PROBATE COURT: Probate Judge cannot require security for costs in an insanity hearing.

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Hon. Elza Johnson
Assistant Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "I shall appreciate your giving me at your earliest convenience, your opinion as to whether or not a Judge of a Probate Court may make an order, requiring Security for Costs in an insanity hearing begun under the provisions of Section 448, R.S. Mo. 1929. Sections 1237 and 1238 R.S. Mo. 1929 in providing for orders for Security for costs, do not specifically name the Probate Court, and Section 2058, R.S. Mo. 1929 provides that Probate Courts shall be governed by certain sections as to jurisdiction.
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> "I fail to find any decisions in our courts touching the above question, and would appreciate your opinion."

Section 448, R.S. Missouri, 1929, reads as follows:

> "If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person

> of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury: Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

This section sets out specifically the procedure for the commencement of the hearing on insanity.

Section 2058, R.S. Missouri, 1929, reads as follows:

> "Probate courts, in the exercise of their jurisdiction, shall be governed by the statutes in relation to administration, to guardians and curators of minors and persons of unsound mind, to apprentices, and such laws as may be enacted defining and limiting the practice in said courts."

It will be noticed by this section that the probate courts shall be governed by the statute in relation to administration to guardians and curators of minors, etc.. It provides further for the enactment of other laws defining and limiting the practices in said courts.

The law as enacted for the filing of securities for costs in ordinary civil procedure and in ordinary civil actions is set out in Section 1238, R.S. Missouri, 1929, and reads as follows:

> "If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay

> the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money be deposited before the motion is determined."

This section, 1238 supra, is not contained in any article governing probate court jurisdictions.

The statutes pertaining to the procedure in insane inquisitions must be strictly construed. In the case of Ruckert v. Moore, 295 S.W. 795, l.c. 798, the court said:

> "An insanity proceeding is in invitum, and seeks to deprive the citizen of his liberty or property, or both. Such proceeding seeks to take away from the citizen not only his right to the possession of his own property, but also his right to contract freely with respect to his property, and to dispose of and do with it as he will. Therefore it is said that:

> "'Where a statute prescribes a certain method of procedure to determine whether persons are insane, such inquiries must be conducted in the mode prescribed, and the statute regulating such proceedings must be followed strictly.' 14 R.C.L. 556, 557.
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> "'Proceedings for an adjudication of insanity against an individual are required to be in strict compliance with the statutory requirements.' 32 C.J. 634."

In the case of State v. Holtcamp, 235 Mo. 232, l.c. 239, the court said:

> "The insanity inquiry involves no question of public wrong. It is a proceeding to protect the private rights of the individual in his property and person. Such proceeding constitutes a civil case, and one within the constitutional amendment providing for a three-fourths verdict."

Proceedings in the probate court must be filed exactly and the statute must be strictly construed as set out in the articles concerning actions and proceedings before the probate court. It was so held in the case of State v. Guinotte, 257 Mo. 1, l.c. 11, where the court said:

> "Who are the parties in interest in an inquest de lunatico under our statute? Manifestly, (a) the public at large, that it may not suffer in person or property from the dangerous vagaries or mania of the individual alleged to be of unsound mind, and for that such person by a dissipation of his property, may not become a charge upon the public purse, and (b) the person whose mind is under suspicion, the alleged crazy person, that he may not suffer from the detention of his property or person in

> the custody of another. If there be others who are interested, in reason, they fall into the class of the general public, already mentioned, or they fall out of consideration because they act from sinister personal motives of self-interest, not fairly to be taken into account as producing an interest in the law to be reckoned with here."

It can readily be seen by the holding in this case that the public is the real party in interest and security for costs should not be required of the informant or plaintiff as he is only an instrument for the purpose of carrying out a public duty.

The Legislature in following Section 2058, supra, saw fit to set out another section to determine who should pay the costs by enacting Section 455, R.S. Missouri, 1929, which reads as follows:

> "If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this article, in which case the costs shall be paid by the county."

This section follows the law as set out in ordinary civil actions, but since Section 2058, supra, sets out the procedure of hearings on insanity, it became necessary to enact this section in reference to costs in the articles dealing with jurisdiction by the probate court of persons of unsound mind.

There is no question but that the procedure of insanity hearings is very different from the procedure in ordinary civil actions. In regard to this matter, 14 R.C.L., page 556, Article 8, states:

> "Where a statute prescribes a certain method of procedure to determine

> whether persons are insane, such inquiries must be conducted in the mode prescribed, and the statute regulating such proceedings must be followed strictly. As a general rule the law is set in motion by a petition or information of a more or less formal character spread before the court by some one who assumes to act in the matter. The petitioner for an inquisition of lunacy is not a party thereto in any different sense than any other person, and is not personally estopped by the findings of the jury, except as all the world is estopped. While in the majority of cases the proceeding is instituted upon the initiative of a member of the family of the lunatic, yet it frequently happens that it is set in motion by some friend or acquaintance of the lunatic, or even by a law officer of the state, and that with which the courts are mainly concerned is not who institutes the proceeding, but whether it is for the best interest of the individual alleged to be a lunatic and of the people among whom he lives. Under the statutes of some states any one, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court, and it has been said that this was the rule at common law, although a strong case was required if the application was not made by some person standing in a near relation to the supposed insane person. When, however, an inquest touching the sanity of a person is begun, the interest of the petitioner being subordinate to the interest of the public and to that of the person under inquiry the petitioner may not dismiss the inquest unless the court consent."

As said above, the statutes in regard to insanity hearings must be strictly construed, as have been enacted in the articles referring to matters of which the probate court has jurisdiction, requiring security for costs in insanity hearings.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the probate court cannot require or make an order for security for costs in proceedings brought for the determination of insanity as set out under Section 448, supra.

We have made considerable research and find no case in this state or any other state where this matter was finally passed upon and are bound to determine the question only by the statutes of this state.

Respectfully submitted,

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Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

WJB:VAC