

- PROBATE JUDGE: 1. After January 1, 1947, cannot be paid anything for services other than his salary;
2. Can appraise estates for inheritance tax purposes without appointing appraisers, but cannot be paid extra for said service.

December 30, 1946



Hon. Bert E. McCracken  
Probate Judge  
Warrenton, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"An examination of The Constitution of 1945 in connection with Art. V. Section 24. And Senate Bill No. 203 of 63rd General Assembly, contains the following language; "No Judge or Magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except Probate Judges during their present Terms."

Does this mean that after January 1st, 1947 a Probate Judge can no longer appoint himself and act as Inheritance Tax Appraiser? Does it mean that in the event he acts, he must make no charge for his service? Does it mean that he must appoint some one else to render this service?

In this County it will be hard to get an appraiser who knows anything about this work and I will appreciate your opinion in the matter."

Your letter in reality submits two questions. One is, "After January 1, 1947, if the Probate Judge appraises an estate for inheritance tax purposes, can he be paid for such service in addition to his regular salary?", and the other is, "After January 1st, will the Probate Judge be required to appoint an inheritance tax appraiser in connection with levying such taxes on estates?". We will discuss the questions in order.

Section 24 of Article 5 of the Constitution of Missouri reads as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

It will be noticed that the foregoing section of the constitution provides that no judge or magistrate shall receive any other or additional compensation for any public service in addition to his salary. We believe this provision contemplates that probate judges are to be compensated for all services rendered by them as public officers by their salary. Said provision is a limitation on the legislature and prevents the legislature from providing compensation for probate judges other than their salary. The probate judge can appraise estates for inheritance tax purposes, as will be discussed hereinafter, but such appraisal, if done by such judges, would be an exercise of the powers and functions authorized by law and hence a part of the services for which a salary is provided.

Apparently carrying out the provisions of the foregoing constitutional provision, the 1945 Legislature by S. B. 203 provided limitations against probate judges practicing law or acting as administrators, etc. and specifically provided that

"Nor shall the judge of such court act as deputy or clerk for any other public official or receive any compensation for any public service other than his compensation as such judge; \* \* \* \*"

It might be suggested that the appraisement of an estate for inheritance tax purposes is not a "public service". We are not able to find a general definition of the words "public service", but we think the words taken in their ordinary meaning mean service rendered by officers and employees of the state, county, political subdivisions, municipalities and other agencies created by law and which administer the laws. The assessment and collection of inheritance taxes are matters provided for by law, and those who appraise estates are administering the laws of the state. The taxes assessed and collected upon such appraisement are controlled and disposed of by the legislature for such purposes as that branch of the state government considers for the best interest of the public. One who appraises estates as a basis for levying inheritance taxes is therefore performing a service to the public and, therefore, we think the law prohibits a probate judge from receiving compensation for such service in any manner other than by his salary.

Moreover, by Section 13404A, Laws 1943, page 868, it is provided that probate judges did not have to account for the fees earned by them in hearing and determining inheritance tax matters, and this office has ruled that such judges were entitled under that law to retain said fees over and above the salary then provided for the judges. However, the 1945 Legislature by S. C. S. S. B. No. 200 prescribed certain fees to be taxed up in connection with the administration of estates for services rendered by the probate judge and then provided as follows:

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall be imposed on the clerk of the probate court.

In counties now or hereafter having 30,000 inhabitants or less, the judge shall, at the end of each month, pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund', all moneys collected by him or his clerk as fees, taking two receipts therefor,

one of which he shall immediately file with the state treasurer. Each judge shall, within thirty days after the expiration of each calendar year file with such director revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid in such calendar year, the amount of such fees paid in each such estate and the amount of fees unpaid and due in each estate at the end of such year. Such judge shall also, within such thirty day period after such calendar year make a written report to such director of revenue of all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer.

In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer.

In counties now or hereafter having more than 250,000 inhabitants such fees shall be charged, collected and paid over and the above mentioned reports and affidavits shall be made by, the clerk of the probate court."

Said latter act specifically designated that all fees charged for services by the Probate Court were to be charged upon behalf of the state or county as the case might be and that said fees when collected should be paid to the Director of Revenue or the County Treasury. We think said section further carries out the purpose of the constitutional provision and salary

statute above referred to. This latter statute contemplates that all fees earned by the probate court should be paid into the public treasury from which the probate judge receives his salary. One of the fees set out by said last named act is a fee

"For supervising all estates in each court and having appraised such of said estates as may be liable for taxes under the state inheritance tax law, in addition to the fees applicable as hereinbefore provided, a fee of two and one-half per cent of all such inheritance taxes finally assessed and paid on property assessed through the respective courts shall be charged, the same to be collected by said judges from the person whose duty it is to pay such tax; provided in all estates in which the state treasurer or the executor, administrator or trustee in charge thereof, shall be required under the provisions of the inheritance tax law to refund to the person entitled thereto any inheritance tax collected by them, the state or county receiving same shall refund to the person entitled thereto out of the two and one-half per cent fee on such tax the proportional part thereof to which any such person may be entitled to a refund.

We think it is clear, therefore, that not only the constitution but the legislative acts above referred to contemplate that probate judges shall receive nothing beyond a salary for any services which they perform by virtue of their office.

Your second question is whether the probate court must appoint an appraiser to appraise estates for inheritance tax purposes. Section 585 of the Statutes of Missouri as enacted by H. C. S. H. B. 651, Laws 1945, vests in the probate courts jurisdiction to determine the amount of inheritance taxes due by estates, and then provides as follows:

"If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing and determining the amount of said tax and to

cause notice thereof to be given in the same time and manner and to the same parties as is hereinafter provided for appraisers, or the court before determining such matters, may of its own motion, or on the application of any interested person, including the Director of Revenue, the prosecuting attorney or attorney-general, appoint some qualified taxpaying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this act."

The foregoing section provides two methods by which an estate may be appraised for inheritance tax purposes. One is for the probate court to set a day, notify interested parties and on the day set proceed to determine the amount of the inheritance tax due by such estate. Such determination would necessarily require that the court first appraise or put a value on the estate. The other method is for the Court to appoint an appraiser to appraise the estate, and when such appraisal has been made, the court then assesses the inheritance taxes due. The statute does not require that an appraiser be appointed. The probate court can appraise the estate and determine the tax, but as pointed out above, the fee for his services in such matter would have to be turned into the state or county as the case may be.

### Conclusion

It is, therefore, the opinion of this office (1) that after January 1, 1947, a judge of the probate court cannot be paid for his services in appraising an estate for inheritance tax purposes any amount over and above his regular salary, and (2) that after

January 1, 1947, the probate judge is not required to appoint an appraiser to appraise estates for inheritance tax purposes but may make such appraisal himself and whatever fees are allowed by law for such services must be turned into the state or county treasuries, as the case may be.

Yours very truly,

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Harry H. Kay  
Assistant Attorney General

APPROVED:

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J. E. Taylor  
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HHK/vlv