INSANE:
PROSECUTING ATTORNEYS:
DEPOSITIONS:
PROSECUTING ATTORNEY'S EXPENSES:

A person who is now a nonresident, but who has been properly declared insane by a Missouri court, can apply to the probate court in the county in which he was adjudicated insane for restoration of his sanity. He need not be personally present on the day of the hearing, and he may have depositions, properly taken, introduced as evidence in the case. The county court, if they believe that the expenditure of public funds is justified by the magnitude of the public interest in the case, may pay the prosecuting attorney's travel expense out of state to take depositions.

June 6, 1958

Honorable LeRoy Snodgrass
Prosecuting Attorney
Tuscumbia, Missouri

Dear Sir:

You recently asked the opinion of this office on the following matter:

> "The Probate Judge of Miller County, the Hon. Chas. M. Abbett, had requested an opinion from me in writing as to the following:
>
> "May the Probate Court make an order restoring an incompetent (insane) person to full capacity upon the basis of depositions taken in another state, where the person sought to be restored is not and will not be present before the Court?
>
> "In this specific case, the party was declared insane by the Probate Court, later was discharged from State Hospital No. 1 at Fulton, Missouri, has moved to the State of California and has remained out there for a number of years.
>
> "The question goes further than as to the admission of testimony by deposition. There could be a question as to identification, and with the depositions being taken in a distant state, I would like to know what provisions, if any, for the payment or presence of an attorney or representative of the State to be at the taking of such depositions."

The first problem involved in your opinion request is whether a now nonresident, who was properly declared incompetent by a court in Missouri, may petition this court for restoration of his

sanity. Section 475.360, RSMo Cum. Supp. 1957, reads as follows:

> "For and on behalf of any person previously adjudged to be incompetent or 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 incompetent or of unsound mind, a petition in writing, verified by oath or affirmation, alleging that subsequent to such adjudication 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 the petition is filed shall hold an inquiry as to the mental condition of the person in whose behalf the petition is filed. If the court, upon the inquiry, finds that the person is not restored to his right mind, and such person, or anyone for him, within ten days after such finding, files with the court an allegation in writing, verified by oath or affirmation that the 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."

Volume 32, C.J., Section 326, says:

> "An application for restoration to sanity is not a new proceeding; it is a continuation of the original guardianship proceeding."

Volume 44, C.J.S. Section 55, says, in part:

> "A proceeding for judicial restoration to competency is a special proceeding, of a summary character, and is regarded not as a new proceeding, but as a continuation of the original guardianship proceeding."

It seems clear from these citations that a person who has been adjudged insane by a court in the State of Missouri, may file a petition for restoration in the probate court of the county wherein he was adjudged insane.

Restoration and sanity hearings are basically similar. The only difference being that the burden of proof in the sanity hearing is on the petitioner who wishes to have someone declared insane, and the burden of proof in restoration proceedings is on the person who wants to have his sanity restored. In this regard see State v. Skinker, 126 S.W. 2d 1156, l.c. 1159:

> "'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. * * *"

Insanity hearings are in the nature of civil suits, they are in personam actions. See State v. Holcamp, 51 S.W. 2d 13, l.c. 19, in which the court said:

> "* * *A lunacy proceeding is a civil as distinguished from a criminal proceeding; yet it is a proceeding <u>in personam</u> by the <u>State</u>; the public is <u>interested in</u> the welfare of the person alleged to be insane. * * *"

Depositions are admissible in sanity proceedings as they are in other civil cases. See State v. Dickman, 175 Mo. App. 543, l.c. 553, where the Court says:

> "* * * We have in our State only two ways by which testimony may be 'heard;' one <u>ore tenus;</u> the other by deposition. Testimony given by either mode is lawful. The law recognizes no distinction between them. Section 6384 gives any party to a suit pending in any court of this State the right to obtain testimony

> of witnesses to be used in such suit, conditionally. This is as broad as language can make it. If, then, there is a suit pending and the informant is a party to it, the right to take depositions is given as fully and as broadly at least by necessary implication, as is the power to produce witnesses and introduce testimony. In no case before our courts that has been reported, is it suggested that it was not within the power of the informant to summon witnesses to attend the inquiry. That right has always been recognized as in the informant. * * *"

Inasmuch as depositions are admissible in sanity hearings the court, of course, could base its opinion as to the sanity or insanity of a person on those depositions. The depositions, of course, should be properly taken so as to eliminate any question as to the identity of the deponent and as to the identity of the person who wishes to be restored.

