

Opinion No. 57

**Clerk of the District Court—Fees
and Salaries—Fees in Probate
Proceedings—Sections 25-232, 25-233,
91-4314, 91-4316, Revised Codes of
Montana, 1947.**

Held: That the clerk of the district court should not charge a party \$2.50 upon that party's first appearance in instances not provided for in the special statute (Section 25-233, Revised Codes of Montana, 1947) governing fees of the clerk in probate proceedings, except in those cases arising out of pro-

bate matters wherein such party must be considered a defendant.

December 31, 1951.

Mr. R. J. Carstensen
Deputy County Attorney
Yellowstone County
Billings, Montana

Dear Mr. Carstensen:

You have presented the following facts:

After a will had been admitted to probate a guardian of one of the heirs filed a petition for suspension and removal of personal representatives, to have the will set aside, and for appointment of an administrator. The court appointed an attorney to represent the non-resident heirs and legatees. Subsequently, several of these heirs filed a notice of motion for change of attorney.

Based upon these facts, you have requested my opinion on whether or not the clerk of the district court should charge \$2.50 upon the filing of such motion for change of attorney.

Fees to be collected by the clerk of the district court are enumerated in Section 25-232 and 25-233, Revised Codes of Montana, 1947. Section 25-233 reads:

"Fees of Clerk in Probate Proceedings. At the time of filing the petition for letters testamentary, of administration, or guardianship, the clerk must collect from the petitioner the sum of five dollars.

For admitting a will to probate and all services connected therewith, in addition to the above, there must be paid to the clerk the sum of five dollars.

If a will is contested, the contestant must pay to the clerk, on filing his grounds of opposition, the sum of five dollars.

And on the entry of judgment thereon, the prevailing party must pay the sum of two dollars and fifty cents.

On filing a petition to determine heirship or title to an estate, the petitioner must pay to the clerk the sum of five dollars.

On entry of judgment thereon, the prevailing party must pay the sum of two dollars and fifty cents." Section 25-232 reads in part:

"Fees of Clerk of District Court. At the commencement of each action or proceeding, the clerk must collect from the plaintiff the sum of five dollars, and for filing a complaint in intervention the clerk must collect from the intervenor the sum of five dollars;

And the defendant, on his appearance, must pay the sum of two dollars and fifty cents (which includes all the fees to be paid up to the entry of judgment). **."

Section 25-232 is a general statute on the subject of fees of the clerk of the district court, and includes the fees to be charged in "actions and proceedings". Section 25-233 is a special statute for the fees in probate and guardianship proceedings.

"Section 8997, Revised Codes of Montana, 1935 (now section 93-2203, Revised Codes of Montana, 1947) defines the term 'action' as follows: 'An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' "And Section 8998, Revised Codes of Montana, 1935, (now Section 93-2204, Revised Codes of Montana, 1947) provides: 'Every other remedy is a special proceeding.' Our Supreme Court in the case of State v. Northern Pacific Ry. Co., et al., 88 Mont. 529, 550, 295 Pac. 257, defines the word 'proceeding' as follows: 'The word 'proceeding' means special proceedings provided for by statute (State ex rel. Carleton v. District Court, 33 Mont. 138, 8 Ann. Cas. 752, 82 Pac. 789, and includes every application to a court for a judicial remedy not comprehended in the term action.' " (1947 Code Citations added Opinion No. 41, Volume 21, Opinions of the Attorney General.

The above quotation shows that the word "proceeding" in the general statute, 25-232, includes probate proceedings. Merely because we have a special statute covering fees in probate proceedings does not mean that Section

25-232 is thereby made completely inapplicable in probate litigation. Where one statute deals with a subject generally and another with a part of the same subject specially, the special statute prevails over the general one. However, the two should be read together and harmonized, if possible. See *Franzke v. Fergus County*, 76 Mont. 150, 245 Pac. 962; *Durland v. Prickett*, 98 Mont. 399, 39 Pac. (2d) 652; *Lillis v. City of Big Timber*, 103 Mont. 206, 62 Pac. (2d) 219. Hence, in determining fees to be charged in probate proceedings Section 25-233 must first be considered, but if the subject is not covered by 25-233, then 25-232 may be looked to.

However, before a public officer may exact a fee for any public service he must be authorized to do so by statute. *State ex rel. Baker v. District Court*, 24 Mont. 425, 62 Pac. 688. Therefore, if a party must pay a fee upon his first appearance in a probate proceeding in instances not covered by 25-233, we must find it provided for in 25-232.

It is to be noted from the heretofore quoted portion of Section 25-232 that only a plaintiff must pay a fee upon commencement of a proceeding, or a defendant upon his first appearance.

Many proceedings do not contemplate a plaintiff and defendant. Volume 17, *Opinions of the Attorney General*, 248, Opinion No. 202 (adoption proceeding).

Section 91-4314, Revised Codes of Montana, 1947, sets out that all issues of fact joined in probate proceedings must be tried in conformity with the provisions of Sections 91-901 to 91-907 and that in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. This section further provides for judgments with costs in such issues.

The provision and procedure for the appointment of an attorney for absent heirs arises in Section 91-4316, Revised Codes of Montana, 1947. Unless an issue of fact were joined or set forth under the facts which you have presented, it is my opinion that the parties involved are neither plaintiff nor defendant in the particular motion filed.

It is, therefore, my opinion that the clerk of the district court should not charge a party \$2.50 upon that party's

first appearance in instances not provided for in the special statute (Section 25-233, Revised Codes of Montana, 1947) governing fees of the clerk in probate proceedings, except in those cases arising out of probate matters wherein such party must be considered a defendant.

Very truly yours,
ARNOLD H. OLSEN
Attorney General