

VOLUME 32

Opinion No. 10

COUNTY CLERKS OF COURT; Fees; Probate proceedings; petition to determine heirship—COURTS; Fees; Probate proceedings; petition to determine heirship—FEES; Clerk of District Court; petition to determine heirship—Section 25-233, R.C.M. 1947.

HELD: The fee to be charged for filing of a petition to determine heirship or title to an estate must be charged only when such a proceeding is initiated pursuant to Sections 21-3301, R.C.M. 1947 et seq. It may not be charged for filing a petition for final accounting and distribution of an estate.

September 1, 1967

Mr. Denzil R. Young
Fallon County Attorney
P. O. Box 620
Baker, Montana

Dear Mr. Young:

You have requested my opinion with regard to the interpretation of section 25-233, R.C.M. 1947, authorizing the collection of fees in probate proceedings. Specifically you have asked whether the clerk of the district court must charge a fee for filing a petition to determine heirship when the final account and petition for distribution is filed.

Section 25-233, R.C.M. 1947, provides in part as follows:

At the time of the filing the petition for letters testamentary, of administration or guardianship, the clerk must collect from the petitioner the sum of ten dollars (\$10).

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 ten dollars (\$10).

If a will is contested, the contestant must pay to the clerk, on filing his grounds of opposition the sum of ten dollars (\$10).

And on the entry of judgment thereon, the prevailing party must pay the sum of five dollars (\$5).

On filing a petition to determine heirship or title to an estate, the petitioner must pay to the clerk the sum of ten dollars (\$10).

On entry of judgment thereon, the prevailing party must pay the sum of five dollars (\$5).

* * *

While it is true that the final decree of distribution in a probate proceeding is conclusive upon the rights of heirs, legatees or devisees; **Harrison v. Cannon**, 122 Mont. 318, 203 P. 2d 978) nevertheless such a decree is not strictly a determination of heirship, (**In re Bell's Estate**, 134 Mont. 345, 331 P. 2d 517) and in some cases a separate proceeding must be conducted in order to make such a determination. (91-3901, R.C.M. 1947) Chapter 38 of Title 91, Revised Codes of Montana, 1947, establishes such a proceeding. Section 91-3801, R.C.M. 1947, provides that a petition to determine heirship may be filed at any time after the issuance of letters testamentary or of administration.

In construing what is meant by the term "petition to determine heirship or title to an estate", all of the provisions of the codes must be construed in relation to each other. Section 12-211, R.C.M. 1947, provides:

With relation to each other, the provisions of the four codes must be construed as though all such codes had been passed at the same moment of time, and were parts of the same statute.

It is my opinion that the legislature in requiring a fee to be collected upon the "filing of a petition to determine heirship or title to an estate" intended this to be charged only when a proceeding was initiated pursuant to sections 91-3801, R.C.M. 1947 et seq. This being so, the clerk may not exact a fee for filing a petition to determine heirship when a petition for final account and petition for distribution is filed since there is no specific statutory authority to do so. It was held in **State v. Baker**, 24 Mont. 425, 62 Pac. 688 that a public officer may not exact a fee for a service unless authorized to do so by statute.

Very truly yours,

FORREST H. ANDERSON
Attorney General

FHA:JRB:vw