

The State of South Carolina



DEPARTMENT 86-92
A-51

Office of the Attorney General

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August 20, 1986

C. Gordon McBride, Esquire
County Attorney
P. O. Box 2555
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Dear Mr. McBride:

In your recent letter to the Attorney General, you inquired as to whether guardian fees earned by a probate judge for service as a public guardian should be retained by the probate judge or paid into the general fund of the county.

The authority under which a probate judge serves as a public guardian is found in §21-23-10, et seq., South Carolina Code of Laws, 1976, as amended. Section 21-23-10 provides for the appointment of the judge of probate as guardian of the estate of a minor or mentally incompetent where no fit, competent and responsible person can be found who is willing to assume such guardianship. Section 21-23-40 specifically entitles the probate judge serving as a public guardian to receive compensation. 1/

In order to determine whether the fee authorized by §21-23-40 should be retained by the probate judge or paid into the general fund of the county, that section must be read in conjunction with the general provisions on fees and costs paid to the probate court, §8-21-760, et seq., South Carolina Code of Laws, 1976, as amended. Section 8-21-760 provides as follows:

The probate judges of the several counties shall receive such salaries for performance of their duties as may be fixed by the governing body of the county, which shall not be diminished during their terms of office.

1/ The recently enacted South Carolina Probate Code, which takes effect July 1, 1987, repeals in totality Chapter 23 of Title 21 of the South Carolina Code of Laws, 1976, as amended. There is no provision in the new Probate Code allowing a probate judge to serve as public guardian.

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Such compensation shall not be measured or affected by the fees and costs received by such officers under the provisions of this article.

All such fees and costs received under the provisions of this article by such officials of any county shall be accounted for and paid into the general fund of the county as directed by the governing body thereof.

Prior to the passage of the Judicial Reform Act, Act No. 690, Acts and Joint Resolutions, South Carolina, 1976, the majority of the counties allowed the probate judges to retain fees and commissions instead of being paid a salary. There were practically as many fee schedules as there were counties. See §27-201, et seq., South Carolina Code of Laws, 1962, as amended. Only a few counties had specific statutory provisions requiring that the probate judge be paid a salary in lieu of fees, commissions and costs and that all fees and costs be paid to the general fund of the county. See §§15-410.1, 15-410.2, South Carolina Code of Laws, 1962, as amended.

One effect of bringing the probate court under the uniform judicial system was to establish uniform operation of the courts. 2/ Article V, Section 6 of Act 690, stated:

Each judge of probate and such persons as he may appoint to the office of associate probate judge pursuant to this act shall be compensated in such amounts as may be provided and appropriated by the governing body of the county in which such judges shall serve. Provided, however, that all fees and other statutory revenues collected by the probate judge in each county shall be the property of such county. Provided, further, that the salary of a probate judge serving in office on the effective date of this act shall not be reduced during his then current term. The term "salary" as used in this proviso shall only mean the basic annual salary appro-

2/ An additional effect of making the probate court part of the uniform judicial system was to place the probate judges under the Code of Judicial Conduct, Supreme Court Rule 33. The Canons should be consulted for possible violations of a probate judge retaining a fee for the performance of a service in his/her official capacity for which he or she receives a salary.

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priation authorized to be paid to a probate judge of a particular county and shall not include any per case or per commitment fee which a probate judge may have received as part of his total compensation.

This section allowed the governing body of the county to set the amount of salary, but replaced the prior situation of some probate courts receiving a salary and some retaining fees and commissions.

Subsequently, and in furtherance of a uniform system, Act No. 164, Acts and Joint Resolutions, South Carolina, 1979, was passed by the legislature to assure uniform fees and costs in the probate courts.

Part I, §2A of Act No. 164, is now codified at §8-21-760, et seq. Although §8-21-770, which sets forth the schedule of fees and costs to be collected, does not make specific reference to fees paid for services as a public guardian, it appears from a review of the legislative history that the real intention of the legislature in passing §8-21-760, et seq., was to establish a uniform system whereby probate judges are compensated for their services by a salary fixed by the governing body of the county instead of through the retention of fees and costs. The Code clearly reflects that §8-21-760 repealed by implication a number of previous provisions allowing for probate judges to retain fees, commissions and costs. See §§14-23-810, 14-23-820, 14-23-830, South Carolina Code of Laws, 1976, as amended. Furthermore, in a previous opinion (a copy of which is attached), our Office has stated that the act repeals by implication any previous act, special or general, on fees due the probate courts. See Opinion letter from Assistant Attorney General Eugene W. Yates, III, to the Honorable Patsy S. Stone, Florence County Probate Judge, dated February 7, 1980.

Nevertheless, it is a generally recognized principle of law that public officials are prohibited from charging and retaining fees for the performance of their official duties where the officer receives a salary for services rendered in his/her official capacity. It is presumed that fees received by the official are received in an official capacity and not as additional compensation. 67 C.J.S. Officers §224.

Our State Supreme Court, in considering the applicability of a county salary act, prior to the passage of the Uniform Judicial Act, concluded that in those counties where probate judges were placed entirely on a salary, the salary was in full, and additional compensation from whatever source was prohibited. Spartanburg County v. Pace, 204 S.C. 322, 29 S.E.2d 333 (1944).

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Therefore, in conclusion, it is our opinion that under §8-21-760, et seq., any compensation received by a probate judge for service as a public guardian should be paid into the general fund of the county.

Sincerely,

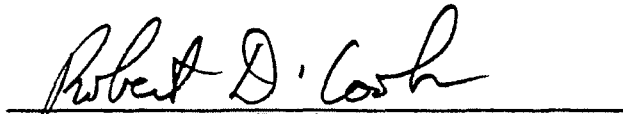


B. J. Willoughby
Assistant Attorney General

BJW/rho

Enclosure

REVIEWED AND APPROVED:



ROBERT D. COOK
Executive Assistant for Opinions