INSANITY PROCEEDINGS: COSTS: Costs in all probate insanity proceedings under Senate Bill 59 and House Bill 30, passed by the 68th General Assembly, such bills, as sections, and other sections on the same subject considered herein being in pari materia, must be paid by the county involved if the estate of the subject of the inquiry, if adjudged to be of unsound mind, is insufficient to pay such costs.

December 16, 1955

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Mr. Henson:

This opinion is rendered by this office in response to your request which reads as follows:

> **"The Probate Judge and I are having trouble in determining the course of procedure we are to follow in committing patients to the State Mental Hospital as wards of the county under the provisions of Senate Bill No. 59 passed by the 68th General Assembly.**
>
> **"I have not examined this Senate Bill personally but I am informed by the Probate Judge that Section 202.150, Revised Statutes of Missouri, 1949, pertaining to the appointment and payment of an attorney for an insane person and Section 202.160, pertaining to the payment of costs by the county for an insane person have both been repealed and that the new law as set out in Senate Bill No. 59 does not provide for the payment of an attorney to represent an indigent person and does not provide for the payment of the costs. He also pointed out that Senate Bill No. 59 provides for the appointment of a special commissioner to assist in the conduct of hospitalization proceedings but the bill is silent as to his qualifications and compensation.**
>
> **"We also note that the bill makes no provision for the payment of the physicians to be appointed by the Court, and we are wondering if a Court order directed to two**

> physicians to make the examination of the patient is intended to force an examination by a physician without compensation.
>
> "We would appreciate your opinion as to our course of procedure with respect to these questions."

Your request indicates that the question has arisen before the probate judge of your county as to the procedure to be followed in committing indigent patients adjudged to be of unsound mind to a state mental hospital as wards of the county, under the provisions of Senate Bill No. 59 passed by the Sixty-eighth General Assembly.

The request includes also various questions to be here considered and answered, such as the appointment and compensation of counsel for an indigent subject of an inquiry as to his competency, the payment of the costs of such proceedings, the appointment by the probate court of a special commissioner to assist in the conduct of the hospitalization proceedings. Senate Bill No. 59 provides in certain of its sections that if an application questioning an indigent person's insanity and requesting hospitalization for such person is referred by the court to the special commissioner he shall cause a prompt examination to be had of the proposed patient by two physicians. If their report is that the patient is not mentally ill the court may terminate the proceedings without further effort and dismiss the application; otherwise, the court shall fix a date for and give notice of a hearing to be held not less than five days nor more than fifteen days from the receipt of the report.

The proposed patient, the applicants, and all other persons entitled to notice shall be offered an opportunity to appear at the hearing and may present and cross-examine witnesses, and the court may, in its discretion, hear the testimony of any other person. Upon the completion of the hearing, and considering the record, if the court finds that the proposed patient is mentally ill and in need of custody, care or treatment in a mental hospital and lacks sufficient capacity because of his illness to make needful decisions concerning his hospitalization the court may make an order for temporary confinement for a period not exceeding six months for hospital observation, or for an indeterminate period; otherwise, the court shall dismiss the proceeding.

Many of these provisions are of the terms appearing in Senate Bill No. 59. They are elements of the procedure necessary to be

followed in approaching and carrying on the process of an inquisition as to any person's soundness or unsoundness of mind and pointing to his hospitalization. Other matters relating to the procedure in such a case and also relating to the subject, will be considered as we proceed.

The question of whether or not Senate Bill No. 59 provides adequate authority for the appointment of counsel for the person alleged to be insane, and the allowance of a fee to such counsel by the court, the payment of the costs of such a proceeding, the authority of the court to appoint and allow compensation to him for his services as special commissioner, and the appointment of and allowance of reasonable compensation to two licensed physicians to examine the proposed patient and report thereon as to his mental condition, all appear to be matters of doubt and uncertainty to the probate judge under the terms of said Senate Bill No. 59 since, as the request states, only some of such matters being expressly named or provided for in said Senate Bill No. 59.

The request also indicates that the matter of uncertainty as to the procedure to be followed in such cases is attributable to the repeal of Sections 202.150 and 202.160, RSMo 1949, and that Senate Bill No. 59 has no provision therein for the payment of such counsel nor the costs of the proceeding, and does not provide for the payment of the compensation of a special commissioner nor for the two physicians, the appointment of whom is authorized by said Senate Bill No. 59.

Sections 202.150 and 202.160, as existing statutes before their repeal, were statutes relating to proceedings followed in a jury trial in probate court and referring to the appointment of counsel for the subject and his fees, and the payment of the costs of the proceedings by the county on the question of insanity or mental incompetency of an indigent person. Senate Bill No. 59 is an act of the General Assembly on the same subject. There are various details to be observed in the proceedings by which a case of competency or incompetency of a person is to be determined, but they all stem from the same subject - insanity or unsoundness of mind. That is the subject upon which the General Assembly was legislating in the enactment of all statutes we are here considering. Such statutes, expressing the intent of the legislature in their enactment, had but one objective, that is, to judicially say whether a named person is of sound or unsound mind.

