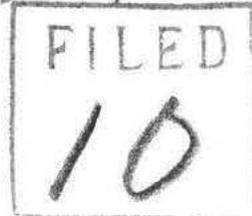


See #31-1959 (7-23-59)
To Patrick O. Freeman.
also #204-1962 - To
Chas A Powell Jr. 5-2-62



July 7, 1961

Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Mr. Boulware:

This is in reply to your letter of May 5, 1961,
wherein you state:

"I have been asked by neighbors to institute proceedings in the Probate Court to have one Virginia Winkler declared incompetent and have a guardian appointed for her. The neighbors believe that she is squandering her inheritance which she received about two years ago. They also state that she is neglecting her three small children all under twelve years of age and that she is giving large sums of money to a man she is living with but to whom she is not married. They also state that she has a very low I.Q. and is not mentally capable of making decisions in business matters.

"None of the neighbors however, will sign a petition alleging her to be incompetent and insist that it is my duty as Prosecuting Attorney to have the Sheriff sign this petition and have a hearing. If there has been an Attorney General's opinion on this question of the Prosecuting Attorney's duties under these circumstances, I would appreciate a

copy of this opinion. If not, I would appreciate an opinion defining the duties and responsibilities of the Sheriff and the Prosecuting Attorney when confronted with this situation."

Enclosed you will find an opinion of this office, dated March 11, 1954, to Robert E. Crist, Prosecuting Attorney of your county. Said opinion holds that the prosecuting attorney may represent the sheriff in a sanity hearing in which the sheriff was the informant.

At the time of this opinion, however, Section 458.040, RSMo 1949, specifically provided that "Whenever any . . . sheriff . . . shall discover any persons, resident of his county, to be of unsound mind, . . . it shall be his duty to make application to the probate court for the exercise of its jurisdiction; . . ."

However, Chapter 458 was repealed in 1955 (Laws 1955, p.385). Under Chapter 475, RSMo 1959, which deals with guardianship, no section is found equivalent to Section 458.040, RSMo 1949. Thus, there is presently nothing in the Missouri Statutes which expressly states that the sheriff must file a petition with the probate court when he believes a resident of his county is incompetent of managing his affairs or caring for himself.

Although, Section 475.055(2), RSMo 1959, specifically excludes sheriffs from being appointed guardians of a person or his estate, Section 475.060, RSMo 1959, states: "Any person may file a petition for the appointment of himself or some other qualified person as guardian of a minor or an incompetent."

Section 475.085, RSMo 1959, states: "The costs of an inquiry into the competency of any person shall be paid from his estate if he is found incompetent or, if his estate is insufficient, costs shall be paid by the county; but if the person is found not incompetent the costs shall be paid by the person filing the petition, unless he is an officer acting in his official capacity, in which case the costs shall be paid by the county." (Underlining ours)

Thus, it is indicated that although, pursuant to

Section 475.055(2), RSMo 1959, a sheriff cannot be appointed guardian of an incompetent's estate, he may under Section 475.060, RSMo 1959, file a petition in such a matter for the appointment of a qualified individual as guardian, and may do so in his official capacity as sheriff. In such an event, if the individual is not deemed incompetent, the county would pay the costs under Section 475.085, RSMo 1959.

Although such a proceeding is civil in nature, yet it is a matter in which the state is an interested party (see State v. Holtkamp, 51 S. W. 2d 13, page 4 of enclosed opinion), and as such, has a duty to protect the incompetent and the public. (See State v. Skinker, 126 S.W. 2d 1156, and State v. Guinotte, 257 Mo. 1, page 2 of enclosed opinion).

Thus, it would seem incumbent upon the sheriff in such a case where the county officials feel that an individual within the county is incompetent and unable to manage his affairs to file the petition for the appointment of some qualified person as guardian under Section 475.060, RSMo 1959.

Since such action on the part of the sheriff is for the benefit of the residents of the county, including the alleged incompetent, and therefore an action in which the county is concerned, it would be the duty of the prosecutor under Section 56.060, RSMo 1959, to prepare such petition for the sheriff and represent him in this action before the Probate Court.

Said Section 56.060, RSMo 1959, in defining the duties of a prosecuting attorney states:

"Each prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, . . . "

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc
1 enclosure