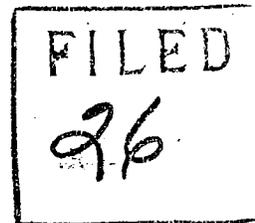


MAGISTRATES: (1) Magistrate may not require fee for solemnization of marriages; (2) Magistrate cannot be compelled to solemnize marriages.

December 31, 1946



Honorable Walter A. Eggers  
Judge of the Probate Court  
Perry County  
Perryville, Missouri

Dear Sir:

We are in receipt of your letter of December 10, 1946, requesting an opinion from this department, which reads as follows:

"SB 280 authorizes Magistrates to solemnize marriages. Two questions now arise in the minds of all magistrates-elect;

"1. Can a fee be collected for the solemnization of marriages and if so, can the magistrate retain this fee?

"2. Is it compulsory for the Magistrate to perform this function or may he refuse to perform marriages?"

The first question arises as a result of a provision in the old justice of the peace law. Section 13400, R.S. Mo. 1939, allowed justices of the peace fees for solemnizing marriage ceremonies. This section was repealed by Senate Bill 334 of the 63rd General Assembly. Section 17 of Senate Bill 207 of the 63rd General Assembly provides for the payment by the state of certain salaries to the magistrate. Then Section 3 of said Senate Bill 207, implementing Section 24 of Article V of the 1945 Constitution, limits further compensation as follows:

"Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next, preceding his election, and shall be licensed to practice law in this state; except that, in counties of 30,000 inhabitants or less, a probate judge who succeeds himself as probate judge may serve as judge of the magistrate court without being so licensed, and except that persons who were on February 27, 1945, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years shall be eligible to the office of magistrate without being licensed to practice law. No magistrate shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate."

This section in prohibiting magistrates from receiving any other or additional compensation for any other public service, seems to have reference only to the provisions of Senate Bill 207. In other words, a magistrate can only be paid for the duties and services as are set out in that bill and then only a specified amount.

Senate Bill 280 of the 63rd General Assembly gives the magistrates authority to solemnize marriage ceremonies but does not provide compensation for this service, so there is no conflict between these two bills. Now, to determine the type of service required in solemnizing marriage ceremonies, we must look to the case of *St. Louis v. Sommers*, 148 Mo. 398, l. c. 401:

"The solemnization of a marriage is in no sense a judicial act. Were a justice to perform it in his court, no record or note could be made of it. It may be performed anywhere within his jurisdiction, at any and all hours of the night or on Sunday and there is nothing which requires the clerk to attend the justice in his perambulations or to take ex officio notice when parties will call upon the

justice at his home to perform the marriage ceremony nor does it require the justice to report such ceremony to his absent clerk.

"The statute does not give the twenty-five hundred dollars in lieu of all other fees. It simply provides he shall receive that amount as justice of the peace for services in his court. It leaves him the other perquisites of the office."

Under this authority there is no question but that the solemnizing of marriage ceremonies is not within the judicial duties set out in Senate Bill 207, and so this function is clearly within the prohibition against compensation for any other public service.

Therefore, a magistrate cannot require payment of a fee in consideration of his services in solemnizing marriage ceremonies.

The answer to the second question submitted here depends on the construction of Senate Bill 280, supra, which provides:

"Section 1. That Section 3363 of Chapter 20, Revised Statutes of Missouri, 1939, relating to who may solemnize marriages, be and the same is hereby repealed and a new section enacted in lieu thereof relating to the same subject and to be known as Section 3363, and to be as follows:

Section 3363. Marriages may be solemnized by any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate court."

The word "may" is important for our purpose. Should this word be construed to be permissive or compulsory? The wording of this bill is, for this purpose, the same as that in Section 3363 of the old justice of the peace law, and under the provision of that law a justice of the peace was not compelled to solemnize marriage ceremonies against his will. This was true because this service was not considered a judicial duty compulsory in its nature, 148 Mo. 398, supra. It is reasonable then to assume that when this law was re-enacted in Senate Bill 280, the same construction was intended.

Viewing this subject from the standpoint of all the officials authorized to perform this service, it seems that all should be on the same level. There is no provision compelling a minister of the Gospel to solemnize a marriage ceremony against his conscience or better judgment, and likewise this should hold true in regard to magistrates. As a general rule the word "may" when used in a statute is permissive and is given its ordinary meaning. The case of *Lansdown v. Faris*, 66 F.(2d) 929, at page 941, set out the rule as follows:

"\* \* \* It will be noted that all through the above quotations the action of the court is governed by 'may.' This word, in ordinary meaning, carries no thought of compulsion-- it is permissive or power giving and not at all compelling, discretionary, and not mandatory. *Farmers' & Merchants' Bank v. Fed. Res. Bank*, 262 U. S. 649, 662, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A.L.R. 635; *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 588, 24 S. Ct. 767, 48 L. Ed. 1124. While this ordinary meaning will be given to that word 'unless it would manifestly defeat the object of the provisions' of the statute (*United States v. Thoman*, 156 U. S. 353, 359, 15 S. Ct. 378, 380, 39 L. Ed. 450; *Thompson v. Lessee of Carroll*, 22 How. 422, 434, 16 L. Ed. 387), such words sometimes are construed as mandatory where the clear intention of the legislative body requires such meaning (*Farmers' Bank v. Fed. Res. Bank*, 262

U. S. 649, 662, 43 S. Ct. 651, 67  
L. Ed. 1157, 30 A. L. R. 635; United  
States v. Thoman, 156 U. S. 353, 359,  
15 S. Ct. 378, 39 L. Ed. 450). \* \* \*"

This case says that such words are construed as mandatory only where the clear intention of the Legislature is to that effect. There is no such intention here, because the duty to solemnize marriage ceremonies is not set out in Senate Bill 207 with the general duties and functions of magistrates, and further, there is no provision, in fact there is a prohibition, for compensation or fees for this service in either Senate Bill 207 or Senate Bill 280. Had the Legislature intended for magistrates to be compelled to perform this service, surely it would have been included in Senate Bill 207 as a duty or function of the magistrate court and a provision made for adequate compensation.

Conclusion

Therefore, it is the opinion of this department that a magistrate cannot require payment of a fee in consideration of his service in the solemnization of marriages. It is further the opinion of this department that a magistrate cannot be compelled to solemnize marriages.

Respectfully submitted,

DAVID DONNELLY  
Assistant Attorney General

APPROVED:

---

J. E. TAYLOR  
Attorney General

DD:EG