In conjunction with the consideration to be given Senate Bill No. 59 in disposing of the questions arising here, due consideration must be given to the sections of House Bill 30 and

other sections relating to procedure in such cases. They all have an equal relationship to the subject and to each other and possess a like measure of authority and responsibility for the accomplishment of their joint purpose to provide for such a hearing under all of such statutes.

It is the view of this office that the terms of the two bills and other statutes noted may be readily reconciled with each other and construed to have the effect of one law, because said Senate Bill No. 59 and House Bill 30 and such other statutes so noted all relate to the same subject of insanity. The terms of the two separate bills now appear as independent sections one, (Senate Bill No. 59) in Vernon's Annotated Missouri Statutes, 1955, and the other (House Bill 30) in the new probate code. The provisions of both bills in their proper places treat of and refer to the hearings and all necessary proceedings incident thereto in sanity cases of all kinds. Whatever the purpose and object of such hearing may be, whether for guardianship or simply regarding the subject of incompetency generally, they all are germane to the subject of insanity and should be considered as one law in relation thereto.

The provisions of Senate Bill No. 59, in subsection 6 thereof, now subsection 6 of Section 202.807, Vernon's Annotated Missouri Statutes, 1955, and the provisions of House Bill 30 (Sections 297 and 299 of the new Probate Code), (Section 475.085, V.A.M.S., 1955), and Section 475.075 (V.A.M.S., 1955), are all in pari materia with each other as such provisions apply to the subject of notice, hearings, and responsibility for payment of compensation of counsel appointed by the court for indigents in insanity and guardianship proceedings, and payment of compensation of two licensed physicians to examine the proposed patient in the matter then in probate courts. Section 475.075, on the question of hearings in incompetency, referring to the requirements incident thereto of notice, service thereof and appointment of counsel for the subject of the inquiry, reads as follows:

> "Hearing on incompetency - notice - service - appointment of attorney
>
> "1. When a petition for the appointment of a guardian for an alleged incompetent is filed, the court, if satisfied that there is good cause for the exercise of its jurisdiction, shall order that the facts be inquired into by a jury, except that if neither petitioner nor the alleged incompetent demands a jury, the facts may be inquired into by the court.

> "2. The alleged incompetent shall be notified of the proceeding by written notice stating the nature of the proceeding, time and place when the proceeding will be heard by the court, and that such person is entitled to be present at the hearing and to be assisted by counsel. The notice shall be signed by the judge or clerk of the court under the seal of the court, and served in person on the alleged incompetent a reasonable time before the date set for the hearing. Notice shall also be given the spouse of the alleged incompetent in the manner prescribed by section 472.100, RSMo, if directed by the court.
>
> "3. If no licensed attorney appears for the alleged incompetent at the hearing the court shall appoint an attorney to represent him in the proceeding, and shall allow a reasonable attorney fee for the services rendered, to be taxed as costs in the proceeding. (L. 1955, p.____, H.B. No. 30, sec. 297.)"

Section 458.060, RSMo 1949, providing the procedure to be followed incident to a hearing and the adjudication of a subject's sanity and the appointment of a guardian for him, if found to be incompetent, is in almost the exact terms as are the terms of Section 475.075, supra, on strictly regular insanity proceedings in any case of insanity considered alone.

Section 475.085, providing for the payment of costs in competency cases, appearing in V.A.M.S., 1955, under the subject of guardianship, and reciting the text of pertinent statutes under "General Provisions" which are intended to indicate and do indicate that their scope includes hearings of any and all kinds in guardianship and in incompetency cases, and they are thereby in pari materia with each other on the subject. Said Section 475.085 reads as follows:

> "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. (L. 1955, p.____, H.B. 30, sec. 299.)"

Senate Bill No. 59 and House Bill 30 both were passed at the same session of the General Assembly of this state. By the enactment of the two bills on the same subject on the same day, the legislature would be thereby presumed to have enacted the Bills to aid one another and with the intent that since each of them relates to the same subject they should be considered and construed and effected and enforced as one law in incompetency cases of any kind and scope.

