

Opinion No. 18.**Statutes, Interpretation of "may"—
County Clerk.**

Held: It was the intention of the legislature in using the word "may" in the last sentence of Chapter 52, Laws of 1941, to make the collection of the fee for the certificate of information on birth or death certificates, optional or permissive, and not mandatory.

March 10, 1943.

Mr. Raymond Shelden
County Attorney
Carter County
Ekalaka, Montana

Dear Mr. Shelden:

You have requested my opinion on the construction of the word "may", as used in the last sentence of Section 2524, Revised Codes of Montana, 1935, as amended by Chapter 52, Laws of 1941. The question, as you state in your communication, arises from the exchange of the word "may" for the word "shall" as was used in Section 2524, before amendment in 1941.

Section 2524, as it appears in the 1935 Revised Codes, reads:

"Every county clerk is required to issue a certified copy of a record of birth or death upon demand of any such record in his office, and shall receive on behalf of the county as the fee for such certified copy the sum of twenty-five cents." (Emphasis mine.)

Section 2524, as amended by Chapter 52, Laws of 1941, reads:

"Every county clerk, on demand, is required to issue a certificate, with seal affixed, certifying to the information contained in any certificate of birth or death of record in his office. The information shall be inserted on a form compiled and prescribed by the state board of health and said form shall be of general use throughout the State and shall be issued by county clerks in lieu of certified copies of the original instrument. **The county clerk may charge a fee of not to exceed twenty-five (25c) cents for each certificate issued.**" (Emphasis mine.)

The fundamental rule of construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. (*State v. Stewart*, 53 Mont. 18, 161 Pac. 309.)

It is stated in 59 *Corpus Juris*, 1079, Section 635 (5):

"As a general rule the word 'may,' when used in a statute, is permissive only and operates to confer discretion, while the word 'shall' is imperative, operating to impose a duty which may be enforced."

In the same volume of *Corpus Juris*, at page 1082, it is stated an amendment substituting "may" for "shall" manifests a clear intent to make the act referred to optional and permissive, instead of mandatory.

The Supreme Court of Montana has had occasion to pass upon the meaning of the word "may" in several instances. In *State ex rel. Stiefel v. District Court*, et al., 37 Mont. 298, 304, 96 Pac. 337, the Court employed the language used in a former decision, *Montana Ore Pur. Co. v. Lindsay*, 25 Mont. 24, 63 Pac. 715:

"This word (may) is sometimes permissive only; sometimes it is imperative. Legislative intent determines whether it is directory or mandatory. According to its natural and usual signification, the word "may" is enabling and permissive only, and so it must be interpreted where no right of or benefit to the public, nor rights of persons other than the one upon whom the permission is conferred, depends giving to it the obligatory meaning; but the word is interpreted to mean "shall" or "must" whenever the rights of the public or of third persons

depend on the exercise of the power or performance of the duty to which it refers. In those cases where the public or persons possess the right to require that the power conferred by the word "may" be exercised, the word is imperative and mandatory, being the equivalent of "shall" or "must."

Again, in *State ex rel. Malott v. Board of County Commissioners*, et al., 86 Mont. 595, 606, 285 Pac. 932, the court stated:

"The recognized rule is that, where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the right of third persons, the execution of the power may be insisted upon as a duty, although the phraseology of the statute may be permissive and not mandatory."

Accepting the words of our Court, that the word "may" must be interpreted according to its natural and usual signification, as permissive only where no right to the public or third persons depends on the exercise of the power conferred, may it be said there is such a right conferred on the public or third persons in Chapter 52, Laws of 1941, which requires that the county clerk must collect the fee provided for by that act? An examination of Chapter 52 reveals the public interest concerned is not the collection of the fee, but is the receipt of the certificate of information on birth and death certificates on demand. That duty—of issuing the certificate—is mandatory on the county clerk. By amending the last line of Section 2524, the county clerk is authorized to charge a fee "of not to exceed twenty-five (25c) cents," whereas, under Section 2524, Revised Codes of Montana, 1935, he was required to charge a fee of "twenty-five cents." By this change, the legislature showed the revenue to be obtained from the collection of the fee for the certificate of information was not of primary importance. Thus, there is no public interest concerned which requires the exercise of a power conferred to protect that public interest.

The last sentence of Chapter 52, Laws of 1941, uses the word "may." The full force and effect of the use of that word may be seen by a comparison with the act before amendment. The

legislature could have repeated the wording of Section 2524 as it appears in the 1935 codes. Instead, it chose to exchange the word "may" for the word "shall." All laws are presumed to be passed with deliberation and with full knowledge of all existing ones. (*Jobb v. County of Meagher*, 20 Mont. 424, 433, 61 Pac. 1034.) Especially should this be so where one act is an amendment of the other. The deliberate change indicates the intention of the legislature to make the collection of the fee permissive and not mandatory.

It is therefore my opinion it was the intention of the legislature in using the word "may" in the last sentence of Chapter 52, Laws of 1941, to make the collection of the fee for the certificate of information on birth or death certificates, optional or permissive, and not mandatory.

Sincerely yours,
R. V. BOTTOMLY
Attorney General