

The State of South Carolina



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The Honorable Evelyn W. Shelley
Judge of Probate of Beaufort County
Post Office Box 1083
Beaufort, South Carolina 29901-1083

Dear Judge Shelley:

You have forwarded your research on the positions of Associate Probate Judge, Deputy Probate Judge, Clerk of Probate Court, and Deputy Clerk of Court to this Office for review. You have asked about the continued viability of a local law for Beaufort County creating a Deputy Probate Judge as well as your following another statute to appoint a Deputy Clerk of Court.

Because the Probate Court is a component of the unified judicial system, S.C. Code Ann. § 14-23-1010 and S.C. Const. art. V, §§ 1 and 12, it is necessary to first review the notion of the unified judicial system before examining the local law in question and addressing your other issues.

Unified Judicial System

The unified judicial system is described by art. V, § 1:

The judicial power [of the State] shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.

As to matters testamentary, minors, and incompetent persons, art. V, § 12 provides:

Jurisdiction in matters testamentary and of administration, in matters appertaining to minors and to persons mentally incompetent, shall

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be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this article.

Then, § 14-23-1010 states specifically: "The probate court of each county is part of the unified judicial system of this State."

An additional consideration is a provision in art. VIII, § 14 concerning local governments which provides in relevant part:

In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside:

... (4) the structure for and the administration of the state's judicial system; ... and (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity.

Finally, prior to the wholesale amendment in 1985 of Article V of the State Constitution, the following existed as art. V, § 22: "Notwithstanding the provisions of this Article, any existing court may be continued as authorized by law until this Article is implemented pursuant to such schedule as may hereafter be adopted." This provision was deleted in the 1985 revisions of Article V.

As stated in Op. Atty. Gen. No. 84-55, dated May 16, 1984,

Act No. 690 of 1976 [now § 14-23-1010 et seq.] was enacted to implement Article V of the South Carolina Constitution which mandates that the judicial power of the State be vested "in a unified judicial system." The preamble to Act No. 690 expressly states that the legislature's purpose was "to comply with the mandate of the Constitution by scheduling in a unified court system." ... [T]he purpose of Act No. 690 was to establish a comprehensive and uniform system of probate courts in this State

... Our Supreme Court has stated in this regard "that statutes which extend or perpetuate a non-unified system or defeat the purpose of Article V must be deemed to be unconstitutional" Douglas v. McLeod, 277 S.C. 76, 282 S.E.2d 604, 605 (1981).

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See also Spartanburg Co. Dept. of Social Services v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988); State ex rel. McLeod v. Civil and Criminal Court of Horry County, 265 S.C. 114, 217 S.E.2d 23 (1975); Cort Industries Corp. v. Swirl, Inc., 264 S.C. 142, 213 S.E.2d 445 (1975); State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1975).

With this background in mind, each of the positions noted in your letter will be examined.

Associate Probate Judge (or Clerk)

As noted in your research, the first general statute authorizing the appointment of an associate probate judge or clerk appears to be in Act No. 1158, 1974 Acts and Joint Resolutions, in § 8A, codified as § 15-405.1 of the 1962 Code. That section provided in relevant part:

For any county, upon request of the probate judge, the Governor may appoint one or more associate probate judges for matters relating to mental illness and retardation

In lieu of the associate probate judges provided for in this section, any probate judge may, upon approval of the governing body of the county, appoint one or more clerks to handle clerical matters relating to mental illness and retardation.

Act No. 690 of 1976 amended to the statute as to associate judges; the amended version was codified as § 14-23-130, which read in part:

In addition to the judge of probate, there shall be an associate judge of probate in those counties in which the governing body thereof appropriates the necessary funds therefor. Associate judges of probate shall be appointed by the judge of probate to serve at his pleasure for a term coterminous with the term of the judge of probate. The associate judge of probate shall have jurisdiction to hear and decide all matters within the jurisdiction of the probate court

See also Act No. 98 of 1983 (one or more associate judges may be appointed).

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Section 14-23-130 was noted to have been repealed by implication and replaced by § 14-23-1030, which is actually a reenactment of § 14-23-130 as amended in 1983.

A review of the foregoing compels the conclusion that a judge of probate may appoint one or more associate judges of probate in those counties in which funds have been appropriated. The term of the associate judge or judges would be at the pleasure of the probate judge and coterminous with that of the probate judge. The associate judge or judges have jurisdiction to hear and decide all matters assigned to them which are in the jurisdiction of the probate court.

Deputy Probate Judge

Act No. 859 of 1956 authorized the appointment of a deputy probate judge for Beaufort County. Codified as § 15-411.1 of the 1952 Code and carried forward into the 1962 Code, this provision was not codified in the 1976 Code revisions. Section 1 of that act provided:

The Probate Judge of Beaufort County may appoint a deputy who shall serve at the pleasure of the probate judge.