In State ex rel Moseley et al. v. Lee et al., 319 Mo. Rep. 976, 5 S.W. (2d) 83, the Supreme Court, 319 Mo. Rep. l.c. 992, 993, on the question, said:

> "It is apparent that the three acts of 1923, aforesaid, each and all deal with the same and identical subject (namely, the board of road overseers) dealt with in said Section 10684, Revised Statutes 1919, and in said Act of April 7, 1921. All said three acts of 1923 were enacted at the same session of the General Assembly, two of said acts having been approved by the Governor on the same day, and the third act having been approved by the Governor nineteen days later.
>
> "Relating, as they do, to the same subject, and therefore being statutes in pari materia, said three acts of 1923 must be construed together as though they constituted one act. (Gasconade County v. Gordon, 241 Mo. 569, 582; State ex inf. v. Amick, 247 Mo. 271, 290; State ex rel. v. Patterson, 207 Mo. 129, 144.) In the Patterson case, supra, this court, en banc, said, quoting approvingly Sutherland on Statutory Construction, section 283; 'All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true where the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day.' And, in the Gasconade County case, supra, this court, en banc, said, quoting approvingly Black on Interpretation of Laws: 'Especially is it the rule that different legislative enactments passed upon the same

> day or at the same session, and relating to the same subject, are to be read as parts of the same act.'"

If Senate Bill No. 59 and House Bill 30 relate to the same subjects of hearings in the probate court in insanity cases, generally, and cases of insanity inquiries where a guardianship is involved and requiring notice to the subject of the time and place of the hearing, the appointment by the court of counsel for the subject, if he does not have or is unable to provide counsel, and were passed at the same session of the legislature such acts must be held to be in pari materia. A hearing of such character would avail nothing as to its validity without notice.

Failure to give notice to the alleged insane person of the time and place of a hearing as to his incompetency in any insanity proceeding, whether involving guardianship or in cases where incompetency is the only issue, leaving him without the opportunity to be present and defend the liberty and freedom of his person or to effect his own independent power to act for himself, involving his right to have a judgment on the issue, if against him, reviewed, would be the deprivation as to him of due process of law.

Section 10, of Article I, of our Missouri Constitution - our bill of rights - states: "That no person shall be deprived of life, liberty or property without due process of law."

The Supreme Court of Missouri, in the case of Wilcox et al. v. Phillips et al., 260 Mo. Rep. 664, l.c. 679, on this question, held:

> "Due process of law depends on service, i.e., notice, and, absent notice, due process was not given them. As pointed out in Womach v. St. Joseph, 201 Mo. l.c. 482: '"Due process of law" means law in the regular course of administration through the courts. (Jones v. Yore, 142 Mo. l.c. 44.) The term '"due process of law" is equivalent to the term "the law of the land" - a term as old as Magna Charta. And, as said by Webster in a brief sparkling forever as a jewel in the crown of the American Bar in the Dartmouth College Case (See 4 Wheat. l.c. 581), "By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life,

> liberty, property and immunities, under the protection of the general rules which govern society." (Barber Asphalt Co. v. Ridge, 169 Mo. l.c. 384.) "In judicial proceedings," says ANDREWS, J., in Bertholf v. O'Reilly, 74 N.Y. 509, "due process of law requires notice, hearing and judgment." ...'"

The Supreme Court of the United States has held in like effect in many cases under the "due process" clause of the Fourteenth Amendment of the federal constitution.

The legislature in sections 1 and 2 of House Bill No. 30, Probate Code of 1955, page 4, has given its own construction of the purpose, terms and effect the bill is intended to have and the procedure to be followed thereunder. Said section reads as follows:

> "Effective Date - Application - Saving Clause
>
> "Section 1 of the Probate Code of 1955, enacted by Laws 1955, p. ___, H.B. No. 30, provides as follows:
>
> "'1. This Code shall take effect and be in force on and after January 1, 1956. The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of the Code and also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply.
>
> "'2. No act done in any proceeding commenced before this Code takes effect and no accrued right shall be impaired by its provisions. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provision of any statute in force before this Code takes effect, such provision shall remain in force and be deemed a part of this Code with respect to such right, except as otherwise provided herein.'"

This section of House Bill 30 fixes the effective date of the new Probate Code as January 1, 1956, and provides that the procedure therein prescribed shall govern all proceedings in probate brought

after the effective date of the Code. The section also further provides that further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court, by application in particular proceedings, they would not be feasible or would work injustice, in which event the procedure prescribed in House Bill 30 shall not apply. The section further provides that no act done in any proceeding commenced before the effective date of the Code, and no previously accrued right, shall be impaired by its provisions.

