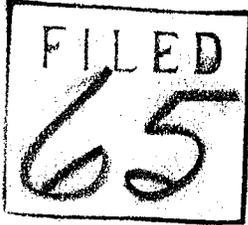


CLERK:
PROBATE COURT:
PROBATE COURT CLERK:
OFFICERS:
INCOMPATIBILITY OF OFFICES:
INHERITANCE TAX:

The offices of probate clerk and appraiser of an estate before the probate court are incompatible, and thus may not be held by the same person at the same time.



September 29, 1955

Honorable Chas. E. Murrell, Jr.
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Sir:

This is in response to your request for an opinion which reads as follows:

"I would like to have your opinion on whether or not a Probate Judge may legally appoint the clerk of his court as an appraiser for the purpose of appraising an estate for State Inheritance Tax."

Section 145.150 limits the appointment of an appraiser to "a qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties" This statutory provision, thus, does not expressly prohibit the appointment of the clerk of a probate court as an appraiser.

Although such an appointment would not contravene a Missouri statute, the common law rule in regard to the holding of two offices could be violated. 67 C.J.S., Section 23, pages 133 to 136, states this rule, in part:

"At common law the holding of one office does not itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. * * *

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"* * * the general rule is that the inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or the power to remove the incumbent of the other, or to audit the accounts of the other, the question being whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other.* * *"

The Missouri Supreme Court has also elaborated this principle in State ex rel. Walker v. Bus, 135 Mo. 325, at page 338:

"* * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him. (Emphasis added.)

"It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result

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in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other.* * *"

To determine then whether the two offices are incompatible requires an analysis of the functions of both the appraiser and the probate clerk. It should be added that it is not necessary in showing incompatibility that all the duties clash so long as some conflict. Sections 145.150 through 145.190, RSMo 1949, specify the duties of the appraiser as follows:

"145.150. 4. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date so fixed and shall also give notice by mail to all interested persons whose address he may have, always including the director of revenue and the prosecuting attorney of the county.

"145.160. 1. The appraiser shall appraise all property, estate, assets, interest or income at its clear market value and he is hereby authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence, to administer oaths and to take the testimony of all witnesses under oath.

"2. He shall make report of his appraisement to the court in writing and shall return the testimony of the witnesses and all other evidence and such other facts in relation thereto as the court may by its order require, and such

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report shall be made within twenty days after the appointment of such appraiser, unless the court, for good and sufficient cause, by order gives such appraiser further time in which to report; provided, when the estate consists of personal property only, the prosecuting attorney may, with the consent of the director of revenue agree with the parties liable to pay any tax upon the amount of the same, and the court, if it approves such agreement, shall enter judgment accordingly and no appraiser shall be appointed."

"145.170.--1. 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.

"2. Any person aggrieved by the judgment of the court as to the amount of liability for the tax may appeal to the court having jurisdiction of appeals from said court in ordinary civil actions, and in case of appeal the appellant shall be required to give bond to the state in double the amount of the tax, interest, penalty and costs involved, conditioned to pay all taxes, interest and penalties assessed and costs taxed by the appellate court.

"145.180.--The report of the appraiser shall be filed with the court in duplicate, one of which duplicate copies, together with the certificate of the court or clerk shall be forwarded to the director of revenue within five days after the amount of said tax shall be fixed.

"145.190.--1. The appraiser shall be entitled to a reasonable fee for the time he is engaged in hearing the evidence, viewing the property,

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and preparing, and filing his reports, and the actual and necessary expenses incurred by him in the performance of his duties, which together with all witness fees and other costs shall be taxed against and paid by the administrator, executor, or trustee as other costs of the estate, and if no administration is pending, then by the person liable for the tax, but before the appraiser shall be entitled to his fee or expenses he shall file with the court appointing him a sworn statement of the same and the court shall allow him a reasonable fee and expenses actually and necessarily paid by him in the performance of his duty as such appraiser. (RSMo Cumulative Supplement, 1953).

It is clear that "the court" referred to throughout these sections plays a supervisory role in regard to the work of the appraiser. Section 483.480, RSMo 1949, must be noted as well, which section provides:

"* * * Upon qualifying, said clerk 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."

Interpreting a similar statute, the Supreme Court of Missouri in *Young v. Boardman*, 10 S.W. 48, 97 Mo. 181, at page 189, speaking of the probate clerk, has said:

"* * * 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

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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."

Moreover, Walker v. Bus, supra, states that incompatibility of two offices may stem from situations where one officer is "required to deal with, control or assist" another officer. Probate clerks of necessity meet this condition vis-à-vis the appraisers appointed by the probate judge.

It should be noted as well that House Bill 30, 68th General Assembly (The Probate Code of 1955, Effective January 1, 1956), makes even clearer the inherent incompatibility of these two offices due to the supervision, control and assistance rendered the appraiser by the probate clerk:

"Section 6. The court shall be open for the transaction of probate business at all reasonable hours. The court may by rule provide for the holding of sessions of the court at regular recurring times for the purpose of hearing claims, settlements and other matters but no such rule shall prohibit the hearing and determination of any proceeding before the court at any time when necessary to promote the ends of justice.* * *"

"Section 8. 1. The clerk may take acknowledgments, administer oaths, and certify and authenticate copies of instruments, documents and records of the court, and perform the usual functions of his office.

"2. Subject to control of the judge, the clerk may issue notices and make all necessary orders for the hearing of any petition or other matter to be heard in the court.

"3. If a matter is not contested, the clerk may hear and determine it and make all orders,

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judgments and decrees in connection therewith which the judge could make, subject to be set aside or modified by the judge at any time within thirty days thereafter; but if not set aside or modified the orders, judgments and decrees made by the clerk shall have the same effect as if made by the judge.

"Section 17. 2. No appeal shall be allowed from any order made by the clerk under section 8 unless a motion to modify or vacate such order has been denied by the court but no such motion is necessary to an appeal from any order made by the judge.

"Section 21. All appeals shall be taken within thirty days after the decision complained of is made. Where a motion to modify or vacate an order made by the clerk is denied or where such order is modified or vacated, the appeal shall be taken within thirty days after the order sustaining, modifying or vacating the order is made."

According to the common law principle as interpreted by the Supreme Court of Missouri, it is not within the public interest, thus, for a probate clerk to serve as an appraiser.

CONCLUSION

It is, therefore, the opinion of this department that the offices of probate clerk and appraiser of an estate before the probate court are incompatible and thus may not be held by the same person at the same time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walker La Brunerie, Jr.

Yours very truly,

John M. Dalton
Attorney General