

# MAINE STATE LEGISLATURE

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30 M.R.S.A. 2 - 4A  
30 M.R.S.A. 65

Probate Fees  
Counties: Probate Fees  
Counties: Salaries - Registry of Probate  
Registry of Probate - Salaries

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February 3, 1978

Michael E. Povich  
District Attorney  
60 State Street  
Ellsworth, Maine 04605

Dear Mr. Povich:

I am writing in reply to your request for an opinion concerning the retention of publication fees by registers of probate.

FACTS:

In your request, you have indicated that a practice has developed in the Hancock County Registry of Probate whereby the register, on behalf of petitioners and other parties, arranges for the publication of notices which are required in probate proceedings and retains a small amount over and above the actual cost of publication for her own benefit.

30 M.R.S.A. Sec. 2, subsec. 4-A, which deals generally with the salaries of county officers, was recently amended to provide, in pertinent part, as follows:

"The salaries mentioned in this section shall be in full compensation for the performance of all official duties by those officers and judges. All fees and charges of whatever nature which may be payable to any county officer, except clerks of court, shall be payable by them to the county treasurer for the use and benefit of the county. . . ."

30 M.R.S.A. Sec. 65, subsec. 1, effective as of October 24, 1977, provides:

"The county commissioners shall set the amount to be charged by the register of probate and the register of deeds for the publication of

notices required by law. The amount set shall not be less than the actual cost to the county of providing the publication service, including the actual cost of publication."

QUESTIONS PRESENTED:

1) Whether the preparation of public notices by registers of probate constitutes the performance of an "official duty" within the meaning of 30 M.R.S.A. Sec. 2, subsec. 4-A.

2) Whether the register of probate is required by that section to remit, to the county treasurer, any money received over and above the actual cost of publication.

3) Whether the county commissioners have the authority, under 30 M.R.S.A. Sec. 65, to establish the amount to be charged for the publication of these notices.

ANSWERS:

1) The preparation of public notices by the register of probate constitutes the performance of an "official duty" only in those instances where the register is required by statute to give public notice.

2) Under 30 M.R.S.A. Sec. 2, subsec. 4-A, the register of probate is obligated to remit all fees, including those charged for the publication of notices required by law, to the county treasurer.

3) Pursuant to 30 M.R.S.A. Sec. 65, the county commissioners are empowered to establish the fees to be charged for the publication of such notices.

REASONING:

With respect to the first issue, it is axiomatic that the performance of a service which is not required by law cannot be classified as an "official duty". A duty exists only where one is required to act. In certain cases, registers are indeed obligated to arrange for publication of notices. 18 M.R.S.A. Sec. 203, for example, requires the register of probate to give public notice of the appointment of an executor or other fiduciary. There is, however, no statutory provision which imposes a general obligation upon registers to arrange for publication whenever publication is required. In many cases in which public notice is required, the register of probate appears to be under no obligation to arrange for publication. See, for example, 18 M.R.S.A. Secs. 1552, 1957, 2051, 2203, 2302 and 2403. In any given case, therefore, the determination of whether the publication of notice

constitutes the performance of an official duty will depend upon the language of the statute requiring public notice. Only where it appears from the language of that statute, or by necessary implication, that the register of probate is legally obligated to give the required notice may publication be regarded as an official duty.

The foregoing, however, is not dispositive of the question concerning the retention of fees. From the language and legislative history of 30 M.R.S.A. Sec. 2, it is evident that all fees, including publication fees received by the registers of probate, must be remitted to the county treasury. This is so regardless of whether, in any given case, publication is characterized as an official duty or otherwise. Immediately prior to the 1977 amendment to 30 M.R.S.A. Sec. 2, that section provided, in pertinent part, as follows:

"All fees and charges of whatever nature, except charges for the publication of notices required by law, which may be payable to any county officer, shall be payable by them to the county treasurer for the use and benefit of the county. . ." [Emphasis Added]

The 1977 amendment deleted the qualifying language underlined above. Section 2 now provides, without exception or qualification, that "all fees and charges of whatever nature" which are collected by county officers must be remitted to the county treasurer. [Emphasis Added] It cannot be presumed that this change was intended to have no significance. On the contrary, it is only reasonable to infer that the legislature intended thereby to render the section all-inclusive by including publication fees within its scope.<sup>1/</sup>