The legislature then provided that new and pending proceedings at the effective date of the Code shall both be governed by the new Code with the exceptions noted. The legislature then knew of its own enactment of subsection 6 of Senate Bill No. 59, now subsection 6 of section 202.807 Vernon's Annotated Missouri Statutes, 1955, under the subject of "Public Health and Welfare" and that the subjects therein contained related to procedure respecting persons of unsound mind touching public welfare, including hearings, notices, the appointment of counsel for the subject of the inquiry, and the payment of costs incident to the case, and that the two bills in their enforcement in the probate court would likely involve the subject of the inquiry in the matter of the possible deprivation of his personal liberty under guardianship. The legislature was aware, at the time of the enactment of both Senate Bill No. 59 and House Bill 30, that the two bills in many proceedings in the probate court would necessarily have to be construed together in hearings in insanity inquiries and proceedings, and especially in such cases where a guardian must be appointed if the subject should be declared to be of unsound mind. It is true that Senate Bill No. 59 does not provide, expressly, for the payment, or by whom, of the costs of such proceedings. But that Bill does provide for notice to the subject of the inquiry and others to whom notice is required to be given. It requires the attendance of witnesses, and other proceedings prescribed in said subsection 6 of said bill. But House Bill 30 (Section 475.085, Vernon's Annotated Missouri Statutes, 1955, page 142) does provide for the costs to be paid by the county in incompetency inquiries if the subject is found to be incompetent and his estate is insufficient. The terms and effect of Senate Bill No. 59 and House Bill 30, and the fact that they were passed at the same session of the General Assembly, constitute them as being in pari materia. As previously pointed out the Legislature has in Sections 1 and 2 of House Bill 30 given its own construction of the provisions of House Bill 30 in insanity proceedings of any sort, including insanity proceedings instituted under said Section 458.060 in guardianship cases, requiring the appointment of a guardian. The construction given of a statute by the legislature itself, as indicated by language in a section enacted or in other or subsequent enactments, while not controlling, is said by the courts to be entitled to due consideration.

Our Supreme Court has so held. In the case of State ex inf. Attorney General v. Long-Bell Lumber Co., 321 Mo. Rep. 461, in discussing the question of corporate powers to engage in different lines of business, but all being in some measure germane to the subject covered by them separately and within their corporate powers, the court, l.c. 499, said:

> "'A further significant factor, though not controlling, but one which is nevertheless entitled to respectful consideration (Hall v. Sedalia, 232 Mo. 344, l.c. 355), is the fact that a subsequent General Assembly so interpret said statutes. ***'"

In the case of Hull v. Baumann, 131 S.W. (2d) 721, the Supreme Court of this state, observing the rule of construction of two statutes passed at the same session of the General Assembly, at l.c. 725 said:

> "'We think the applicable rule is: "That where two acts are passed at the same session of the Legislature relating to the same subject-matter, as here, they are in pari materia, and, to arrive at the true legislative intent, they must be construed together * * *."'"

The same rule of construction was considered and restated in the case of State ex rel v. Mitchell et al., 181 S.W. (2d) 496. The court, on the question, l.c. 499 said:

> "Statutes are in 'pari materia' when they are upon the same matter or subject. 31 C.J., p. 358; and the rule of construction in such instances proceeds upon the supposition that the several statutes relating to one subject were governed by one spirit and policy and were intended to be consistent and harmonious in their several parts and provisions. ***"

We believe that under the above authorities, applied to the terms of said bills and the context of the bills themselves, respecting incompetency and guardianship proceedings under Section 297 (New Probate Code, House Bill 30) and under subsection 6 of Senate Bill No. 59, all being in pari materia, costs, of any proceeding to determine the competency of any person in guardianship cases or in any other cases of incompetency shall be paid under Section 475.085

by the county if the estate of the subject, if the subject is adjudged to be incompetent, is insufficient to pay such costs. This would include reasonable compensation to be allowed by the court for two licensed physicians, the appointment of whom, to examine the proposed patient and report on the mental condition of the patient and his needs, is provided for in subsection 3 of section 3 of Senate Bill No. 59, page 3.

We find no provision in Senate Bill No. 59 or House Bill 30 for the payment of compensation to the special commissioner whose appointment to assist in the conduct of hospitalization proceedings is authorized by section 9, page 5, of Senate Bill No. 59. The section provides that the court is authorized to appoint such commissioner but it is not mandatory that the court do so. If the court does not appoint such special commissioner for such purposes, it would appear that the court would be required to perform the services itself that the commissioner might perform in such proceedings in case he should be appointed by the court, but is not so appointed. In no event does Senate Bill No. 59 or House Bill 30 provide for compensation to be paid to such commissioner. We believe that the rule applies here that a public officer must be able to point to some provision of the statute authorizing payment to him of compensation, and no such authority exists here with respect to the services of such special commissioner.

CONCLUSION

Considering the premises, it is the opinion of this office that Senate Bill No. 59 and House Bill 30, enacted by the 68th General Assembly, prescribing the procedure to be followed in probate proceedings, and other statutes here considered relating to the same subject of insanity hearings, are in pari materia with one another and that in such hearings and proceedings the costs of the proceedings to determine the competency of any person in guardianship cases or other cases of alleged insanity shall be paid under Section 475.085 by the county if the estate of the subject, if he is adjudged to be of unsound mind, is insufficient to pay such costs.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Crowley.

Very truly yours,

JOHN M. DALTON
Attorney General

GWC/lc/bi