

346

COURTS, PROBATE—COMBINED JUVENILE AND PROBATE  
—JUDGE—COMPENSATION—§§141.04, 141.05, 2151.11 R.C. . . .  
SECTION 20, ART. II, OHIO CONSTITUTION.

SYLLABUS:

1. The salary of the judge of the probate court of Marion County, during the term which began February 9, 1955, is that fixed by Sections 141.04 and 141.05, Revised Code, as then in effect, and such salary includes also his compensation as juvenile judge. By reason of the provision of Section 20, Article II, Ohio Constitution, the salary so fixed may not be increased during the term of such judge.

2. Section 2151.11, Revised Code, limits the compensation of the probate judge, including his service as juvenile judge, to an amount not greater than the salary of the judge of the court of common pleas, as the same stood at the beginning of the term of such probate judge.

3. Section 2151.11, Revised Code, was not repealed by implication in the amendment of Sections 141.04 and 141.05, Revised Code, effective October 2, 1953.

Columbus, Ohio, April 14, 1959

Hon. Robert O. Stout, Prosecuting Attorney  
Marion County, Marion, Ohio

Dear Sir:

I have before me your request for my opinion as to the salary to which the probate judge of your county, acting also as juvenile judge, is entitled. The underlying facts are set forth in a letter to you from Judge R, the incumbent, who is directly concerned.

It appears that R entered on his current six year term as probate judge on February 9, 1955. It is stated that pursuant to the provisions of

Sections 141.04 and 141.05, Revised Code, he is drawing an annual salary as *probate judge* of \$8,497.60; that he receives no salary as juvenile judge.

The question specifically presented is

“Whether or not the juvenile judge may now draw the \$1500 per annum provided by Section 2151.11, Revised Code?”

This issue, according to the judge’s statement, resolves itself into two questions, *viz.* :

- (1) Would this violate the constitutional provisions prohibiting an increase during term of office?
- (2) Was Section 2151.11, Revised Code, repealed by implication by virtue of the enactment of Sections 141.04 and 141.05, Revised Code?

Let us examine the law as to the status of the juvenile court and the compensation of the probate judge and the juvenile judge on February 9, 1955, when Judge R entered on his present term. Section 2151.07, Revised Code, being a part of the chapter relating to the juvenile court, provided :

“The juvenile court, or the court of common pleas, division of domestic relations, of any county, *separately and independently created*, established, and functioning as such, has and shall exercise the powers and jurisdiction conferred in sections 2151.01 to 2151.54, inclusive, of the Revised Code. Except in counties in which there now is, or may hereafter be created, a separate and independent juvenile court or court of domestic relations, there is hereby established *within the probate court a juvenile court, presided over by the probate judge*, which shall be a court of record and exercise the powers and jurisdiction of such a court.  
\* \* \*”

Since no separate juvenile court had been established for Marion County, it is clear that the second sentence above quoted applies and that the juvenile court of that county is a court “within the probate court,” and if there is no other statute providing for a separate salary for such juvenile judge, he would perform the duties of both courts for the salary fixed by law for the probate judge.

Sections 141.04 and 141.05, Revised Code, as enacted in the Revision, and effective October 1, 1953, related to the salaries of the judges of the several courts, including the court of common pleas, but not the probate court. By an act effective October 2, 1953, (125 Ohio Laws, page 107), these sections were amended to read, insofar as pertinent, as follows :

Section 141.04, Revised Code:

“The annual salaries of the chief justice of the supreme court and of the judges named in this section *payable from the state treasury* are as follows:

“\* \* \*

“(D) Judges of the court of common pleas, four thousand dollars;

“(E) *Judges of the probate court, four thousand dollars.*

“\* \* \*

“The salaries of the judges of the probate court whose terms have not expired on October 2, 1953, shall be the same as the salary, allowance, and compensation provided for such judges in section 325.05 and 2151.11 of the Revised Code.”

Section 141.05, Revised Code:

“In addition to the salary allowed by section 141.04 of the Revised Code, each judge of the court of common pleas and each judge of the probate court shall receive an annual compensation equal to twelve cents per capita for the first twenty-five thousand of the population of the county in which he resided when elected or appointed, as ascertained by the latest federal census of the United States, and six cents per capita for the population of such county in excess of twenty-five thousand. Such additional annual compensation shall not be more than nine thousand dollars, payable monthly from the treasury of such county upon the warrant of the county auditor.” (Emphasis added)

It will be observed that the salaries of the common pleas and probate judges, both the portion payable from the state treasury and that paid by the county, are identical.

The application of the provision of said Section 141.04, *supra*, and the formula set out in Section 141.05, *supra*, produce the sum of \$8,497.54 which is substantially the amount which Judge R states he is receiving.

