SANITY HEARINGS: PROSECUTING ATTORNEY MAY BE GUARDIAN'S ATTORNEY: WHEN:

When probate court adjudges one insane and appoints guardian who was informant in inquiry. Prosecuting attorney who appeared for state or county at hearing cannot be retained as attorney for guardian subsequent to adjudication.

JOHN M. DALTON
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April 29, 1953

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J. C. Johnsen

Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads in part as follows:

> "Your opinion is sough with reference to a situation where the prosecuting attorney is retained subsequent to the adjudication of insanity by the duly appointed guardian who was an informant at the time of the inquisition.
>
> "Is such action on the part of a prosecuting attorney in conflict with any official duty?"

Reference is made in your letter to an opinion of this department furnished to the Honorable Roy W. McGhee, Jr., Prosecuting Attorney of Wayne County, Missouri. In this opinion it was held that it was improper for a prosecuting attorney to represent at a sanity hearing held in his own county, the person who is the subject of the hearing, or for a prosecuting attorney to represent, in his private capacity, an informant in the sanity hearing, but that it is the duty of the prosecuting attorney to represent the state or county at all sanity hearings held within his county. However, it is believed that said opinion is not broad enough to cover the situation mentioned in your letter, the facts of which are alleged to have occurred subsequently to the adjudication of insanity.

The statement of facts given in the opinion request fail to indicate whether or not the rights of the person (adjudged insane)

to file a motion to set the judgment aside (as provided by Section 458.100 RSMo. 1949), or to take an appeal from such judgment to the circuit court (as provided by Section 468.020, RSMo. 1949) of the county have expired. However, for the purposes of our discussion herein, it will be assumed that such rights have expired; that such judgment has become final and that no motion to set it aside has been filed or appeal has been taken therefrom.

The only proceeding in which the same parties, interests and issues of the sanity hearing might become involved in a proceeding subsequent to the inquiry would be that of a restoration of sanity proceeding. This proceeding might be instituted by the insane person, or by some other person in his behalf.

Section 458.530, RSMo. 1949, provides for restoration of sanity proceedings, and reads as follows:

> "For and on behalf of any person previously adjudged to be of unsound mind by any court in the state of Missouri, there may be filed in the probate court of the county wherein he was adjudged insane, a petition in writing, verified by oath or affirmation, alleging that subsequent to his adjudication of insanity he has fully recovered his mental health and been restored to his right mind and is now capable of managing his affairs, and the probate court wherein any such petition is filed shall hold an inquiry as to the sanity of the person in whose behalf the petition is filed; provided, that if said court, upon such inquiry, shall find that such person is not restored to his right mind, and such person, or anyone for him, shall within ten days after such finding, file with the court an allegation in writing, verified by oath or affirmation that such person is of sound mind and is aggrieved by the action and finding of the court, the court shall then cause the facts to be inquired into by a jury."

In the case of Harrelson v. Flournoy, 229 Mo. App. 582, it was held that the same issues are involved in a restoration proceeding regarding the sanity or insanity of the person adjudged insane as were involved in the sanity inquiry, except that the burden of proof

is upon the petitioner. At l.c. 593, the court said:

> "It necessarily follows that, upon this inquiry under Section 493, upon alleged restoration to rightness of mind or discharge from guardianship, the same issues as to sanity or insanity at the time of the later inquiry and as to the capacity of the subject to manage his affairs are in question as were in question upon the previous inquiry under Section 448- upon the original inquiry under which he was adjudicated to be a person of unsound mind and incapable of managing his affairs. The only difference in such inquiries is as to the burden of proof. In the original inquiry, the burden was upon the petitioner or informant seeking the adjudication of appellant's unsoundness of mind. In the later inquiry, the burden was upon the appellant, the petitioner who seeks his discharge, to show his restoration to his right mind. Upon the previous inquiry, the informant charged, and it was adjudicated, the appellant was a person of unsound mind and incapable of managing his affairs. Clearly, inasmuch as the later inquiry is for the purpose of avoiding the adjudication upon the previous one-where the proof warrants--it is necessary, in order so to warrant, that it be made to appear that the situation upon which the former adjudication rests no longer exists. It is therefore necessary that appellant show upon the inquiry for his discharge that he had not only been restored to his right mind and was sane but that he was capable of managing his affairs. The instruction was not erroneous in so requiring. Indeed, it is alleged in appellant's allegation for his discharge that he was, at the time of his filing, a person of sound mind, sane and capable of managing his affairs, and had been restored to his right mind. Such contention, for such further reason, is not open to appellant."

While no reference is found in the opinion request to a restoration yet, because such proceedings are to be expected in every instance subsequent to a sanity hearing in which one is found to be insane, we believe it is necessary and proper to consider such proceedings and its effect, if any, upon the subject matter of the opinion request.

Proceedings of this nature are very similar to sanity inquiries and in view of the fact that the parties interested in the hearing are the same, as well as the issues, it is our thought that it is the duty of the prosecuting attorney to appear at all such proceedings held in his county and to represent only the state or county.

It does not appear that a guardian of an insane person would be directly interested in the issues involved in a restoration proceeding, or that he would be a necessary party thereto, yet he would be primarily interested in such proceeding if he had filed the petition authorized by Section 458.530, supra, and his interest in the matter would be identified with that of his ward. In such instances it would be improper for the prosecuting attorney to represent the guardian or any interests other than those of the state or county, since the state or county would be as much interested in the restoration proceeding as it was in the sanity inquiry.

In such event the prosecuting attorney would find himself in the position of attempting to represent the guardian and ward, and the state or county in the same proceeding. Of course the prosecuing attorney is prohibited from engaging in such actions which are highly improper and conduct unbecoming to a member of the Bar. While we are merely stating a hypothetical case not founded upon any known facts, yet it serves to illustrate the unenviable position in which the prosecuting attorney may find himself unless he scrupulously refuses to accept any employment or to engage in any activity which might interfere with the performance of his official duties relating to sanity inquisitions or restoration of sanity proceedings.

The guardian in the instant case was the informant in the sanity inquiry and, for reasons given in above mentioned opinion the prosecuting attorney could not represent the informant in that hearing. Although it does not appear from the facts given in the opinion request that the guardian-informant is primarily interested in the restoration proceedings, it is entirely possible, or even probable, that he might be, and in the event the prosecuting attorney should represent said guardian-informant, he might find that he had represented a person or interest in conflict with his official duties, which require him to represent only the state or county in either the sanity inquisition or restoration proceedings.

In view of the foregoing, it is our thought that a prosecuting attorney would be guilty of improper actions and conduct in the event he represented a guardian of one adjudged to be insane subsequent to the adjudication of insanity under the circumstances referred to in the opinion request.

Hon. R. M. Gifford

CONCLUSION

It is the opinion of this department that when a probate court in a sanity inquiry adjudges one insane and appoints a guardian who was informant of the alleged insane person, the prosecuting attorney, who represented the state or county at the inquiry, cannot be retained as attorney for the guardian, subsequent to the adjudication.

The foregoing opinion, which I hereby approve, was written by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General