

PROBATE JUDGES:  
MAGISTRATES:  
DISABILITY:  
VACANCY:  
APPOINTMENT OR  
TRANSFER OF JUDGES:  
SALARY:

Section 482.120, RSMo, relating to the appointment of a judge of the magistrate court by the judge of the circuit court, and Section 481.180 relating to the appointment of a special probate judge by the Governor, are in conflict with Supreme Court Rule 11.05, which provides that the Supreme Court of Missouri make transfers to the probate and magistrate

courts, and are null and void. A de facto judge appointed under either such section is not entitled to the compensation provided for the office. The de jure judge holding said office is entitled to the emoluments of the office.

OPINION NO. 251  
36 (1969)

FILED  
36

January 30, 1969

FOR OPINION

Honorable Haskell Holman  
State Auditor  
State Capitol Building  
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your request for an opinion from this office, which you posed as follows:

"1. When the duly elected Probate Judge is incapacitated does the person appointed Special Judge to hold Magistrate Court also act in the capacity of Judge of the Probate Court?

"2. Would the individual appointed Special Judge to hold Magistrate Court be entitled to receive compensation from the State in the manner and amount as contained in the provisions of Section 482.120 RSMo., 1959?

"3. Should any amount paid by the State to the appointed Special Judge be deducted from the applicable monthly compensation provided for the duly elected, but incapacitated, official?

"4. Would the individual appointed as Special Judge of the Probate Court and Ex-Officio Magistrate be entitled to receive from the State, under the provisions of Section 481.180 RSMo., 1959, the amount of compensation provided for that of Magistrate in the applicable size county?

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"5. Would the duly elected and qualified, but incapacitated, official be entitled to receive from the State the amount of compensation as provided for the applicable size county during the period such official was incapacitated?"

You have advised us that in fact, an audit by your office disclosed that the regular judge, who had by affidavit voluntarily declared himself disabled and requested appointment of a "temporary judge" under the provisions of Section 481.180, RSMo 1959, was paid his salary to the conclusion of his term, as was the judge so appointed and actually serving. It is further our understanding that the disabled judge did not seek re-election and that the "temporary" judge was later elected judge at the regular general election.

These judges were in a county (Moniteau) of between ten and fifteen thousand inhabitants with an assessed valuation of over eleven and less than thirty million dollars; in such county the probate judge is ex-officio magistrate and compensation for one is compensation for the other (Section 482.150, RSMo Supp. 1967 and Article V, Section 18, of the Constitution of Missouri).

On July 13, 1966, a Moniteau County attorney was appointed "special" magistrate judge by the circuit judge of Moniteau County, pursuant to provisions of Section 482.120, RSMo. On July 25, 1966, the Governor appointed the same attorney temporary probate and ex-officio magistrate, pursuant to Section 481.180, RSMo.

Section 481.180, RSMo, reads as follows:

"Judge incapacitated, appointment of special judge--compensation--tenure.-- Whenever the judge of probate, from any cause, shall be unable to hold any term of court, or shall be unable to discharge his duties from continued sickness or mental or physical inability, the Governor, upon the certificate of such judge, or upon satisfactory proof of such fact, shall have power to appoint some suitable person, a resident of the county possessing the qualifications of a probate judge, to discharge the duties of said office, and to hold probate court in said county, during the existence of such inability of the regular judge; and the judge so appointed, during the period he shall act, shall possess the same powers, take and subscribe to the same oath and be liable to the same responsibilities, as the regular judge of said court, and receive the same compensation during such time; provided, that after

the appointment of such special judge, he shall continue to act as such until the Governor shall be satisfied by competent evidence that the regular judge is competent in all respects to act as judge, and until the Governor is thus satisfied, the regular judge shall have no power to act." (Emphasis added)

Section 482.120, RSMo, states:

"Disability or absence of judge--appointment of another, by whom.--If the judge of the magistrate court in any county which has only one magistrate court is incapacitated and unable to act or to dispose of the business pending before him for any reason, or is absent from the county, for a period of five days or more, the judge of the circuit court of such county may make an order to be entered in the records of such magistrate court, appointing and designating either some magistrate of another county within the circuit or some qualified attorney of the county to act as judge of the magistrate court of such county until such magistrate resumes his duties, and such magistrate or special judge, when so appointed shall possess all the powers and shall be subject to all the responsibilities of the regular judge of the magistrate court during the time of his appointment. Any person so appointed shall, before acting as judge of the magistrate court, take the oath required of magistrates. Any magistrate so appointed shall be entitled to such travel and subsistence expense as may be fixed by the circuit judge which shall be paid by the state and charged against the salary of the regular judge of the magistrate court of such county. Any attorney appointed to act as magistrate shall be entitled to one-thirtieth of the monthly salary of the regular judge of the magistrate court of the county for each day he shall act as magistrate to be paid by the state and charged against the salary of the regular magistrate. Such payments shall be made upon the certification of the circuit judge and the clerk of such magistrate court that the person or magistrate was duly appointed and acted as magistrate of such court." (Emphasis added)

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In Opinion No. 85 dated January 18, 1955, to the Honorable John W. Stegner, enclosed, this office ruled that Section 482.120 was rendered null and void because of a conflict between that section and Article V, Section 6 of the Missouri Constitution, and Supreme Court Rule 11.05 pursuant thereto.

Article V, Section 6, provides:

"The supreme court may make temporary transfers of judicial personnel from one court to another as the administration of justice requires, and may establish rules with respect thereto."

Supreme Court Rule 11.05 states:

"Under Section 6 of Article 5 of the Constitution, the Supreme Court may temporarily transfer to the probate court or magistrate court of any county either a circuit judge, a probate judge, a judge of a magistrate court or a probate judge who is also judge of the magistrate court of his county. When any judge is so transferred he shall have the same powers and responsibilities as judge of the court to which he is transferred and may hold court at the same time either with or separately from the regular judge or judges of said court."

We remain of the opinion that Section 482.120 is null and void because of the conflict with the Constitution, and with Supreme Court Rule 11.05. The appointment of a "special judge" of the magistrate court by the circuit court was not authorized by law.

The further question is whether the same reasoning applies to appointment of a "special" probate judge by the Governor under Section 481.180. From a review of applicable law, we conclude that it does and that Section 481.180 is also in conflict with Article V, Section 6, of the Constitution and Supreme Court Rule 11.05.

Your last two questions inquire as to whether or not the "special judge" is entitled to the emoluments of the office and whether the de jure judge is entitled to any compensation.

We conclude that since the "special judge" was not lawfully appointed he is not entitled to any compensation.

The regular judge, however, is a de jure officer and is entitled to the emoluments of the office. *Davenport v. Teeters*, 315 S.W.2d 641 (1958).

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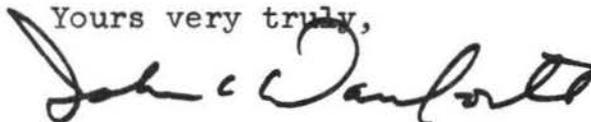
CONCLUSION

It is the opinion of this office that Section 482.120, RSMo, relating to the appointment of a judge of the magistrate court by the judge of the circuit court and Section 481.180 relating to the appointment of a special probate judge by the Governor, are in conflict with Supreme Court Rule 11.05, which provides that the Supreme Court of Missouri make transfers to the probate and magistrate courts, and are null and void.

A de facto judge appointed under either such section is not entitled to the compensation provided for the office. The de jure judge holding said office is entitled to the emoluments of the office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

enc: Opinion No. 85, Stegner, 1/18/55