Section 2 provided:

Before entering upon the duties of deputy probate judge such deputy shall take the oath prescribed by the Constitution of this State. Upon proper qualification the deputy shall have the same powers and duties as the probate judge and shall receive such compensation as may be fixed by the probate judge and approved by a majority of the Beaufort County Legislative Delegation.

In the Statutory Tables, Volume 22 of the South Carolina Code, this statute is called a "local law."

Act No. 690 of 1976, in article V, § 7, provided for the appointment of deputy probate judges. Codified as § 14-23-1070, the statute provides:

Each judge of probate may from time to time appoint a deputy to act in his stead during his temporary absence, and in evidence of such appointment shall issue an order which shall be filed and recorded as herein provided. Each deputy so appointed shall have power, during the

temporary absence of the judge of probate, to perform all the duties of his office; and all such acts, judgments, decrees, orders and licenses shall be done and issued in the name of the judge of probate by his deputy and when so done and issued shall have the same force and effect in law as if done and issued by the judge of probate. The judge of probate shall be accountable and responsible for all acts of his deputy within the scope of his duties, and may, at his pleasure, by order, remove any such deputy. All orders appointing or removing such deputy shall be recorded and indexed in the office of the judge of probate in a book to be kept for that purpose, available for public inspection.

Thus, after the advent of the unified judicial system, each county's judge of probate is authorized to appoint a deputy judge. It is our opinion that § 14-23-1070 most probably impliedly repealed 1962 § 15-405.1 as well as other local laws relative to appointment of deputy judges.

If 1962 § 15-405.1 were allowed to stand with present § 14-23-1070, the uniformity of the constitutionally mandated unified judicial system would be undermined. Following the old statute concurrently with the new statute has the effect of postponing the complete execution of the unified court system. Such would postpone or defeat the purpose of Article V and would perpetuate non-uniformity. At most, § 15-405.1 would have been viable until Article V had been implemented, pursuant to art. V, § 22. Whether § 15-405.1 might be violative of art. III, § 34 is also questioned. But see Op. Atty. Gen. No. 84-55.

Based on the foregoing, it is our opinion that 1962 Code § 15-405.1 has most likely been impliedly repealed by the adoption of current § 14-23-1070 and the advent of the unified judicial system. However, § 14-23-1070 permits the appointment of a deputy probate judge, so that the position is still authorized in Beaufort County.

Clerk of Probate Court

At least as far back as 1868-1871, and perhaps earlier, probate judges were authorized to appoint clerks for their courts. See 1868-71 STAT. (14) 432. Probate judges are currently authorized by § 14-23-1090 to appoint a clerk and to remove him at pleasure. Duties of the clerk of probate court are specified in § 14-23-1100. These are general statutes applicable to every probate court in the State.

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Deputy Clerk of Court

The authority which you have cited as authorizing the appointment of a deputy clerk of probate court is present § 14-17-60, which provides in part:

The clerk [of the court of common pleas]
may appoint a deputy or deputies to be approved
by the court of common pleas

Such authorization has existed at least as far back as 1868-71 for the clerk of court (of common pleas) to appoint a deputy clerk of court. See 1868-71 STAT. (14) 431. As far as can be determined, this statute does not seem to have provided similar authorization to the probate judges to appoint a deputy clerk of court, nor has it been codified in that part of the state statutes relative to probate courts. It is extremely doubtful that a probate judge could rely upon this statute to appoint a deputy clerk of probate court, as this statute is an express authorization to the clerks of court to take the specified action.

Other Personnel

In addition to the personnel discussed above, the statutes relative to probate judges contemplate that other support staff may be needed. Section 14-23-1130 provides in relevant part:

In addition, the governing body of each
county shall provide office space and additional
support personnel necessary for the orderly
conduct of the business of the probate court.

The job titles or classifications of such support personnel and the duties or responsibilities assigned to such personnel are matters to be worked out by the probate judges and their respective county councils. In this regard, we note that § 4-9-30(7) vests in elected officials (such as a probate judge) the authority to employ and discharge the county personnel within their departments. Such authority would necessarily include assessing the functions and responsibilities of the department (probate court) to determine how many employees are needed for the orderly conduct of business and what their duties will be.

Conclusion

In conclusion, the Beaufort County Probate Judge, whose court is an integral part of the unified judicial system, would be statutorily authorized to appoint a deputy probate judge, one or

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more associate judges, and a clerk of court, in addition to other support personnel who may be needed to carry out the functions of the office and court. The local law relative to appointment of a deputy probate judge specifically for Beaufort County has most likely been impliedly repealed with the implementation of the unified judicial system. The statute relied upon to appoint a deputy clerk of court is applicable to a clerk of court of common pleas rather than a probate judge.

We trust that the foregoing has adequately responded to your inquiry. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

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