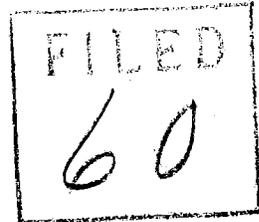


PROBATE COURT\ Right of probate court to fees for holding
FEES: hearing in an insanity case.

February 3, 1947



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Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which reads:

"I understand the law to be that the probate court is the only court which has the power to commit indigent insane to state hospitals.

"Now the Probate Judge requests an opinion in regard to the fees due the probate judge for hearing insane cases and also if the attorneys that he calls in to represent the party charged of unsound mind is entitled to any fee and if so who pays the fee in case the party charged has no money or property to pay attorney fee and court fee. Will appreciate your opinion in regard to this matter."

Under date of July 31, 1946, this department rendered an opinion to Honorable George H. Hubbell, Probate Judge of Grundy County, Missouri, holding that probate courts under Senate Bill No. 284, passed by the 63rd General Assembly, which became effective on July 1, 1946, are the only courts any longer authorized to commit indigent insane persons to state hospitals.

You now inquire if the probate judge is entitled to a fee in such cases and if an attorney called in to represent such persons is also entitled to a fee; if so, who pays same.

It is well established that probate judges are entitled to all fees earned during their term of office prior to January 1, 1947, however, not to exceed the maximum amount they are allowed to retain under the law. This department has rendered such an opinion. Under Section 24, Article V, Constitution of

Missouri, 1945, probate judges were entitled to receive their compensation as provided by law until the expiration of their term of office, which terms, in most instances, expired as of January 1, 1947. Section 24, Article V, supra, reads:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

Probate courts for a long time have been vested with authority to hold sanity inquisitions. However, until the 63rd General Assembly passed Senate Bill 284, such courts had no authority to commit indigent insane persons to state hospitals. Such authority was vested solely in the county court. The law also provided that, in the absence of sufficient funds in the estate of one found to be insane, costs of such proceedings shall be paid by the county. (See Sections 447 and 453, R.S. Mo. 1939.)

Section 13404, R.S. Mo. 1939, was the fee statute controlling the amount of fees probate judges were entitled to receive for services rendered and was in effect until repealed by Senate Bill No. 284, supra. In *Van Loo v. Osage County*, 141 S.W. (2d) 805, 1.c. 808, 809, the Supreme Court discussed at length the authority of the probate court to hold sanity inquisitions of poor persons. In that decision, the court held that probate courts had concurrent jurisdiction with county courts in holding such hearings, but that probate courts had no authority to commit an insane poor person to the state hospital. It was held that when costs could not be paid out of the estate, the county was liable for same. In so holding, the court said:

"It is our conclusion and we so rule that the probate court has concurrent jurisdiction with the county court to hold sanity inquisitions of poor persons, but that such court has no authority to commit an insane poor person to a state hospital. And we further rule that when a poor person is adjudged by the probate court to be insane and also found by said court to be disordered in mind, etc., as set out in Sec. 498, supra, then the probate court has the authority to make an order that such person be held until the county court shall cause him or her, as the case may be, to be 'removed to a state hospital' as provided in Sec. 8657, R.S. 1929, Mo. St. Ann. Sec. 8657, p. 7750, for the circuit court, and to transmit to the county court a certified copy of its proceedings in the matter. And in such situation there would be, as in the circuit court procedure, no occasion for any adjudication of sanity in the county court. The procedure in the Cox case, supra, was such or similar.

"As appears, supra, from Sec. 454, R.S. 1929, Mo. St. Ann. Sec. 454, p. 286, 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, and the fact that the probate court committed Anna Van Loo to the state hospital at Fulton, instead of ordering her held for disposition by the county court, would not relieve the county of its duty to pay the costs. The judgment should be affirmed and it is so ordered."

