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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

June 2, 2004

The Honorable George K. Fickling  
Barnwell County Clerk of Court  
Post Office Box 723  
Barnwell, South Carolina 29812

Dear Mr. Fickling:

In a letter to this office you questioned as to the situation where a clerk of court is filling the position of probate judge pursuant to S.C. Code Ann. Section 14-23-60 (1977), is the clerk of court entitled to his regular salary as clerk of court as well as that of the probate judge during the time he is fulfilling the duties of both offices. Such provision states:

In case of any such vacancy...(in the office of probate judge)... the clerk of the circuit court of the county shall take charge of the office and all papers therein, discharge the same duties, receive the same fees and be subject to the same liabilities as by law provided for a judge of probate, until such vacancy shall be filled by appointment of the Governor or by an election, as the case may be.

Along with your letter, you referenced a prior opinion of this office dated August 27, 2001 which concluded that "...it continues to be the opinion of this office that the clerk of court should receive the salary of the probate judge while temporarily serving in that capacity." As to the construction of Section 14-23-60, the opinion stated:

...the language "receive the same fees"...(as used in Section 14-23-60)... is subject to two possible interpretations. The first interpretation...is that the clerk acting as probate judge is entitled to the same salary as the judge...A second interpretation, however, is also reasonable and consistent with statutory law, but does not address the clerk's income while serving as probate judge. That interpretation construes "receive the same fees" to mean simply that the clerk charges and collects the normal fees associated with the official duties of the probate judge and would remit those to the county general fund...Because Section 14-23-60 is subject to two different interpretations, we cannot say with a high degree of certainty that a court would construe the language "receive the same fees" to mean "receive the same salary". However, construing that language otherwise certainly would not prohibit the clerk from receiving the same salary as the probate judge while serving in that position.

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Indeed, we believe that the common law, if not necessarily Section 14-23-60 requires it.

The 2001 opinion referenced prior opinions of this office dated June 2, 1997, July 8, 1981 and December 12, 1967 which dealt with the same question. The June 2, 1997 opinion, noting that the 1981 and 1967 opinions had concluded that the clerk of court would be entitled to the probate judge's salary while fulfilling that office's duties, further stated that

...as clerk, you would be entitled to the probate judge's salary while executing the duties of that office...Legislation regarding probate judges' salaries since...(the earlier)...opinions were issued does not appear to alter these conclusions.

Reference had been made in the 1981 and 1967 opinions to the decision of the State Supreme Court in Ridgill v. Clarendon County, 188 S.C. 460, 199 S.E. 683 (1938). The conclusion of that case is instructive as to your question. In Ridgill, the legislature passed an act abolishing the office of probate judge for Clarendon County and placed the duties of that office on the clerk of court. The clerk thereafter brought suit for the compensation attached to the probate judge's office. The supreme court ruling in favor of the clerk stated:

...if the office be one already established with well-defined duties, responsibilities and jurisdiction, and the discharge of the duties, and the assumption of the jurisdiction and responsibilities of the office are devolved upon another, who holds another office of grave responsibilities and onerous and exacting duties, it is a logical implication that the emoluments and compensation attached to the abolished office still attach to the office to which its duties have been transferred.

Consistent with the referenced prior opinions of this office indicating that the clerk of court would receive the salary of the probate judge in the referenced circumstances is a decision of the Wyoming Supreme Court in State ex rel. Chatterton v. Grant, 73 P. 470 (Wyo. 1903) which concluded that as to the situation where the Secretary of State, upon the death of the Governor, assumed the duties as Acting Governor, the Secretary of State would be entitled to the salary appropriated for both offices while performing the duties of both offices. Also, a prior opinion of this office dated October 6, 1986 determined that in circumstances where the coroner acts as the sheriff during a vacancy in the office of sheriff pursuant to S.C. Code Ann. Section 23-11-50 (Supp. 2003), the coroner would be entitled to the salary appropriated for the office of sheriff.

You also enclosed a copy of a letter dated September 11, 2001, a follow-up letter to the August 27, 2001 opinion, which apparently has added to the confusion on the issue. That letter stated that "(a)lthough we believe that the clerk is entitled to the probate judge's salary, should he elect to accept it, we cannot advise the county to compensate him twice for the performance of all of his statutorily mandated duties." No authority is cited for that conclusion. That letter again commented that the three prior opinions cited in the August 27, 2001 opinion which determined that the clerk of court is entitled to the salary of the probate judge when the clerk serves in that position

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due to a vacancy in that office remain the opinion of this office. As to any inconsistency, this office can only defer to the August 27, 2001 opinions along with the prior opinions cited in that opinion as being the more correct interpretations of the law. Therefore, it remains the opinion of this office that a clerk of court would be entitled to the salary of the probate judge while serving in that position pursuant to Section 14-23-60.

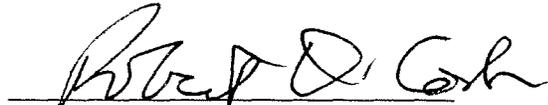
With kind regards, I am,

Very truly yours,



Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General