's 2004 decision in *Perdue v. Palmer*, 278 Ga. 217, 600 S.E.2d, which involved a challenge to the governor's announced intention to fill a state court vacancy after candidates had already qualified to run for the seat.

The court noted that Article VII of the Georgia Constitution requires that judicial vacancies "shall be filled by appointment of the Governor except as otherwise provided by law in the magistrate, probate, and juvenile courts."

Another article says that, "[w]hen any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law"

"The governor clearly has the right to fill a vacancy on the bench," said Chalmers. "But I'm not entirely sure he has an obligation to do so."

Another issue is where Perdue might seek a candidate. Perdue has previously called on his Judicial Nominating Commission process, a panel of attorneys who vet applicants for open judgeships then provide the governor with a short list of likely candidates from which he makes his selection.

But, given that Perdue picked Nahmias for the Supreme Court from a short list of nine names provided by the JNC, Perdue has in hand a collection of eight other pre-vetted names.

Perdue's former executive legal counsel, **Joshua B. Belinfante**, said the governor's "options legally are pretty broad."

"He could call in the JNC. He could not call in the JNC. He could go completely on his own and do something else. He could go with one of the candidates that he interviewed on the Supreme Court short list," Belinfante said. "The only thing the law requires is that the governor make an appointment."

Belinfante said a possible clue to Perdue's thinking in how he picks appellate court judges might be found in comments he made on appointing Nahmias to the state Supreme Court. Perdue said he chose Nahmias because of his "intellectual curiosity" and because he "exuded integrity."

One of the individuals on that list, Cobb County Superior Court Judge Mary E. Staley, said she hadn't even considered seeking the appellate court position.

"I haven't thought about it," said Staley. "I'd have to take a look at it. ... I think my first reaction is that Judge Blackburn has been a great asset to the state and news of his retirement should be focused on him. People ought to be talking about what an excellent job he did for the state, so I think this is premature."

Staley described Blackburn as a friend, with whom she leads annual tours of old Marietta.

The other members of the short list for last year's Supreme Court opening were Alcovy Circuit Superior Court Judge Samuel D. Ozburn, Gwinnett County Superior Court Judge William M. Ray II, Fulton County Superior Court Judge Craig L. Schwall Sr., Henry County State Court Judge Benjamin W. Studdard III, Sutherland partner Rocco E. Testani, Atlanta solo practitioner James P. Kelly III and Macon appellate lawyer Stephen Louis A. Dillard. The others either could not be reached or declined to comment on the Appeals Court opening.

Court of Appeals Chief Judge M. Yvette Miller said she is willing to go along with whatever Perdue decides, but that whoever comes to the court, by whatever route, should be ready to work.

"This is so important; it's a very busy court up here," said Miller, who described Blackburn as a "pillar" of the court, both as presiding judge and when he served as chief judge.

"Judge Blackburn has done a wonderful job," said Miller. He is "collegial, willing to work." Both he and Johnson will be sorely missed, she said.

"I anticipate the governor will appoint someone who can hit the ground running; someone who is scholarly, but not averse to getting to work."

If the seat is decided by an election, "then may the best man or woman win," said Miller. "In the interim, I have to basically be concerned about that caseload. That's a vacuum I have to fill. But whatever the case, we will continue to move. I'm going to make some adjustments to get the work done and see that it's done impeccably."