

1984 S.C. Op. Atty. Gen. 138 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-55, 1984 WL 159862

Office of the Attorney General

State of South Carolina

Opinion No. 84-55

May 16, 1984

*1 The Honorable C. Alexander Harvin, III
Member
House of Representatives
505-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Harvin:

This is in response to your request for an opinion concerning the office of Probate Judge for Clarendon County.

The General Assembly, by virtue of Act No. 7 of 1931 abolished the office of Probate Judge for Clarendon County, and all duties pertaining to the office were devolved upon the Clarendon County Clerk of Court. Other Acts of the General Assembly¹ amended the general laws of the State by creating special exceptions for Clarendon County. These Acts required the Clerk to turn over to the County Treasurer fees and costs collected by him while acting in the place and stead of the former Probate Judge. See, [Ridgill v. Clarendon Co.](#), 188 S.C. 460, 199 S.E. 683 (1938).²

You have asked whether the Act abolishing the office of Probate Judge for Clarendon County violates [Art. III, § 34, Subsection IX of the Constitution](#) prohibiting the enactment of a special law where a general law can be made applicable. You also wish to know whether [Article V, Section 1 of the Constitution](#), providing for a unified judicial system, is violated by the Clerk of Court of Clarendon County serving as Probate Judge. And finally you have asked whether the Clerk of Court of Clarendon can be elected to serve as the Judge of Probate without violating the dual office holding provisions of the [South Carolina Constitution \(Art. XVII, § 1A\)](#). It is our opinion that one or more of these constitutional provisions may be violated by Act No. 7 of 1931, but there is no necessity to so conclude, because a court would most probably find that Act No. 7 has now been impliedly repealed by [§ 14-23-1010 et seq. of the Code of Laws of South Carolina](#) (1976 as amended).

In 1976, the General Assembly enacted legislation providing for the existence of a Probate Court for each county. See, Act No. 690 of 1976, now codified at [§ 14-23-1010 et seq.](#) Therein, § 14-23-1020 expressly notes that there 'shall be a judge of probate for each probate court.' It is also clear from an examination of [§ 14-23-1010 et seq.](#) that, not only must there exist a Probate Court in each county in the State, but that there must exist in each county the office of probate judge. Thus, Act No. 690 of 1976 ([§ 14-23-1010 et seq.](#)) appears to conflict with Act No. 7 of 1931 which, as noted above, had abolished the office of Probate Judge in Clarendon County. See, [Ridgill, supra](#).

Of course implied repeals are not favored. See, [1A Sutherland Statutory Construction](#), § 23.09. And special laws usually take priority over general laws in case of conflict. [Supra](#) at § 23.15. However, when a comprehensive revision of a particular subject is promulgated, the special law may be deemed to have been repealed by implication. [Supra](#).

Act No. 690 of 1976 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.' See, [Section 1](#). In view of the fact that the purpose of Act No. 690 was to establish a comprehensive and uniform system of probate courts in this State

and, that Act specifically speaks to the existence of the office of probate judge in every county, it would appear that a court would probably conclude that this Act effectively repealed Act No. 7 of 1931.³

*2 This conclusion is supported by the numerous constitutional problems which would now exist with Act No. 7 of 1931, were that Act not impliedly repealed by Act No. 690 of 1976. Courts will not pass upon the constitutionality of a statute unless absolutely necessary. [Wallace v. Sumter County](#), 189 S.C. 395, 1 S.E.2d 345 (1939). All statutes are presumed to be constitutional, [Cothran v. Mallory](#), 211 S.C. 387, 45 S.E.2d 599 (1947), and it must be presumed that the General Assembly had in mind a constitutional purpose rather than an unconstitutional purpose. [Powell v. Thomas](#), 214 S.C. 376, 52 S.E.2d 782 (1949). Thus, we must attempt to construe the statute with the purpose of avoiding its potential unconstitutionality. [Powell v. Hargrove](#), 136 S.C. 345, 134 S.E. 380 (1926).

If Act No. 7 of 1931 were not deemed impliedly repealed by Act No. 690 of 1976, the former statute would raise serious problems as to whether it is in conformity with Article V of the Constitution. Again, Article V mandates that there exist in South Carolina a unified judicial system. 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). The probate courts are part of the unified judicial system, [State ex rel. McLeod v. County of Probate of Colleton County](#), 266 S.C. 279, 223 S.E.2d 166 (1976), and the clerks of court probably are as well, since they are officers of the circuit courts.

While the abolition of the office of Probate Judge of Clarendon County and the devolution of the duties of that office upon the Clerk of Court may not alter the jurisdiction and authority of either individual office under the general law, compare, [State ex rel. McLeod v. Court of Probate of Colleton County](#), *supra*, certainly it would appear nevertheless, that the existence of such a system in one particular county ‘perpetuates non-uniformity’ in the probate courts. For example, pursuant to [§ 14–23–1010 et seq.](#), there now exists the office of Probate Judge in every county but Clarendon. Moreover a Probate Judge in Clarendon County would possess additional duties as compared to other probate judges in South Carolina. Further, as noted above, it is evident the General Assembly perceives that Article V requires the existence of the office of Probate Judge in each county; and nowhere in that Act is there a provision for the combining of the duties of Probate Judge with those of Clerk of Court. If Act No. 7 of 1931 were not deemed impliedly repealed by [§ 14–23–1010 et seq.](#), a court might conclude that the General Assembly was not fully in compliance with Article V as to clerks of court.⁴