The legislative history of the amendment, moreover, indicates that one of the principle purposes of the deletion was to ensure that registers of probate account for publication fees. The amendment constituted an integral part of a comprehensive legislative scheme to revise the salaries of county officers. The original bill was the product of an exhaustive study and report by the Local

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<sup>1/</sup> Even prior to the amendment, there seems to have been considerable doubt as to whether, under any circumstances, registers of probate were entitled to retain any fees arising from the publication of notices. On two separate occasions, this office concluded that registers were without authority to do so. Opinion of the Attorney General, February 1, 1977 and Opinion of the Attorney General, May 18, 1966. Neither of these opinions, however, specifically addressed the issue of whether a distinction exists between fees received for the performance of official duties and those received for the performance of services not legally required.

and County Government Committee. See, Report of Local & County Government Committee: Study on County Officers Salaries (1976) Among the legislative objectives manifested in the report was the achievement of equity among various county officers by removing discrepancies in compensation resulting from unevenly distributed "fringe benefits" including, inter alia, fees received by registers of probate for the publication of notices. Id. pg. 2. In this regard, the report concluded:

"In most counties the Register's salary does not reflect the full compensation of the Register, as they are also allowed to retain the fees collected for the publication of notices. Though these fees commonly appear to be relatively small (though one Register reported receiving \$4,100 in 1975), and are erratic and unevenly distributed; they are nonetheless fees collected by county officers for their own use. The Committee recommends, consistently with its other recommendations, that all such fees be turned over to the county treasury. . . ." Id pg. 38 [Emphasis added]

Similarly, the statement of fact which accompanied the original bill, L.D. No. 62, and which was incorporated by reference in its successor, L.D. 752, is equally probative of the legislature's intent.

". . . The bill also removes the unevenly distributed compensation some county officers receive and places all officers in an exclusively salaried position. To reach an equitable and rational salary for each officer, this bill makes the following changes in the present statutes:

3. Requires that all fees received by the registers of probate and registers of deeds, including publication fees, are to be turned over to the county treasury." Emphasis Added

In addition, there is nothing in the language of the statute which suggests that a distinction is to be drawn between those fees received for the performance of official duties and those received for the performance of services not legally required. The language of the statute, the accompanying statement of fact and the committee report is unequivocal and all-inclusive; all fees are to be remitted to the county treasury. This construction, moreover, is amply supported by the legislative history of the statute prior to the 1977 amendment. In 1959, the legislature enacted the original version of the statute which remained substantially unchanged prior to the 1977 amendment. By that statute, county officers were required to account

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for ". . . all fees and charges of whatever nature, except charges for the publication of notices required by law. . ." P.L. 1959, ch. 372, Sec. 7. During proceedings in the House relating to this bill, Rep. Jalbert commented:

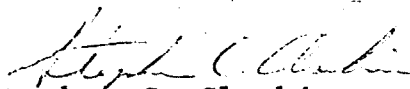
"Mr. Speaker, with regard to the last paragraph of Section 7 which would make all fees accountable except charges for newspaper notices and civil fees of deputy sheriffs, without going into the question of the desirability of abolishing all fees, attention is called to the following: In almost if not all cases the present fees retained by county officers are fees for performing services that the officer is not required to perform. Fees for services that the officer is required to perform are now paid over to the county." Legislative Record, 1959 pp. 2287-2288  
[Emphasis Added]

Subject to the exceptions prescribed by the statute, it is readily apparent that the legislature intended to include all fees within its scope, regardless of whether they were attributable to the performance of official duties or otherwise. It follows, therefore, that upon repeal of the exception for publication fees in 1977, those fees were to be accorded the same treatment as other fees collected by county officers.

Finally, you have requested an opinion as to whether county commissioners have the authority, under 30 M.R.S.A. Sec. 65, to establish the amounts to be charged by registers of probate for the publication of notices. In view of the foregoing, there is no reason for departing from the plain meaning of that section. Accordingly, it is evident that the county commissioners have the authority to establish these fees.

If you need any further assistance, please do not hesitate to contact this office.

Sincerely,

  
Stephen C. Clarkin  
Assistant Attorney General

SCC:spa