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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

August 27, 2001

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

By your letter of August 8, 2001, you have requested an opinion of this Office concerning the compensation of a clerk of court who temporarily fills the vacancy in the office of a probate judge. You essentially ask for clarification of prior opinions of this office with three follow-up questions, each of which will be answered in turn. By way of background, you write:

On July 6, 2001, you provided to me by facsimile Opinion No. 2354 of December 12, 1967 and Opinion No. 81-65 of July 8, 1981. You also provided a copy of a letter from your office dated June 2, 1997 to the Honorable Douglas C. Murdaugh. Contained within that letter was the following statement relative to the above mentioned opinions:

"Legislation regarding Probate Judges' salaries since those opinions were issued does not appear to alter these conclusions."

You now ask the following:

1. Will you please provide me with an updated statement as above, if, in fact, legislation to date still has not altered these conclusions.

The letter of this Office dated June 2, 1997 confirmed that Opinions Nos. 2354 and 81-65 had not been superceded by any later opinions of this Office or significant case law or statutory amendments. All three opinions concluded that based upon the common law, the clerk of court is entitled to the salary of the probate judge when the clerk serves in that position as a result of a vacancy in office. Since the issuance of the latest opinion of June 2, 1997, no amendments to any relevant legislation alter its conclusion, either. Thus, 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.

2. Inasmuch as the above referenced letter states that the previous opinions have not relied upon

*Respectfully,
Charlie Condon*

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14-23-60, please provide me with a separate opinion as to whether the language of that statute, relative to "receive the same fees" may be properly construed to mean "salary," keeping in mind that when this legislation was written, the salary of the probate judge was derived from the fees collected by that office.

South Carolina Code of Laws Section 14-23-60 provides:

In case of any such vacancy 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.

Unfortunately there is no case law directly on point that interprets this particular language of Section 14-23-60. However, prior opinions of this Office, as well as the impact of later legislation on Section 14-23-60 sheds some light on the meaning of the phrase "receive the same fees." Before the passage of the Judicial Reform Act of 1976 ("Act") (Act No. 690 of 1976 Acts and Joint Resolutions), Article 1, Chapter 23, of Title 14 contained the general provisions governing the probate courts, such as the election of the probate judges and the filling of vacancies in office. The Judicial Reform Act established probate courts of uniform jurisdiction and provided for the operation of those courts. Former Sections 14-23-10 through 14-23-130, with the exception of Section 14-23-60, were repealed by implication of the Act. The Act contained a provision allowing for the compensation of each judge in the amount appropriated by the governing body of the county, "[p]rovided, however, that all fees and other statutory revenues collected by the probate court in each county shall be the property of such county." Act No. 690, Art. V, § 6, 1976 Acts and Joint Resolutions.

This provision of the Act concerning the compensation of probate court judges has been amended since 1976. Currently, Section 8-21-760 states:

The probate judges must receive salaries for performance of their duties pursuant to Section 8-21-765.

A probate judge who is receiving a salary greater than provided for his position under the provisions of this chapter must not be reduced in salary during his tenure in office. Tenure in office continues at the expiration of a term if that judge is reelected.

...

Fees and costs received under the provisions of this article by the officials of a county must be accounted for and *paid into the general fund of the county as directed by the governing body of that county*. Any remuneration received by a probate judge for performing duties assigned by the Department of Mental Health

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must be remitted by the probate judge to the county treasurer for deposit into the general fund of the county.

Statutes such as these, which relate to the same subject matter and thus are in pari materia, must be construed together and reconciled, if possible, to render both operative. Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). If the statutes are found to be ambiguous or inconsistent, they may be reconciled into one harmonious statute, where both statutes were adopted in the same legislative session. State v. Liggett & Myers Tobacco Co., 171 S.C. 511, 172 S.E. 857 (1933). If it is not possible to harmonize apparently inconsistent provisions, the one most recently enacted by the legislature will prevail. Jolly v. Atlantic Greyhound Corp., 207 S.C. 1, 35 S.E.2d 42 (1945).

Reading Section 14-23-60 harmoniously with Section 8-21-760, the language "receive the same fees" is subject to two possible interpretations. The first interpretation, as you suggest, is that the clerk acting as probate judge is entitled to the same salary as the judge. This interpretation construes the term "fees" broadly, but in light of Section 8-21-760, would not include the official fees remitted to the county and paid into its general fund. This interpretation, though admittedly forced, is somewhat reasonable because it leads to a result consistent with the common law. 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 county general fund in accordance with Section 8-21-760. This interpretation may be the more plausible because the term "fees" is then used consistently in Sections 14-23-60 and 8-21-760 to refer to the amounts charged by the office for the performance of certain services.

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. Indeed, we believe that the common law, if not necessarily Section 14-23-60, requires it. Your first question illustrates why this is so.

3. Please provide me with a separate opinion as to whether the language "and shall receive the same salary" contained in 8-7-50 would apply in the case of a clerk of a court serving as acting probate judge pursuant to 14-23-60. ...

South Carolina Code of Laws Section 8-7-50 states:

The person appointed in accordance with the provisions of §§ 8-7-10 to 8-7-80 to fill temporarily any office or position shall have and may exercise all the rights, powers, authority and jurisdiction and shall perform the duties vested in or required

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by law of the officer whose office or position such person is so appointed to fill temporarily and shall receive the same salary, fees, expenses or other compensation as such officer would be entitled to receive.

Furthermore, concerning the appointee, Section 8-7-40 states that "the appointive authority" shall appoint the person who shall serve "during the absence of the officer in the military service or until the expiration of the term... ."

By the plain language of the statute above and the definition of "Officer" contained in Section 8-7-10(1), Section 8-7-50 applies to a person appointed to fill a vacancy in the office of the probate judge. However, in our opinion, the "person appointed" does not refer to a clerk of court temporarily serving as the probate judge until the appropriate successor is determined. First, the person is "appointed" by an "appointive authority," which is defined as either the Governor or the person, board, commission, or other authority originally electing the officer. See S.C. Code Ann. § 8-7-10(3). The clerk of court is not appointed by an appointive authority, but mandated by statute to fill the vacancy temporarily. Second, Section 8-7-40 describes the person who serves until the expiration of the term or until the officer returns from military service. The clerk of court, on the other hand, serves until the person contemplated by Section 8-7-40 is appointed. Thus, it is our opinion that the language "and shall receive the same salary" contained in 8-7-50 would not apply to a clerk of a court serving as acting probate judge pursuant to Section 14-23-60.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole
Assistant Attorney General