Moreover, absent implied repeal, there would continue to exist the question of whether Act No. 7 of 1931 is violative of [Article III, § 34 of the Constitution](#), which prohibits the enactment of a special law where a general law can be made applicable. As noted above, the [Ridgill](#) case did not address the constitutionality of Act No. 7 itself. And it could be argued that since the Court mentioned Act No. 7 throughout its opinion in [Ridgill](#) in the context of [Article III, § 34](#), that it did not believe the Act unconstitutional on [Article III, § 34](#) grounds. Moreover, Act No. 7 has existed for several decades following [Ridgill](#) without challenge or change by court decision, the General Assembly or the people. See, [State ex rel. McLeod v. Edwards](#), 269 S.C. 75, 236 S.E.2d 406 (1977).

*3 On the other hand, our Supreme Court has consistently stated that the General Assembly may not enact special legislation in the face of a general law or where a general law could be made applicable, absent peculiar conditions requiring special treatment, [Shillito v. City of Spartanburg](#), 214 S.C. 11, 51 S.E.2d 95 (1948) or unless there exist . . . differences which are either defined by the Constitution or are natural and intrinsic, and which suggest a reason that may rationally be held to justify the diversity in legislation.

[State ex rel. Riley v. Martin](#), 274 S.C. 106, 117, 262 S.E.2d 404 (1980). Here, no reason is apparent for the abolition of the office of Probate Judge of Clarendon County and the devolution of his duties upon the Clerk of Court, especially when there exist now and have existed general laws upon the subject. See, [State ex rel. Riley v. Martin](#), *supra*. Therefore, unless Act No. 7 has been impliedly repealed by [§ 14–23–1010 et seq.](#), a court could conclude that Act No. 7 is violative of [Article III § 34](#).⁵

In summary, Act No. 7 of 1931 appears to be in direct conflict with Act No. 690 of 1976; the latter act was intended as a comprehensive response by the General Assembly to its constitutional mandate under Article V to establish a uniform judicial system. Because of this conflict and the fact that if Act No. 7 of 1931 remains operative, it is at the least of questionable constitutionality pursuant to Article V and [Article III, § 34](#), we believe a court would probably conclude that Act No. 7 of 1931 has been impliedly repealed by Act No. 690 of 1976 ([§ 14-23-1010 et seq.](#)).

Of course, all previous acts and adjudications by the Clerk of Court of Clarendon County as Probate Judge, pursuant to the authority of Act No. 7 of 1931, would be valid as to third parties. See, State ex rel. McLeod v. Probate Court of Colleton County, supra.

Sincerely yours,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

- 1 Act Nos. 8, 9, 11 of 1931.
- 2 In [Ridgill](#), the Clarendon County Clerk of Court had duly performed the duties of the Probate Judge and turned over to the County Treasurer fees and costs collected by him for performing such duties. He later sued to recover the fees and costs. The South Carolina Supreme Court held that the various amendments to the general laws of the State constituted special laws and this violated [Art. III, § 34, Subsection IX](#). The court was never called upon to rule on whether Act 7 itself was unconstitutional.
- 3 This conclusion is arguably strengthened by the rule of construction that in case of conflict between statutes, the last legislative expression ordinarily governs. [South Carolina Electric & Gas Co. v. South Carolina Pub. Service Authority](#), 215 S.C. 193, 54 S.E.2d 777 (1949).
- 4 [Article V, § 22](#) provides that '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 hereafter be adopted.' Of course, this provision, together with [Article V, § 1](#) makes it clear that the General Assembly is mandated to create a unified judicial system. Act No. 690 of 1976 reflects the General Assembly's response to that constitutional mandate. There would be no reason for the General Assembly to have intended to exempt Clarendon Court in the area of probate courts; but if that had been the legislative intent, an argument could be made that the General Assembly has now had more than sufficient time to bring the system of probate courts into full conformity with [Article V](#)'s mandate. We believe the better and more reasonable conclusion is that [Article V](#) has already been fully complied with by the General Assembly's repeal of Act No. of 1931.
- 5 Were Act No. 7 of 1931 not deemed repealed by Act No. 690 of 1976, there would probably be no dual office holding problem because the office of Probate Judge was abolished by that act and functioned as Probate Judge by virtue of his position as Clerk of Court. Our Supreme Court has said that so long as there is a reasonable relationship between the duties of the two positions in such a case, there is no violation of the dual office holding provisions of the Constitution. See [Ashmore v. Greater Greenville Sewer Dist.](#), 211 S.C. 77, 44 S.E.2d 88 (1947). Here, the General Assembly has found the existence of a relationship between the duties of the two offices, see, §§ 14-23-60 and 14-14-20 and we assume this relationship to be a reasonable one. However, since we conclude that Act No. 7 of 1931 has been repealed, there would exist a dual office holding problem if the same person were to occupy both the offices of probate judge and clerk of court. There is no question that [§ 14-23-1010 et seq.](#) makes the probate judge an office, see, [Op. Atty. Gen.](#), Aug. 14, 1980, and this office has consistently concluded that the position of clerk of court is likewise an office. See, [Op. Atty. Gen.](#), Nov. 19, 1982.

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