

PROBATE COURTS: When stenographic services may be  
STENOGRAPHIC SERVICES: provided; same person may act as  
clerk in probate court and stenog-  
rapher if services as clerk are  
paid for by probate judge himself.

February 19, 1945



Honorable Forrest Smith,  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for  
an opinion upon the following question:

Can a probate judge employ the same per-  
son as clerk of his court and as stenog-  
rapher in his office, and pay said person  
for her duties as clerk out of his own  
funds and cause such person to be paid  
for her duties as stenographer by the  
county?

Under Section 2440, R. S. Mo. 1939, a probate judge  
is required to act as his own clerk unless he elects to  
appoint a clerk and pay such clerk himself. Said section  
reads, in part, as follows:

"The judge of probate is required to act  
ex officio as his own clerk, and give  
bond in like amount, with like conditions  
and penalties, to be approved by the  
judges of the county court, filed and re-  
corded, the same as is required of clerks  
filling said office by appointment: Pro-  
vided, that any judge of probate may, by  
an entry of record in said court, appoint  
a separate clerk, who shall be paid by  
said judge and shall hold his office at  
the pleasure of the judge. \* \* \* "

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There is no statute authorizing a probate court to appoint or employ a stenographer, nor is any specific provision made by statute for the employment of a stenographer for a probate court by anyone. If any authority exists for the employment of a stenographer for the probate court, such authority must be found in the general or implied powers granted to the county court.

Article VI, Section 36, of the Constitution of Missouri provides as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. \* \* \*"

In State ex rel. v. McElroy, 309 Mo. 595, 274 S. W. 749, 751, the Supreme Court, in discussing the foregoing constitutional provision, said:

" \* \* \* Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives; i. e., that it shall transact all county business. \* \* \*"

In said case the court also quoted with approval the following citations of authority:

"Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercises the corporate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs. Within the

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scope of its powers, it is supreme, and its acts are the acts of the county. While acts outside their statutory powers are without validity, yet, within the limits of the jurisdiction conferred on them by law, county boards have a wide, or at least a reasonable, discretion, and courts will not interfere with such boards in the lawful exercise of such jurisdiction, on the sole ground that their actions are characterized by lack of wisdom or sound discretion; it being permissible for equity to interfere only in cases of fraud or a clear abuse of discretion. \* \* \*

\* \* \* \* \*

"In defining the phrase "county affairs" the court said in *Hankins v. Mayor*, 64 N. Y. 22: "County affairs are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers.""

In the case of *Rinehart v. Howell County*, 348 Mo. 421, 153 S. W. 2d 381, the court held that a prosecuting attorney was entitled to be reimbursed for the reasonable and actual expenditures he had made for stenographic services where it was shown that such expenditures were for indispensable expenses of his office. In that case the court said:

"So far as presented for review, the record, viewed in the light of the judgment for respondent, is to be considered as establishing that the expenditures for which respondent asked reimbursement were for indispensable outlays for stenographic services incurred in the discharge of his official duties. Appellant offered no evidence and its brief does not question the probative value of respondent's testimony tending to establish said fact. \* \* \*

The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in *Ewing v. Vernon County*, 216 Mo. 681, 695, 116 S. W. 518, 522(b)."

In discussing the case of *Ewing v. Vernon County*, cited in the above quotation, the court said:

"That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'"

In the *Rinehart* case the court also pointed out that in certain counties the Legislature had specifically provided that stenographic services should be furnished a prosecuting attorney, and the court reasoned that provisions for stenographic services to county officials in those counties represented "an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public." The court went on to say (153 S. W. (2d) 1. c. 383):

"Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. \* \* \* "

The Rinehart case is authority, we think, for the conclusion that if a county court determines that stenographic services for a county officer are necessary for the proper conduct of the duties of such officer, such services can be paid for by the county court out of the county revenues, and further that if stenographic services are in fact indispensable to the proper functioning of a county office, and the county court refuses to provide same, and the officer is compelled to provide them himself, then such officer can recover from the county his reasonable and actual expenditures for such services. Whether stenographic services are indispensable to any county officer is a question of fact to be determined in the first instance by the county court, and if that body acts arbitrarily in such determination, then by a court of law in a suit by the officer for recovery of his expenditures for such services.

Your request presents another question, and that is whether a probate judge can appoint the same person as clerk and stenographer and pay such person out of his own money for such services as she renders as clerk, and have her paid out of county funds for such services as she renders as stenographer.

As pointed out above, the probate judge is required to pay his clerk himself. If, by the arrangement suggested in

your request, a probate judge can get his clerk paid out of the county funds, then the arrangement would be illegal because it would result in increasing the compensation of the probate judge. (See Article XIV, Section 8, Constitution of Missouri.)

The Supreme Court, in the Rinehart case, was careful to point out that the allowance to an officer for stenographic services was reimbursement for outlays by the officer for indispensable expenses of his office, and would not, therefore, amount to an increase in the officer's income. If he is reimbursed for necessary outlays, he is merely made whole and his income has not been increased.

From all of the above, we conclude that stenographic services for a probate judge may, under proper circumstances, be legitimate charges against a county, but that the compensation of a probate clerk is not a legitimate charge against the county, but is a charge against the probate judge personally. If one person performs both the service of a probate clerk and a stenographer in the office of the probate court, we see no reason why the respective services could not be paid for by the county and the probate judge proportionately, that is, in amounts for which each is respectively liable. The amount for which the county would be liable will be a question of fact to be determined by the county court. If the officer concludes that the county court has acted arbitrarily in its determination, and that he is obliged to have stenographic services in order to properly carry on his office, and he does in fact provide such services, then he may bring suit against the county to recover for his necessary expenditures in that regard, but the duty would be upon him in such an action to prove that the stenographic services were indispensable to the proper conduct of his office.

We might suggest that the arrangement mentioned in your request may lead to complications and disputes, for the reason that it might be difficult to determine just where the duties of a clerk end and those of a stenographer begin. It must be assumed that the county courts will exercise their good judgment both as to protecting the unnecessary expenditure of public funds and also as to equipping county offices so that they can function in a proper manner. If a county court abuses its discretion in determining the necessity for stenographic services, its actions can be reviewed in a proper proceeding in a court of law.

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CONCLUSION

It is, therefore, the opinion of this office that (1) stenographic services may be provided by the county court for a probate judge if such county court finds as a fact that such stenographic services are necessary for the proper conduct and administration of the affairs of such office and for the public welfare; (2) that if a county court refuses to provide stenographic services for a probate judge when in fact such services are indispensable to the proper conduct and administration of the affairs of his office, and he provides such services at his own expense, he may recover his actual and reasonable outlay for same, and (3) that a probate judge may appoint the same person as clerk and stenographer in his office, provided the probate judge personally pays such person for services rendered as clerk; the amount of services rendered by such person as stenographer, and whether such services are indispensable to the proper conduct of the office, being questions of fact to be determined in the first instance by the county court, and in case such court acts arbitrarily in such determination, then by a court of law in an action brought by such officer against the county to recover for his outlays for such services.

Respectfully submitted

HARRY H. KAY  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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