

Section 154-8 of the General Code is an "officer mentioned" in Section 154-5 of the General Code.

In specific answer to your inquiry, I am of the opinion that the office of chief of the division of accounts and control created by virtue of the provisions of Section 154-8 of the General Code is in the unclassified civil service of the state by virtue of the provisions of Section 154-19 of the General Code.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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1389.

REAL ESTATE—DEvised BY WILL—APPLICATION TO BE FILED WITH  
PROBATE JUDGE REQUESTING ORDER FOR TRANSFER UPON TAX  
DUPLICATE AND CERTIFICATE TO COUNTY RECORDER.

*SYLLABUS:*

*Proceedings in connection with a certificate of real estate devised discussed.*

COLUMBUS, OHIO, January 13, 1930.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—In your recent communication you request my opinion upon the following:

"Section 10526 of the General Code provides that when a will is admitted to probate which devises real estate situated in the county where it is recorded, upon recording such will the court shall immediately transmit to the recorder of the county in which the will is recorded, a certificate containing the fact of such filing and probate, the name of the testator, the name of the devisees of the real estate, and a description of such real estate as the will contains, and separately with each parcel the names of the devisees thereof, together with the volume and page of the record of the will. The following section requires the recorder to record this certificate in the books provided for the recording of deeds and index such records in the name of the testator as grantor and the devisees as grantees in the index provided for the record of deeds.

Section 2768 of the General Code provides that the county recorder shall not record any deed of absolute conveyance of land or any conveyance, absolute or otherwise, or minerals or mineral rights until it has been presented to the county auditor, and by him endorsed 'transferred' or 'transfer not necessary.'

Section 2573 of the General Code provides for transfers by the county auditor.

Question 1. In the certificate made by the court is it necessary that the particular description of the real estate devised be given or is such a description as is contained in the will all that is necessary?

Question 2. Does Section 2768, G. C., require that the certificate which is to be recorded by the county recorder be presented to the county auditor for transfer before recording and, if not, how will the county auditor get the property in the name of the devisees on his tax list duplicate?"

Section 10526 of the General Code, to which you refer, provides:

"When a will is admitted to probate which devises real estate situated in the county where it is recorded, or when the certified copy of a will is filed in the Probate Court, as hereinafter provided in this chapter, which devises real estate in the county where it is recorded, upon recording such will, the court shall immediately transmit to the recorder of the county in which the will is recorded, a certificate containing the fact of such filing and probate, the name of the testator, the name of the devisees of the real estate and a description of such real estate as the will contains, and separately state with each parcel the names of the devisees thereof, together with the volume and page of the record of the will."

From the above section standing alone, it is somewhat difficult to determine whether or not, when the certificate is made, it is necessary that the same be submitted to the auditor. The section provides that the certificate shall be made to the recorder and requires him to record the same.

In an opinion of this office, found in Opinions of the Attorney General for the year 1921, page 1091, it is stated:

" \* \* \* It is not clear whether the certificate of the probate judge issued under Section 10526 of the General Code can be recorded without transfer on the books of the auditor."

Another question which your inquiry presents is whether the phrase in Section 10526, supra, "and a description of such real estate as the will contains" has reference to setting forth in the certificate the actual language which the will contains in describing the real estate, or whether said section contemplates a description of the real estate which is actually devised by the will. In other words, there is some question as to whether the words "as the will contains," included in the phrase above quoted, modify "description" or "real estate", as mentioned therein.

However, from a practical standpoint it is believed unnecessary to give an elaborate consideration to the questions you raise for the reason that the Probate Courts of the state have generally adopted a method of procedure which results in the transfer being made by the auditor. In this connection it should be noted that Section 2573 of the General Code provides:

"On application and presentation of title, with the affidavits required by law, or the proper order of a court, the county auditor shall transfer any land or town lot or part thereof or minerals therein or mineral rights thereto, charged with taxes on the tax list from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent or otherwise. If by reason of the conveyance or otherwise, a part only of a tract or lot, or minerals therein or mineral rights thereto, as charged in the tax list is to be transferred, the person desiring the transfer shall make satisfactory proof of the value of such part compared with the value of the whole, as charged on the tax list, before the transfer is made. The auditor shall indorse on the deed or other evidences of title presented to him that the proper transfer of the real estate therein described has been made in his office or that it is not entered for taxation, and sign his name thereto."

The forms set forth by Rockel's Probate Practice consist of an application to be filed with the probate judge, praying for an order directing the transfer of said real estate upon the tax duplicate and for a certificate to the county recorder, as provided by law. The text above mentioned suggests that the real estate be described in the application "in the language of the will, and if not specific, such as would be necessary

in making a deed, after said description, say 'The following is a specific description of said real estate' and describe it accordingly." Upon hearing the application, if satisfied that the same should be granted, the court puts on an entry ordering that said real estate be transferred upon the duplicate and "that a certificate of this order, together with the description contained in the application, issue to said auditor and recorder, as required by law."

In the order which is issued by the court to the auditor and recorder, which is designated as "Certificate for Transfer and Record of Real Estate Devised", the real estate is ordered transferred in the name of the devisee; "and that this certificate then be presented to the said county recorder for record."

In this connection it may be noted that the practice usually adopted by the Probate Courts is not to issue a certificate showing real estate devised immediately, but the practice is to delay the issuance of such certificate until the terms of the will have been fully carried out. However, Rockel seems to contemplate that there shall be instances wherein a certificate may be issued before the terms of the will are carried out, because he provides in his instructions for the elimination of that clause in the event the conditions do not warrant the use of the same. The proceedings, as hereinbefore described, would seem to be a combination of Section 10526, supra, and Section 2573. In fact, some of the forms that are distributed by legal form printing companies designate the application, order and certificate as being governed by Section 2573 of the General Code. In an event, the proceeding as outlined above complies with the provisions of Section 10526, and, being in the form of an order, would require the transfer of the premises described by the county auditor before the certificate could be recorded.

This or a similar method of procedure results in the transfer being properly made and results in the real estate being specifically described in the certificate. Of course, if a certificate should be issued containing the language of the will which is in general terms, it is possible that the auditor should determine from extrinsic evidence the real estate that is described therein. However, as hereinbefore indicated there is some doubt as to whether a certificate made to the recorder must be transferred because such an instrument probably is not a conveyance under Section 2768, General Code, which you mention. However, as above suggested, if the method of filing the application and obtaining the order and certificate with a specific description is followed, these difficulties will disappear.

Without further discussion, it is my opinion that the proceeding hereinbefore outlined which is generally followed, is a proper procedure and there would seem to be no difficulty in complying with the provisions thereof. Under such procedure a certificate of real estate devised is issued by the court to the recorder and also there is an order issued to the auditor to make the proper transfer. Under this procedure there is a definite description set forth in the application, in the entry and in the certificate. This is a proper procedure because the applicant usually is in much better position to determine the exact description of the premises devised than any other person. When the application is made, of course the court must be satisfied that the description therein is correct and, as a matter of practice, the court frequently relies upon the attorney representing the estate as to the correctness thereof. However, such court may make such investigation as to the correctness of the application as it deems advisable. In view of the foregoing, it would seem that the county officials should have no difficulty with respect to the subject about which you require.

It is believed that a more specific answer to your inquiries is not required.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*