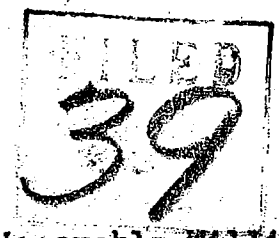
PROBATE COURT: DESIGNATION OF SESSIONS IN COURT RECORDS: SHERIFF'S FEES: POSTAGE FEES:

A session of non-regular session during a term is not a session in vacation; sheriff is entitled to fees only on days court is in session. Letters testamentary may be granted even though the court is not in session. Fees for mailing notices are to be remitted to the state. Collections made for postage actually expended may be retained by the county.



February 14, 1956

Honorable William J. Hensley
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Sir:

Your November 30 request for an opinion reads as follows:

"The following questions have arisen in the mind of John H. Mittendorf, Probate Judge of Johnson County, and after discussing same with me he suggests that your opinion be obtained in the immediate future.

"I am at this time therefore requesting that you give us your opinion as regards the following matters, all involved with the new probate code and in the event that you have received requests for similar opinions, it is my suggestion that these questions be merely combined with the other questions which possibly have been propounded to you for your opinion.

"1. Section 472.050 provides that the Court shall be open at all reasonable hours and that the court may provide for the holding of sessions. Since the code makes no mention of terms of court or of acts to be performed in vacation, where the court is in session only one or two days per week, do the records of the court show that acts performed on any other day are in vacation? If not shown as performed in vacation, what is the proper designation in court records of the days that court

is not in session? Since under the provisions of Section 57.280 the sheriff receives $3.00 per day for attending each court of record, is this sum computed on the number of days that court is open for the transaction of probate business or on the number of days that court is in session?

"2. Section 472.070 provides that the clerk may hear and determine matters not contested. When the clerk enters a judgment pursuant to this section, is such day considered and shown on court records as a day when the court was in session? If not, what designation is given to such days in the court records?

"3. Section 473.023 provides that the probate court or the clerk thereof shall grant letters testamentary or administration. May this act be performed only on those days when court is in session? If not, what designation is given to those days in court records when letters are granted by the judge or by the clerk and court is not in session?

"4. Section 483.582 provides that postage charges of serving notices shall be charged to the estate. Is this sum, when collected, remitted to the Director of Revenue with other probate fees or is it returned to the county which advanced the postage charges originally?

"Please give this your considered judgment and advise this office at your earliest convenience as to your opinion as regards the above questions."

It is correct that the 1955 Code makes no mention of terms, since the provisions of Section 481.030, RSMo 1949, have been repealed. Although "the court may by rule provide for the holding of sessions of court at the regular recurring times for the purpose of hearing claims, settlements and other matters," you will note that "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." Therefore, at any time the court hears a matter it is in session whether or not it be on a day other than one set aside by rule for "the holding of sessions * * * at regular recurring times * * *."

It is true that the term "session" normally means that period when the court is sitting for the transaction of business during a term. However, since there are no terms there can be no "vacation."

"Vacation" has been held to mean the period between terms and not the mere interval during a term when it is not in session. See Warner v. Donahue, 99 Mo. App. 37, l. c. 44, 72 S.W. 492 and cases cited. Consequently, the court records should not show that the court sat during vacation merely because court was held on some day other than the ones set aside for the "regular" sessions.

It is suggested that the records merely show that the court was "in session."

On your question regarding Section 57.280, it is suggested that the sheriff cannot "attend court" if no session is held. The mere statement that "the court shall be open for business," merely means that the office shall be open. The court might very well not be sitting as a "court." The sheriff's attendance might not be requested. The sheriff is entitled to $3.00 for attending court, as provided for in Section 57.280, only when the court is in session, and then only when requested by the judge. See, in this regard, the attached opinion to Honorable John A. Eversole, Prosecuting Attorney, Washington County, dated January 3, 1947.

Turning to the question in the paragraph you have labeled

No. 2, it is noted that the powers of the clerk, enumerated in paragraphs 1 and 2 of Section 472.070, V.A.M.S., 1955, are ones that may be performed at any time. Paragraph No. 3, besides providing "that the clerk may hear and determine matters not contested" as you mention, also provides that if the judge permits the clerk's records, decrees or judgments to stand they shall "have the same effect as if made by the judge." In effect, then, the clerk sits for the judge when he hears and determines matters. When he so sits it may be considered that court is in session. The "designation given to such days in the court records" could be the same as suggested in our answer to the same question raised in your paragraph No. 1.

Your first question in paragraph No. 3, regarding the granting of letters testamentary or of administration, is "May this act be performed only on those days when the court is in session?" In our opinion, the court's authority is not limited to such days. It is suggested, however, that, if notwithstanding our opinion, the court feels compelled to make some insertion that it show only that the court was "in session." It certainly does not have to show "in regular session" and, as mentioned above, should not show "in vacation."

In answer to your question in paragraph No. 4, we note that you speak of "postage charges," as mentioned in paragraph 2 of Section 483.582, but also speak of "other probate fees" as though the postage charges might be called fees. We do not believe that they are one and the same. As to the fees provided for in paragraph 1 of Section 483.582, in the opinion of this office the fees should be accounted for and remitted to the department of revenue the same as all fees provided for in Section 483.580, and under the same provisions regarding accounting and remitting as are contained in that section. However, in our opinion, the postage charges as mentioned in paragraph 2 of 483.582 are not fees in the same sense as are those provided for in paragraph 1 of this section and in Section 483.580. It will be noticed that fee charges are made for services performed. The postage charge is not made for service performed, but is made for the purpose of obtaining reimbursement from the estate of expenditures

actually made from county funds. Nowhere do the statutes provide for division of fees collected by the state and the county, but since the amount collected from the estate for postage charges incurred by the clerk is not a fee and, since the statute is silent on the disposition of such postage charges, we think the same should be retained in the county which expends its own funds in the first instance.

CONCLUSION

In the opinion of this office the probate court records for sessions other than those set aside for regular sessions should show only that the court was "in session," and should not show that the court acted in "vacation"; that a sheriff is entitled to fees for attending court only on the days court is in session and when requested by the court; that the probate court may be "in session" when the clerk sits for the judge; that the court or clerk may grant letters testamentary without being "in session"; that the fees collected pursuant to paragraph 1 of Section 483.582, V.A.M.S., 1955, should be remitted to the department of revenue; that the postage charges collected pursuant to the provisions of paragraph 2 of Section 483.582 should be retained by the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General

RSN:lc

1 enclosure