

PROBATE JUDGE: Probate Judge is entitled to deduct amount of salary he has paid a probate clerk who holds over after the expiration of the term for which he was appointed.

April 8, 1935.

4-13



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

"In 1929 Mr. Uhrig was appointed Probate Judge of Carroll County. Under Section 2049, R. S. Mo. 1929 he qualified and appointed a clerk which said clerk qualified and gave bond as provided for in Section 2049, for the term ending December 31, 1930.

"In November 1930 Mr. Uhrig was elected Probate Judge and entered upon his term for which he was elected, on January 1, 1931. The same clerk has remained in this office during the term for which Mr. Uhrig was elected from 1931 to December 31, 1935, but the clerk has never given a bond and there is no entry of record in Carroll County showing that the Probate Judge has appointed this individual to act as clerk in his office.

"In the auditing of the Probate Judge's office, should the Probate Judge be charged with the amount of salary he has paid the clerk during the years 1931 to 1934 inclusive, as there is no official record showing either the appointment or the qualification of this

individual to act as such clerk."

Section 2049, R. S. Mo. 1929, provides that the judge of probate be required to act ex officio as his own clerk and give bond in like amount with like conditions as is required of clerks filling said office by appointment provided that a probate judge may, by an order of record appoint a clerk who shall be paid by said judge and hold his office at the pleasure of the judge. 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 recorded, the same as is required of clerks filling said office by appointment: Provided, 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. Said clerk shall take the oath required of other clerks of court in this state, and, before entering upon the duties of his office, shall enter into a bond of the state of Missouri, with two or more good and sufficient sureties, to be approved by the judge, in the sum of one thousand dollars, conditioned that he will faithfully discharge all the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county where such clerk of probate is to serve, upon which bond, when breach thereof is made, suit may be brought as upon other penal bonds. Said clerk, when so appointed and qualified, may discharge all the duties of clerk, and shall have power and authority to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation, subject to the confirmation or rejection of said court at the next regular term held thereafter.  
\*\*\*\*."

It is plain from the above section that the probate judge may act ex officio as his own clerk or he may appoint a separate clerk. If he elects to act as his own clerk, he is required to give a bond in like amount with like conditions and penalties, the same as is required of clerks filling same office by appointment. In view of the fact that the clerk, who was appointed and qualified during Mr. Uhrig's first term, held over and performed the duties of the office of probate clerk and since you do not state that the probate judge gave bond and acted as his own clerk, we assume, for the purpose of this opinion, that the probate judge did not qualify or act as his own clerk.

Section 11782, R. S. Mo. 1929, provides what fees a Probate Judge is allowed for his services and provides what fees he is allowed to retain after deducting all reasonable and necessary expenses for clerk hire. Said section reads in part as follows:

\*\*\*\*\*Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent. thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; \*\*\*\*\*"

There can be no doubt that a probate clerk is a public officer and the clerk of the probate court is not a mere employee of the judge. In Young v. Boardman, 97 Mo. loc. cit.189, the Court said:

\*\*\*\*\* The charge is that he was clerk of the judge and not of the court; but it is stated that he was appointed by the judge of the court in pursuance of section 1179, Revised Statutes, 1879. That section makes it the duty of the judge of the probate court to act ex officio as his own clerk, 'provided 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.' The clerk thus appointed is required to give bond before entering upon the duties of 'his office,' conditioned to discharge the 'duties of his office.' And when so appointed and qualified,

'may discharge all the duties of clerk and shall have power to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation,' etc. Throughout the law relating to the administration of estates of deceased persons and the probate of wills, various duties are assigned to probate clerks. When the judge appoints a clerk, these duties devolve upon the clerk thus appointed. There can be no doubt but he is the clerk of the court and an officer of the court, and not in any sense the clerk of the judge."

Section 5, Article XIV. of the Constitution of Missouri provides:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

You state that the Probate Judge was appointed to his office in 1929 and appointed a clerk who qualified and gave bond for the term ending December 31, 1930. Under the terms of the statute, a probate clerk does not hold his office for any definite term but only at the pleasure of the probate judge. In this case it would make no difference as the clerk did serve at the pleasure of the judge until December 31, 1930, and his term of office, in either event, would be from the date of appointment until December 31, 1930. Under Section 5 of Article XIV. of the Constitution of Missouri, an officer holds his office during his official term and until his successor shall be appointed and qualified. If no clerk is appointed at the expiration of the Clerk's term, he would hold over by virtue of his original appointment until a successor is appointed and qualified, and the period he holds over is as much a part of the term of his office as that which precedes the date at which the new appointment should be made.

In the case of *State v. McGraw*, 87 Mo. loc. cit. 160-161, the Court said:

"Where an officer, especially a public officer, thus holds his office for a period and until his successor is appointed and qualified, a failure to appoint a successor at the end of the defined period, does not work a vacancy. State ex rel. v. Lusk, 18 Mo. 333. The incumbent holds until the successor is elected or appointed and qualified, and it is then, and not until then, that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 94; Bank v. Hunt, 73 Mo. 597. For his acts during the time he thus holds over, without any new appointment, he and his sureties are liable on his official bond, given at the date of the qualification. Long v. Seay, 72 Mo. 648; State ex rel. v. Kurtzeborn, 78 Mo. 99. It is true the law by which the re-lator was appointed fixed the term of office at four years and contemplates that at the expiration of that time a new appointment will be made, but the same law also contemplates that the appointing power may not be promptly exercised, and to prevent a vacancy the incumbent is made to hold over until such appointment is made. This is a contingency contemplated by the law, and enters into every such appointment, and the time he holds over the designated period is as much a part of the term of his office as that which precedes the date at which the new appointment should be made. \*\*\*\*\*"

In the case of *State v. Brown*, 274 S. W. loc. cit. 967, the Court said:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk,

4/8/35

18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 78."

In view of the above, it is the opinion of this office that the office of probate clerk does not become vacant at the expiration of the term for which the clerk was appointed, but that the clerk in office holds over by virtue of his original appointment until a successor is appointed or elected and qualifies and that period for which said clerk holds over is as much a part of his term of office as the period preceding the time at which the new appointment should be made; that the clerk while holding over is a dejure officer and is entitled to compensation for performing the services of his office.

We therefore hold that a probate judge is entitled to deduct from the amount of fees he is allowed to retain as compensation for his services the salary he has paid a clerk of the probate court, for the time said clerk has held over by virtue of his original appointment.

Yours very truly,

J. E. TAYLOR  
Assistant Attorney-General.

APPROVED:

---

ROY MCKITTRICK  
Attorney-General.