

VOLUME NO.35

Opinion No. 30

PUBLIC ADMINISTRATORS — Estates, fees allowable. Sections 25-237, 91-623, 91-628 and 91-3407, R.C.M. 1947.

HELD: 1. If the aggregate market value of an estate of a deceased person is fifteen hundred dollars or less, the public administrator is entitled to a commission of fifteen percent of the total amount of any such estate in which he serves as administrator.

2. If the aggregate market value of an estate exceeds fifteen hundred dollars, the fees allowed the public administrator for administering the estate are determined by the provisions of section 91-3407, R.C.M. 1947.

3. A court may grant additional allowances to a public administrator if deemed necessary, in those instances where compensation for the administrator is determined on the basis of section 91-3407, R.C.M. 1947.

September 28, 1973

Mr. Frank McChesney, Director
 Department of Intergovernmental Relations
 805 North Main
 Helena, Montana 59601

Attention: Mr. George H. Pendergast, Administrator
 Municipal Division

Dear Mr. McChesney:

Your department has requested my opinion on the following questions:

1. Does section 91-628, R.C.M. 1947, which provides for a commission of 15% for the public administrator, including attorney's fees, apply to all estates handled by the public administrator or to just those estates of \$1500 or less which may be summarily settled?

2. If it applies only to summary estates, then does section 91-3407, R.C.M. 1947, apply to public administrators in all other estates?
3. If deemed necessary, may the court or judge grant further allowances to a public administrator or an attorney for any extraordinary services?

Section 91-628, Revised Codes of Montana, 1947, relating to the compensation of public administrators, provides:

The public administrator shall receive as full compensation for his services, including attorney's fees, a commission of fifteen per cent (15%) of the total amount of money received by him in any estate provided for in this act; provided, that in no case shall the compensation be less than twenty-five dollars (\$25).

Section 91-3407, R.C.M. 1947, specifies the amount of compensation to be received by executors or administrators of an estate, determined by a graduated percentage based upon the total value of the estate. Section 25-237, R.C.M. 1947, codified within the chapter relating to the fees of county officers, provides:

The public administrator is allowed to receive and collect for his own use, for services rendered, the same fees as are allowed executors and administrators, as provided in section 91-3407.

It would seem, from a reading of the foregoing statutory provisions, that there exists a conflict between the requirements of section 91-628, *supra*, and those of section 25-237, *supra*. However, similar questions of construction were considered by then attorney general Olsen in 24 **Opinions of the Attorney General**, no. 45. Attorney General Olsen, in reconciling the apparent inconsistencies of sections 91-628 and 25-237, stated at 24 **Opinions of the Attorney General**, page 62:

These two sections [91-628 and 25-237] on their face appear to be in conflict with each other and under the general rule the section that was enacted later would be held to prevail. Since Section 91-628, *supra*, was enacted in 1909 and Section 25-237, *supra*, came into the law as part of the Political Code of 1895, it would appear that Section 91-628, *supra*, would apply.

However, a closer examination reveals that the two sections are not in conflict except in those estates where the aggregate market value of the estate is five hundred dollars or less, and in those cases Section 91-628, *supra*, would apply.

Section 91-628, *supra*, was originally enacted as Section 8 of Chapter 134, Session Laws of 1909. The 1909 act has not been amended since it was enacted and now comprises Sections 91-621 to 91-628 inclusive of the 1947 code. The 1909 act provided a procedure to be followed by the

public administrator in ascertaining the amount of property left by a decedent for whose estate no administrator had been appointed. The Act also outlines a summary procedure to be followed if the estate is five hundred dollars or less in value. You will note that I have underlined the following words of Section 91-628, *supra*, "provided for in this act." Since Section 91-628, *supra*, is the last section of Chapter 134, Session Laws of 1909, I believe that it is clear that the legislative intent was that the administrator would be entitled to the fifteen per cent fee only in those estates worth five hundred dollars or less.

Section 25-237, *supra*, is a general statute and governs the fees to be allowed a public administrator generally. However, in those estates with a value of five hundred dollars or less, Section 91-628, *supra*, being a special statute would control.

Attorney General Olsen then held in effect that if the total aggregate value of an estate was five hundred dollars or less, the public administrator was entitled to a fifteen per cent commission of the total value as provided by section 91-628, *supra*, and further, that if the total value exceeded five hundred dollars, the fees of the public administrator were to be determined by sections 25-237 and 91-3407, *supra*.

The rationale and holdings enunciated in 24 **Opinions of the Attorney General**, no. 45, are still applicable and controlling as they relate to your first and second questions. However, the five hundred dollar limitation referred to in the above-quoted opinion and specified in section 91-623, R.C.M. 1947, was increased to fifteen hundred dollars by section 1, Chapter 222, Laws of 1969. Consequently, under current law, if the value of an estate is fifteen hundred dollars or less, pursuant to section 91-628, *supra*, the public administrator is to be compensated in the amount of fifteen per cent of the total amount of any such estate in which he acts as administrator. In those estates in which the total market value exceeds fifteen hundred dollars the fees of the public administrator are determined pursuant to the provisions of sections 25-237 and 91-3407, *supra*.

With reference to your third question, section 91-3407, *supra*, provides in pertinent part:

In all such cases further allowances may be made as the court or judge may deem just and reasonable for any extraordinary services. The total amount of such extra allowances must not exceed the total amount of commission allowed by this section.

The above-quoted provision allows additional compensation, within the discretion of the court, to executors and administrators for the performance of extraordinary services subject to the specified limitation. Since section 25-237, *supra*, allows for the compensation of public administrators under section 91-3407, *supra*, the provision relating to extraordinary allowances would also apply

to public administrators. It should be noted, however, that section 91-628, supra, does not permit extraordinary allowances and in fact provides that a commission of fifteen per cent is "full compensation" for a public administrator's services. Thus, additional allowances for extraordinary services, when determined to be appropriate by the court, may only be granted a public administrator in those estates exceeding fifteen hundred dollars in aggregate market value. Attorney's fees are established by rule of court in the various judicial districts.

THEREFORE, IT IS MY OPINION, based on the foregoing discussion:

1. Section 91-628, R.C.M. 1947, which provides for a commission of 15% for the public administrator, including attorney's fees, applies only to those estates handled by the public administrator which do not exceed fifteen hundred dollars in aggregate market value.
2. If the aggregate market value of an estate exceeds fifteen hundred dollars, the fees allowed the public administrator for administering the estate are determined by the provisions of section 91-3407, R.C.M. 1947.
3. The court may, if deemed necessary, grant additional allowances to a public administrator for extraordinary services in those instances in which compensation is determined on the basis of section 91-3407, R.C.M. 1947, subject to the limitation specified in said statute.

Very truly yours,

ROBERT L. WOODAHL
Attorney General