There is no necessity for the presence of the insane person at the hearing; he should, of course, be given an opportunity to attend the hearing, but if due notice and opportunity to attend are extended, the presence of the alleged insane person is not essential. See In re Moynihan, 62 S.W. 2d 410.

The next question presented by your letter is the question as to what provisions, if any, there are for the payment or presence of an attorney or representative of the state to be at the taking of out-state depositions in sanity cases. First of all, the State has an interest in sanity hearings and restoration proceedings. This interest arises out of the possibility of the insane person squandering his estate and becoming a charge on the public purse and, further, a general superintending control is necessary for the protection of the public and of the insane person.

See State vs. Skinker, 126 S.W. 2d 1156, l.c. 1161, where the court said:

> " * * * But it is also true that in these lunacy proceedings, the state, as parens partriae, the community, --society--has an interest, both to protect the insane person and to protect the public from possible injury and to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public. * * *"

The prosecuting attorney is, of course, required to represent the state and county under Section 56.060, RSMo 1949, which reads as follows:

> "Duties--general--in changes of venue--on appeal.
>
> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

With regard to the prosecuter's duties, also see Sections 56.070, 56.080, and 56.090, RSMo 1949. Inasmuch as a sanity case is a civil case in which the state has an interest and the prosecuting attorney represents the state in civil cases, we feel that the prosecuting attorney should represent the state in sanity cases. There is no statutory authority, for allowing prosecuting attorney's of smaller counties expenses for travel. The courts have held, however, that an allowance for stenographic help is proper. In this regard see the case of Rinehart v. Howell County, 153 S.W. 2d 381, l.c. 383, subsection 5, which reads:

> "Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. * * *"

This office, on January 23, 1947, gave an opinion to James L. Paul, prosecuting attorney of McDonald County, which concluded as follows:

> "Prosecuting attorneys may be reimbursed for actual and necessary traveling expenses in the investigation of crimes and the county court is authorized to provide such expenses."

We enclose a copy of this opinion and we see no reason why the county court should not be authorized to provide necessary traveling expenses for the investigation and preparation of civil cases in which the county has an interest. It must be said, however, in this regard that public moneys are trust funds insofar as public officers are concerned and that care must be used in authorizing their expenditure. County courts are invested with discretion in the matter of the expenditure of public money for prosecuting attorney's expenses. See the case of Bradford v. Phelps County, 210 S.W. 2d 996, at l.c. 1000, where the court said:

> "* * * This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the

> expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government: To put it in another and summary way--since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."

This opinion should not be taken as authority for extensive trips for prosecuting attorneys in every case where there is an out-of-state witness in an insanity hearing. Every case, of course, must be judged on its own merits, and the question to be decided by the county court before they authorize the prosecuting attorney's out-state travel expense is whether or not the public interest in the case is great enough to justify the expenditure of such an amount of public money in its preparation. In a proper case where the interest of the public, in the opinion of the county court, justifies the expense, travel expenses of the prosecuting attorney may be paid out of the county coffers for out-of state trips to take depositions in insanity cases.

CONCLUSION

A person who is now a nonresident but who has properly been declared insane by a Missouri court can apply to the probate court in the county in which he was adjudicated insane for restoration of his sanity, he need not be personally present on the date of

Honorable LeRoy Snodgrass

the hearing and he may have depositions, properly taken, introduced as evidence in the case. The county court, if they believe that the expenditure of public funds is justified by the magnitude of the public interest in the case, may pay the prosecuting attorney's travel expense out of state to take depositions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James E. Conway.

Very truly yours,

John M. Dalton

JEC:gm

Enclosure - Opn. to James L. Paul
1-23-47