Section 1639-7a, General Code, which became effective February 5, 1949, read as follows:

“In all counties where the state is not paying a salary direct to the judge exercising the powers and jurisdiction conferred in this chapter the state shall pay into the county treasury of the county, wherein such judge was elected, the sum of fifteen hundred dollars annually. The juvenile judge in such counties shall receive as his annual compensation fifteen hundred dollars. Provided that the combined salaries, allowances and compensation, of the probate judge and juvenile judge of said county shall not

exceed the total salary *provided by law* for a common pleas judge in said county. Said limitation, however, shall be restricted only by the formula established by law for the total salary of a common pleas judge in said county whose term of office has begun, or will begin, subsequent to September 18, 1947. Any unused portion of said fund shall remain in the county treasury to be used in the maintenance and operation of the juvenile court.” (Emphasis added)

That section was codified in the Revised Code as Section 2151.11, Revised Code, effective October 1, 1953, in substantially the same language. The words “provided by law” appearing in the original, were supplanted by the words “provided by Sections 141.04 to 141.07, inclusive, Revised Code.”

A reading of this section leaves one in doubt as to whether it has any present effect on the compensation of a juvenile judge “within the probate court.” While it purports to allow him an additional \$1500.00, payable by the state, it proceeds at once to destroy that grant by providing that the combined compensation of the probate and juvenile judges shall not exceed the salary of the judge of the court of common pleas. If the additional allowance can have any effect, it must be confined to a judge whose term began prior to the code revision, when the compensation provided by the law for a probate judge may have been less than that of the common pleas judge. That possibility is suggested by the final paragraph of Section 141.04, *supra*.

It is perfectly plain that when Judge R took office, his salary as fixed by Sections 141.04 and 141.05, *supra*, was the same as that of the common pleas judge, and that while those sections have since been amended, raising the state’s contribution in each case from \$4000.00 to \$5000.00, neither judge then serving could take advantage of the increase, in view of the positive prohibition of Section 20, Article II, Ohio Constitution.

Judge R in his letter raises the question whether he may not draw the additional \$1500.00 provided by said Section 2151.11 without violating the constitutional provision prohibiting an increase during term of office. I quote from his letter the following:

“1. Would this violate the constitutional provisions prohibiting an increase during term of office?”

“It has been held in analogous cases that this does not violate such provisions for the reason that the salary was fixed prior to

the current term, but the enjoyment thereof postponed until the happening of a certain event; namely, in this case, until the common pleas judge took a new term of office. See *State v. Guckenberger*, 139 O.S. 273; *Derhammer v. Board of Co. Com'rs.*, 38 O.O. 439."

The case of *State, ex rel. Mack v. Guckenberger, supra*, certainly fails to support, but on the contrary, clearly refutes the claim made by the judge. I quote the first and third paragraphs of the syllabus:

"1. By reason of Section 14, Article IV of the Constitution, a legislative act diminishing or increasing the compensation of common pleas judges on the basis of change of population of the county in which they are elected, has no application to a judge of the Common Pleas Court whose term of office commenced before the act became effective.

"\* \* \*

"3. A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is *automatically increased during his term* by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court 'shall not be diminished or increased during his term of office.'"

Manifestly, the third paragraph of the syllabus above quoted can have no application to the case before us, since there is no provision whatever for an "automatic increase" of salary with increase of population or upon any other event. On the contrary, the formula in said Section 141.05, *supra*, is based on "the population \* \* \* as ascertained by the *latest federal census*."

Judge R follows the above quotation by the following:

"The intent of both Sec. 1639-7a G.C. and later Sec. 2151.11 R.C. being to place the compensation of the Probate and Juvenile Judge on a parity with that of the Common Pleas Judge, the \$1500.00 provided for therein now can and should be paid in order to carry out the intent expressed therein."

With that proposition I wholly disagree. Possibly the judge considered that the salary of a judge of the common pleas court is to be a *measure* of the compensation of the judge of the probate court. It has nothing of that character. On the contrary, it is a *limitation*. The salary

of the incumbent probate-juvenile judge cannot be increased because a later elected common pleas judge comes in under an increased salary schedule.

As to the possibility of Section 2151.11, Revised Code, being repealed by implication in the amendment of Sections 141.04 and 141.05, *supra*, it seems to me little need be said. If we consider that Section 2151.11, *supra*, was repealed, then there is no authority for the allowance of the sum of \$1500.00 or any other amount as salary to the juvenile judge. If that statute was not repealed, then it stands as a specific bar to any such allowance when the salaries of the probate judge and judge of the common pleas court are equal, as they are in the situation before us. In my opinion, there is nothing in the language of Sections 141.04 and 141.05, Revised Code, as amended, that worked a repeal either expressly or by implication of said Section 2151.11, Revised Code.

Accordingly, in specific answer to the questions submitted by you, it is my opinion, and you are advised:

1. The salary of the judge of the probate court of Marion County, during the term which began February 9, 1955, is that fixed by Sections 141.04 and 141.05, Revised Code, as then in effect, and such salary includes also this compensation as juvenile judge. By reason of the provision of Section 20, Article II, Ohio Constitution, the salary so fixed may not be increased during the term of such judge.

2. Section 2151.11, Revised Code, limits the compensation of the probate judge, including his service as juvenile judge, to an amount not greater than the salary of the judge of the court of common pleas, as the same stood at the beginning of the term of such probate judge.

3. Section 2151.11, Revised Code, was not repealed by implication in the amendment of Sections 141.04 and 141.05, Revised Code, effective October 2, 1953.

Respectfully,

MARK MCELROY

Attorney General