Senate Bill No. 284, supra, repeals said statutes authorizing the county courts to hold sanity hearings and commit indigent insane persons to state hospitals and prescribes a procedure that shall be followed in such cases. Under said bill, it requires a probate court to appoint an attorney to represent any alleged insane person, if none appear for said person, and that the court shall also allow a reasonable attorney fee for services rendered by the attorney, same to be taxed as costs. Section 9338, Senate Bill No. 284, in part reads:

"* * * If no licensed attorney appears for the alleged insane person at such hearing, the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

Furthermore, Section 9339 of Senate Bill No. 284, in providing that the costs of such examination shall be paid out of the county treasury, in part reads:

"* * * and, also, that the costs of this examination be paid out of the treasury of the county; * * *"

We also find, in Section 9344 of said Senate Bill No. 284, that, whenever inmates of any private or public charitable institutions for the maintenance and care of indigent persons shall be determined to be insane by the probate court, the county of which such insane indigent persons may be found to have been a resident just prior to his admission to such institution, shall pay all costs and expenses in like manner to that of an insane indigent person being sent to a state hospital on order of the county court. Said section in part reads:

"* * * and the county of which such insane person is found to have been a resident immediately prior to his admission to such charitable institution shall pay all costs and expenses and provide all things required by this article, the same as if said person had been sent to the state hospital as an indigent insane person by order of the court of the county of which he is found to have been a resident immediately prior to his admission to said charitable institution."

All of the foregoing provisions clearly indicate that it was the legislative intent that the county shall pay the costs of such proceedings in a hearing to determine if a person is an indigent insane person.

The 63rd General Assembly passed Senate Committee Substitute for Senate Bill No. 200, which bill specifically repeals Section 13404, R.S. Mo. 1939. Said bill provides what fees the probate court shall charge and collect. However, said bill also provides when it shall become effective, and reads:

"This Act shall take effect on January 1, 1947, except that in all counties where the present terms of office of the incumbent probate judges extend beyond said date, this Act shall become effective in each such county at the expiration of the present terms of the probate judges of such county."

This last proviso carries out the provisions of the Constitution of Missouri of 1945. (See Section 24, Article V, Constitution, 1945.)

The 63rd General Assembly also passed Senate Committee Substitute for Senate Bill No. 198, which places probate judges in this state on an annual salary. Said bill became effective January 1, 1947, except in such cases where the term of the present incumbent probate judge ended after the aforesaid date. In such case, the act became effective in such county when said judge's term ends. The same General Assembly enacted Senate Bill No. 207, which contained an emergency clause and became effective when approved by the Governor on March 11, 1946. This bill provides that, in counties of 30,000 inhabitants or less, the probate judge shall be the magistrate. (See Sections 1 and 6 of said bill.) Section 17 of the same act provides the salary of all magistrates shall be paid by the state, except that additional magistrates appointed in the county shall be paid by the county, and further provides what the annual salary of such magistrates shall be, and also provides that, in all counties now or hereafter containing a population of 30,000 inhabitants or less, the salary of the magistrate as above provided shall include his compensation as probate judge of said county.

Senate Committee Substitute for Senate Bill No. 200, supra, requires the probate judges or clerks of said probate courts, in some instances, shall collect and pay over monthly all fees accruing to said offices either to the county or state treasury, as the case may be, and in counties having less than 30,000 inhabitants such fees shall be paid to the Director of Revenue, to be deposited with the state treasurer in the "magistrate fund." Said bill in part reads:

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall

be imposed on the clerk of the probate court.

"In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end of each month, pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. Each judge shall, within thirty days after the expiration of each calendar year file with such director revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid in such calendar year, the amount of such fees paid in each such estate and the amount of fees unpaid and due in each estate at the end of such year. Such judge shall also, within such thirty day period after such calendar year make a written report to such director of revenue of all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer.

"In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer."

The last provision in Senate Committee Substitute for Senate Bill No. 200, requiring the courts and clerks to pay over fees to the county or state treasury as the case may be, also complies with Section 24, Article V, Constitution, 1945, which requires the fees of courts, judges and magistrates to be paid monthly into the state or county paying their salaries.

CONCLUSION

Therefore, it is the opinion of this department that the probate court is the only court authorized to commit indigent insane persons to state hospitals subsequent to Senate Bill No. 284, passed by the 63rd General Assembly, becoming effective; that when no attorney appears to represent a person before a probate court in a sanity hearing the court shall appoint an attorney and allow him a reasonable fee for services rendered, said fee to be taxed as costs in such proceedings and to be paid by the county if the estate of such person is insufficient to meet such expenses. Likewise, all costs of the proceedings shall be taxed as costs and be paid out of the county treasury when the estate is insufficient to meet said costs. Furthermore, probate judges are entitled to any fees accruing to their office for holding sanity inquisitions and earned prior to January 1, 1947, however, subject to the maximum amount allowed said judge under the law. After the aforesaid date, said judges shall charge and collect all fees accruing to their office by virtue of authority granted under Senate Bill No. 284, passed by the 63rd General Assembly, however, such fees shall be paid monthly into the county or state treasury.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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