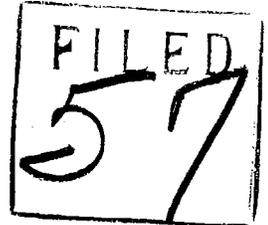


PROBATE COURT:
PROSECUTING ATTORNEY:

In re: Costs paid by county in indigent insane hearings; accrued fees due probate judge; duties of prosecuting attorney in indigent insane hearing; prosecuting attorney cannot be appointed appraiser in assessing inheritance tax.

January 16, 1947

Filed No. 57



Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your letter, in which you requested an answer to four questions presented therein. Your letter reads in part as follows:

"There are some questions I would like to have answered.

"Does the county pay the costs of a hearing held to determine if a poor person is insane. I mean the costs due the Magistrate acting as probate judge so that he in turn can pay same to the state.

"In estates that are pending in probate court where fees are already earned but not paid, shall the probate judge pay such accrued fees to the county or to the state.

"Please advise who is to present the facts in a hearing when it is sought to declare a poor person insane? Does the prosecuting attorney have any duty to perform.

"Can the prosecuting attorney be appointed appraiser in assessing inheritance tax?"

The first question presented is whether the county pays the costs of a hearing held to determine if a poor person is insane. Section 453, R. S. Mo. 1939, provides:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

Said Section 453 is the same provision as Section 454, R.S.Mo. 1929, to which the Supreme Court of Missouri referred in the case of Van Loo v. Osage County, 346 Mo. 358, when they said at l.c. 366:

"As appears, supra, from Sec. 454, R.S. 1929, and from the Cox case, when a person is adjudged insane in the probate court, and the costs cannot be paid out of the estate of such insane person, then the county is liable for such costs, * * * * *

The Osage County case, supra, was decided when the county courts had the exclusive authority to admit an insane poor person to an insane hospital. Since that case Senate Bill No. 284, Section 9328, gives to the probate courts power to send to a state hospital the insane poor of their respective counties. However, simply because such hearings are held in a probate court instead of the county court is no reason to believe that the respective county is no longer liable for such costs.

The next question presented is whether in estates that are pending in probate court where the fees are already earned but not paid, the probate judge pays such accrued fees to the county or to the state. In answering this question I am inclosing a copy of an opinion rendered by this office to Honorable Hugh P. Williamson, Prosecuting Attorney of Callaway County, Fulton, Missouri, under date of June 18, 1946, which held that the probate judge was entitled to fees which accrued last year of term prior to January 1, 1947, but were not collected until after that date.

The third question presented is who presents the facts in a hearing when it is sought to declare a poor person insane and whether the prosecuting attorney has any duty to perform. From an observation of Senate Bill No. 284, it is to be noted that any citizen of the county in which the alleged insane person is a resident may file a written verified statement with the judge or clerk of the probate court. Thereupon the clerk shall cause the alleged insane person to be notified of the proceeding. Section 12944, RSMo 1939, in setting out the duties of the prosecuting attorney, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate

all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. * * * * *

An indigent insane hearing held before the probate court is a proceeding in which the county has an interest; the county is liable for the costs; the hearing is dealing with the resident of the county, and is conducted by county officers. The Kansas City Court of Appeals said in the case of Ex parte Trant, 175 S.W. (2d) 161, l.c. 164:

"* * * * A lunacy proceeding is a civil, as distinguished from a criminal proceeding; it is a proceeding in personam by the state; the public is interested in the welfare of the person alleged to be insane; * * * * *

Thus it will be seen that the prosecuting attorney, when necessary, should advise and supervise the proceeding, even though in certain cases the informant in the proceeding may be a private citizen.

The fourth question presented by your letter raises the question whether the prosecuting attorney can be appointed appraiser in assessing inheritance tax. Section 12944, R.S. Mo. 1939, in setting out the duties of the prosecuting attorney, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. * * * * *

House Bill No. 651, Section 585, provides that the probate court shall have jurisdiction to determine the amount of

tax provided under the inheritance tax law to determine any question that may arise in connection therewith. It further provides that the court may on its own motion or on the application of any interested person, including the Director of Revenue, the prosecuting attorney or the attorney-general, appoint some qualified taxpaying citizen of the county as appraiser. Section 589, R.S. Mo. 1939, provides that if an appraiser be appointed he is entitled to five dollars per day for the time he is actually engaged in the performance of his duties. Section 587, House Bill No. 651, provides:

"Any interested person, including the Director of Revenue, attorney-general or prosecuting attorney of the county may file exceptions to the report of the appraiser within thirty days after the date same is filed, specifically pointing out his or their objection thereto, and such exception shall be determined by the court in a summary manner. * * * * *"

Section 590, House Bill No. 651, provides:

"The prosecuting attorney shall represent the state at all hearings, proceedings and trials under the provisions of this law in the probate and circuit courts, and the attorney-general shall, at the request of the Director of Revenue, assist the prosecuting attorney in any such hearing, proceeding or trial and shall appear for and represent the state in any appeal or proceeding in the supreme or appellate courts of the state, and in any case in the federal courts."

Thus from a reading of these inheritance tax statutes, and keeping in mind the general duties of the prosecuting attorney as set out in Section 12944, R.S. Mo. 1939, it can readily be seen that the prosecuting attorney, in carrying out the duties of his office, could be involved in subsequent proceedings relative to the inheritance tax and the appraisal thereof. Consequently, it is obvious that the prosecuting attorney, were he appointed appraiser in assessing the inheritance tax, would at the same time be representing conflicting interests. Universal recognition is accorded the principle that generally a lawyer should not represent conflicting interests.

Section 12948, R.S. Mo. 1939, provides:

"If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Said Section 12948, supra, appears to apply to criminal cases, but it is expressive of the policy of the law that a prosecuting attorney should not accept employment to advise or represent in any case where such employment is inconsistent with the duties of his office.

CONCLUSION

Therefore, it is the opinion of this department that: (I) The county does pay the costs of the hearing held to determine if a poor person is insane. (III) The prosecuting attorney, if not called upon to actually present the facts in a hearing when it is sought to declare a poor person insane, does, when necessary, supervise and advise the presentation of the facts in such hearing. (IV) The prosecuting attorney cannot be appointed appraiser in assessing inheritance tax. Question II, relative to fees in probate courts, is answered by an opinion rendered by this office, a copy of which is enclosed, which held that a probate judge was entitled to fees which accrued prior to January 1, 1947, but not collected until after that date.

Respectfully submitted,

WILLIAM C. COCKRILL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCC:LR
Enc.