

PENSIONS:- Probate court may waive statutory fees in guardianship proceedings for applicants or recipients of old age assistance.
PROBATE COURT:

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June 11, 1948

Honorable John F. Moeckel
Judge of the Probate Court
Cape Girardeau County
Jackson, Missouri

6-14

Dear Judge Moeckel:

This will acknowledge receipt of your recent request for an opinion, which reads:

"The County Welfare office representative has discussed with me several times the matter of appointment of guardians and curators for people receiving old age assistance, whose mental condition has deteriorated to the point where they are considered unable to manage their business affairs. The question is, whether or not the Probate Courts can properly charge court costs in such cases.

"The local Welfare office just today talked with me about appointing a guardian for a woman here in Jackson who is on their rolls and receiving assistance. They inquired if court costs could be charged.

"Will you please let me have an opinion from your office as to whether or not the probate court may properly charge the statutory fees in guardianship matters involving payments to individuals of public funds by state agencies?"

Unless there is some specific exemption under the laws of this state for the payment of fees for proceedings in appointing such guardians, the Probate Court must charge regular statutory fees for such services.

The population of Cape Girardeau County exceeds 30,000 inhabitants. Section 13404, page 1517 to 1520, inclusive, Laws of Missouri 1945, prescribes the various fees that the probate court shall charge in proceedings appointing guardians and requires that the probate court shall charge such fees, and reads in part:

"In the probate proceedings in the different probate courts in this State, there shall be charged against and collected from the estates or parties requiring the services of the probate judge, clerk or court, fees, as follows:

* * * * *

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall be imposed on the clerk of the probate court.

* * * * *

"In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer.

* * * * *

"Every judge and clerk of the probate court shall, before entering upon the duties of their respective offices, give a separate, good and sufficient bond which, in counties now or hereafter having the following number of inhabitants, shall be in a penal sum as follows:

* * * * *

"(2) in counties with more than 30,000 and less than 70,000 inhabitants, the sum of \$3000.00,

* * * * *

"Such bonds shall be approved by the clerk of the circuit court having jurisdiction in such county, and shall be filed with such clerk. Every such bond shall run to the state or county to which the fees herein provided for are payable and shall be conditioned respectively upon the faithful performance by such judge or clerk of each and every the duties hereinabove imposed upon such respective officer."
(Underscoring ours.)

By the Legislature's using the word "shall" instead of "may" in the foregoing section, under well established rules of statutory construction, it leaves no discretion with the probate court but is a mandate directed to him to charge and collect such fees. See State ex inf. McKittrick v. Wymore, 119 S.W. (2d) 941, 345 Mo. 98. Furthermore, the Legislature required the probate court and clerk of the court to enter into a separate bond for the faithful performance of their duties to run to the state or county, as the case may be, wherever said fees are payable. All of which clearly indicates that it becomes a mandatory duty upon the probate court to charge a fee for such services, unless there be some specific statutory provision exempting such cases from the foregoing Section 13404, supra.

We find under Section 9417, page 647, Laws of Missouri 1941, wherein the Legislature has left the matter of charging fees in such cases within the discretion of the probate court when, in the opinion of said court, such persons are unable to assume such expense. Section 9417, supra, reads in part:

"Benefits hereunder shall be delivered to the applicant in person or, in the event of his incompetency, to his legally appointed guardian, and in the case of a dependent child to the person or relative with whom he lives. All guardianship proceedings in the case of an applicant or recipient shall be carried out without fee or other expense, when in the opinion of the Probate Court, the aged person is unable to assume said expense. At the discretion of the court such a guardian may serve without bond.* * *"

CONCLUSION

Therefore, in view of Section 9417, page 647, Laws of Missouri 1941, we are of the opinion that regular statutory fees in guardianship proceedings for an applicant or recipient of old age assistance may be waived when, in the opinion of the probate court, such aged person is unable to assume such expense. However, this opinion only applies to applicants or recipients of old age assistance.

Respectfully submitted,

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APPROVED:

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