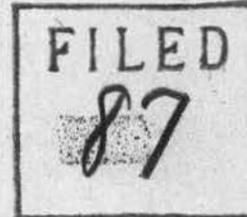


PROBATE COURT)
COSTS)
CLERKS)
COURTS)

Cost of publishing probate court docket which exceeds the statutory amount allowed to be charged against estates for that purpose, shall be paid out of the county treasury.

June 9, 1949



Honorable A. B. Suenkel
Judge of Probate Court and Magistrate
Gasconade County
Hermann, Missouri

Dear Sir:

We are in receipt of your letter of May 28th, 1949, in which you request an opinion of this office as follows:

"According to Statute we can charge in each estate the sum of 20¢ for publishing the docket. Our publishers figure Legal rate now and I do not find any way to get that money. To explain; On last docket of 27 cases we collected \$5.40. The Printer has a charge of 10.50. Where do I get the money to pay that.

"Will you kindly check and inform me in this case. Thanks."

Section 215, R. S. Missouri, 1939, reads as follows:

"It shall be the duty of the clerk of the probate court, thirty days before each regular term, to make a docket, listing the names of all executors and administrators whose settlements are due at such term, and shall designate in such docket the day upon which each settlement is required to be made, and shall cause the same to be published for three weeks in some newspaper published in the county, if there be one, the cost of which to be paid as provided by law for the publication of the docket in cases of the settlements of guardians and curators, and if there be no such paper published in the county, the clerk shall post up such docket in some conspicuous place in his office thirty days before said term; and on the day so appointed, the executor or administrator shall appear and make his settle-

ment, unless for good cause shown the court shall continue the same.

Section 421, R. S. Missouri, 1939, reads as follows:

"The probate court shall keep a docket in which shall be entered, at least thirty days before each regular term, the names of all guardians and curators whose settlements are due each term, and shall designate in such docket the particular day of said term upon which such settlement is ordered to be made, and shall cause the same to be published for three weeks in some newspaper published in the county, if there be one, and the court shall divide the cost of printing each docket by the whole number of cases docketed, and tax against each estate the amount ascertained by such division as its cost in the case: Provided, that cost of publication shall not exceed twenty cents for each estate. And if there be no newspaper published in the county, a copy of the docket shall be posted by the clerk in some conspicuous place in his office; and on the day so appointed, the guardian or curator shall appear and make his settlement, unless, for good cause shown, the court shall order the same to be postponed to some other day or term."

These two sections indicate that it is the duty of the clerk of the probate court to make a docket of the settlements due at regular terms of the probate court. The cost of such publication is to be paid by taxing the estates involved for their prorata share of the cost. However, a maximum of twenty cents may be charged each estate for this purpose. There is, therefore, a statutory prohibition against taxing the estates in any greater amount. Under the situation presented in your letter, there is thus an additional cost, arising due to changing times, which is unprovided for by statutory enactments.

Since the statute places a duty upon the probate clerk to cause the publication of a docket, the question becomes one of whether the probate clerk or the revenue fund of the county should be charged with the extra cost. There are two lines of decisions with regard to the question of whether expenses are payable by the county, where a county officer incurs such expenses. The first is one in which there is a question of additional compensation to the officer,

and the courts hold that the officer may not be allowed to receive a remuneration which is very close to compensation, even though it may be in the form of payment to someone to assist him in the performance of his duties. This line of case is exemplified by the cases of Maxwell v. Andrew County, 146 S.W. (2d) 621, and Alexander v. Stoddard County, 210 S.W. (2d) 107. Another line of cases deals with those expenses which are closely allied to or which are a part of the necessary material tools with which it is necessary to conduct the duties of an office. This line of cases is exemplified by the cases of Ewing v. Vernon County, 216 Mo. 681, 116 S.W. 518; Buchanan v. Ralls County, 283 Mo. 10, 222 S.W. 1002; and Rinehart v. Howell County, 153 S.W. (2d) 381.

These cases involve such things as janitorial services, stamps, stationery, etc. In the Rinehart case stenographic services for the Prosecuting Attorney were involved. In the recent case of Alexander v. Stoddard County, supra, the Supreme Court of Missouri held that the treasurer and ex-officio collector of Stoddard County could not recover salary paid to a deputy for aiding him in the performance of his duties. The court in that case said, l. c. 108:

"The Ewing case was distinguished in Maxwell v. Andrew County, 347 Mo. 156, 164, 146 S.W. 2d 621, 625: 'It is true that there are certain decisions in which it has been said that where an officer in performing a duty enjoined on him by statute necessarily expends his own funds, there being no statutory provision for meeting these expenses out of the public treasury, he may be reimbursed for such expenses. * * * A careful review of these decisions, however, discloses that they are based upon a construction of the particular statutes involved and hold that by reasonable implication they permit payment of some particular item of expense.' The present case is not an instance of the legislature's providing for an office or for official duties but wholly failing to provide some method of paying for them. 20 Ann. Cas. 148. The Rinehart case is distinguishable on these facts: The prosecuting attorney of Howell County was paid a fixed, annual, statutory salary and there was no statutory provision for paying his stenographer."

The court also found a specific prohibition of the type of payment which was sought, that is, payment out of the general revenue act of the county, in a statutory provision that deputies should be paid out of "fees and commissions earned and collected by such officer only and not from general revenue."

The case of Rinehart v. Howell County, supra, mentioned in the above quotation stated that where a duty was imposed upon an officer and there was no provision for necessary expense in the performance of the duty, that the officer was entitled to have it paid by the county. The Alexander case distinguishes the Rinehart case on the grounds that in the former case this statutory provision as to payment of deputies was provided for. In other words, in the Alexander case, it was clear from statutory enactment that the Legislature intended that the treasurer and ex-officio collector should pay for the deputies himself. This was not true in the Rinehart case, and we are of the opinion that it is not true in the instant situation. It seems clear that the Legislature intended that the probate clerk should not pay the cost of the publication of the docket, since they specifically provided that it should come out of the estate. Yet, they have failed to amend the statute to bring the allowance in line with the rising cost of publication. We are of the opinion that this presents a situation analogous to that in the Rinehart case.

The court in the Alexander case stated to the effect that in the cases in which allowance for expenses had been approved, the court found some statutory provision from which a reasonable inference could be raised that such expense should be paid. In the Rinehart case this consisted only of the fact that a duty was placed upon an officer, and there was no provision for paying for it.

In the situation before us now there was a method of payment, but the method is now a wholly inadequate one. We are therefore of the opinion that this situation is much more analogous to that in the Rinehart case than in any of the other cases dealing with this type of thing. This is especially true where there is not, as there was in the Alexander case, any statutory provision which even remotely indicates that the payment should come out of the pocket of the county officer.

It may be superfluous to add that the publishing of the docket, is county business, and the cost of its publication is as much beneficial to the county as was the purchase of stationery and other office supplies in some of the other cases mentioned above.

CONCLUSION.

We are therefore of the opinion that, pending an amendment of the General Assembly of Missouri, which will bring the amount allowed

Hon. A. B. Suenkel

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to be charged against estates into line with present costs, the cost of publishing the probate court dockets which exceeds the amount allowed to be charged to the estates involved, is payable out of the revenue funds of Gasconade County.

Respectfully submitted,

APPROVED:

SMITH N. CROWE, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

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